



June 16, 2017

Charlie Savage
c/o The New York Times
1627 I Street, NW, 7th Floor
Washington, DC 20006

Dear Mr. Savage,

I am writing in response to your Freedom of Information Act request of May 18, 2017 for records in the custody of the National Archives and Records Administration. Your request was received in this office on the same date and assigned FOIA case tracking number 53042.

You requested access to the draft indictment of President Bill Clinton and related documents that provide legal analysis on the question of whether a sitting President may be indicted, found in the Records of Independent Counsels Kenneth Starr and Robert Ray.

I have conducted a preliminary assessment of the entries you identified from the OIC file manifest and have confirmed the responsiveness of the following files:

486 DC, Paul Rosenzweig Attorney Work Files: 2. William Jefferson Clinton Indictment
232 DC, Jay Apperson Attorney Work Files: 6. Presidential Indictability
232 DC, Jay Apperson Attorney Work Files: 7. Project Idaho
405 DC, John Bowler Attorney Work Files: 2. DOJ Brief – Indictment After Impeachment
405 DC, John Bowler Attorney Work Files: 15. WJC Status Memorandum
405 DC, John Bowler Attorney Work Files: 16. WJC Status Memo Supplemental Materials

All of these records, with the exception of the file titled DOJ Brief – Indictment After Impeachment, require screening for categories of information exempted from disclosure under the terms of the Freedom of Information Act (5 USC 552), prior to public release. In particular, documents may be redacted to preserve the secrecy of grand jury proceedings pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

Requests for investigative files that do not exceed 500 pages are assigned to our first-tier processing queue. Taking into consideration our existing backlog, the estimated time required to complete the processing of your request is approximately 24 months from the date of this letter.

To notify this office of a change in your contact information or to track the status of your request, please telephone 301-██████████ or e-mail specialaccess_foia@nara.gov. If you have specific questions regarding the subject of your request, please contact me directly at 301-██████████ or

[REDACTED]@nara.gov. All communications concerning this request should reference FOIA case tracking number 53042.

If you are not satisfied with our action on this request and would like the opportunity to discuss our response, you may contact our FOIA Public Liaison for assistance:

Accessioned Executive Branch Records – Washington, DC Area
FOIA Requester Service Center: 301-837-3190
FOIA Public Liaison: Martha Wagner Murphy
8601 Adelphi Road, Room 5500
College Park, MD 20740-6001
Telephone: 301-[REDACTED]
E-mail: dc.foia.liaison@nara.gov

Sincerely,

[REDACTED]

ROBERT REED
Archivist
Special Access and FOIA Staff



July 10, 2017

Charlie Savage
c/o The New York Times
1627 I Street, NW, 7th Floor
Washington, DC 20006

Dear Mr. Savage,

I am writing in further response to your Freedom of Information Act request of May 18, 2017 for records in the custody of the National Archives and Records Administration. Your request was received in this office on the same date and assigned FOIA case tracking number 53042.

I have completed a line-by-line review of four documents found in the Records of Independent Counsels Kenneth Starr and Robert Ray and released information to the greatest extent possible. Two pages have been redacted to protect the personal privacy of living individuals per 5 USC 552 (b)(6) and (b)(7)(C) and to protect information derived from documents filed under seal with the United States District Court for the District of Columbia. A summary of the results of this review is provided below:

DC box 405, John Bowler Attorney Work Files, DOJ Brief -- Indictment after Impeachment, Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, August 18, 2000 (51 pages released in full).

DC box 232, Jay Apperson Attorney Work Files, Presidential Indictability, Draft Memorandum from Ronald D. Rotunda, May 13, 1998 (56 pages; 54 pages released in full and 2 pages released in redacted form).

DC box 232, Jay Apperson Attorney Work Files, Project Idaho, Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, September 24, 1973 (41 pages released in full).

DC box 232, Jay Apperson Attorney Work Files, Project Idaho, Memorandum from Robert M. Bork, Solicitor General of the United States, October 5, 1973 (23 pages released in full).

This concludes the processing of the expedited portion of your request. If you have questions concerning my review of these documents or would like to make arrangements to receive copies, please contact me directly at [REDACTED] [@nara.gov](mailto:[REDACTED]@nara.gov) or 301 [REDACTED].

If you are not satisfied with my action on this request, you have the right to file an administrative appeal within ninety (90) calendar days from the date of this letter. Appeals must be in writing and may be delivered by regular U.S. mail or by e-mail. By filing an appeal, you preserve your rights under the Freedom of Information Act and present the deciding agency with an opportunity to review your request and reconsider its decision. If you submit your appeal by regular mail, it should be addressed to the Deputy Archivist of the United States (ND), National Archives and Records Administration, 8601 Adelphi Road, Room 4200, College Park, Maryland 20740-6001. Both the letter and envelope should be clearly marked "FOIA Appeal." If you submit your appeal by e-mail, please send it to foia@nara.gov, addressed to the Deputy Archivist, with the words "FOIA Appeal" in the subject line. Please be certain to explain why you believe this response does not meet the requirements of the Freedom of Information Act. All communications concerning this request should reference FOIA case tracking number 53042.

If you would like the opportunity to discuss our response and attempt to resolve your dispute without initiating the appeals process, you may contact our FOIA Public Liaison for assistance:

Accessioned Executive Branch Records – Washington, DC Area
FOIA Requester Service Center: 301-837-3190
FOIA Public Liaison: Martha Wagner Murphy
8601 Adelphi Road, Room 5500
College Park, MD 20740-6001
Telephone: 301-██████████
E-mail: dc.foia.liaison@nara.gov

If you are unable to resolve your dispute through our Public Liaison, the Office of Government Information Services (OGIS) is the federal FOIA ombudsman. OGIS offers mediation services to help resolve disputes between FOIA requesters and federal agencies. You may contact OGIS at the following address:

Office of Government Information Services (OGIS)
National Archives and Records Administration
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001
ogis@nara.gov
202-741-5770
1-877-684-6448

Sincerely,

████████████████████

ROBERT REED
Archivist
Special Access and FOIA Staff

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May 13, 1998

draft

The Honorable Kenneth W. Starr
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Ave., N.W.
Suite 490 North
Washington, D.C. 20004

Re: INDICTABILITY OF THE PRESIDENT

Dear Judge Starr:

SUMMARY AND INTRODUCTION.

You have asked my legal opinion as to whether a sitting President is subject to indictment.¹ Does the Constitution immunize a President from being indicted for criminal activities while serving in the office of President? For example, if the President committed a crime before assuming office, does his election to the Presidency immunize his criminal activities? If the President in his private capacity commits one or more crimes while in office, does his election serve to immunize him? In short, is a sitting President above the criminal law?

As this opinion letter makes clear, I conclude that, in the circumstances of this case, President Clinton is subject to indictment and criminal prosecution, although it may be the case that he could not be imprisoned (assuming that he is convicted and that imprisonment is the appropriate punishment) until after he leaves that office. A criminal prosecution and conviction (with imprisonment delayed) does not, in the

¹ For your information, I am attaching a resume listing my publications.

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1 words of *Nixon v. Sirica*,² "compete with the impeachment device by working a
2 constructive removal of the President from office."
3

4 In addition, I express no opinion as to whether a prosecution by state
5 authorities may be proper (a state prosecution may violate the Supremacy Clause).
6 Nor do I consider whether the President could be indicted if there were no
7 Independent Counsel statute. In the circumstances of this case, there is such a
8 statute, and it was enacted as the specific request of President Clinton, who knew —
9 at the time he lobbied for and signed the legislation — that a specific purpose of the
10 statute was to investigate criminal allegations involving him. He welcomed the
11 independent investigation so that it could clear the air.
12

13 In addition, as discussed below, I express no opinion as to whether the Federal
14 Government could indict a President for allegations that involve his *official* duties as
15 President. The Office of Independent Counsel is investigating allegations that do not
16 involve any official duties of President Clinton. The counts of an indictment against
17 President Clinton would include serious allegations involving witness tampering,
18 document destruction, perjury, subornation of perjury, obstruction of justice,
19 conspiracy, and illegal pay-offs; these counts in no way relate to the President
20 Clinton's official duties, even though some of the alleged violations occurred after he
21 became President. The allegations involved here do not involve any sort of policy
22 dispute between the President and Congress. The allegations, in short, do not relate
23 to the President's official duties; they are not "within the outer perimeter of his
24 official responsibility."³ Indeed, the alleged acts involved here are not only outside
25 the outer perimeter of the President's official responsibility, they are contrary to the
26 President's official responsibility to take care that the law be faithfully executed.
27

28 Also, as discussed below, a grand jury indictment is not inconsistent in present
29 circumstances with the conclusion reached by the Watergate Special Prosecutor.⁴ For
30 example, in the present case (and unlike the Watergate situation) a criminal
31 prosecution would not duplicate any impeachment proceeding already begun in the

² 487 F.2d 700, 711(D.C. Cir. 1973) (per curiam) (en banc). President Nixon chose not to seek U.S. Supreme Court review of this decision. Instead he fired Watergate Special Prosecutor Archibald Cox.

³ *Nixon v. Fitzgerald*, 457 U.S. 731, 756, 102 S.Ct. 2690, 2704, 73 L.Ed.2d 349 (1982).

⁴ I should disclose that I was Assistant Majority Counsel to the Senate Watergate Committee.

1 House of Representatives.⁵ In the Watergate era, the House of Representatives had
 2 — *prior* to the time that Special Prosecutor Leon Jaworski turned over any
 3 information to the House Impeachment Inquiry — already made the *independent*
 4 decision to begin, and, in fact, had begun impeachment proceedings. In the present
 5 case, no House Impeachment Inquiry has begun, and, if one were to begin, it would
 6 only be because the House of Representatives would be responding to information
 7 that the Office of Independent Counsel would transfer to the House of
 8 Representatives. Watergate Prosecutor Jaworski, in short, did not want to preempt
 9 the House inquiry that had independently begun. Now, there is no House inquiry,
 10 and the OIC would not be preempting any House inquiry. While the Independent
 11 Counsel statute authorizes the OIC to transmit relevant information to the House,
 12 the statute does even suggest that the OIC must postpone any indictment until the
 13 House and Senate have concluded any impeachment inquiry.
 14

15 In this country, the U.S. Supreme Court has repeatedly reaffirmed the state
 16 that no one is “above the law.”⁶ The Constitution grants no one immunity from the

⁵ See LEON JAWORSKI, *THE RIGHT AND THE POWER* 100 (1976). Watergate Prosecutor Jaworski’s views are discussed below. One should also note that, in the present case, the House might not see fit to begin an impeachment, or it might decide that the alleged violations of law do not merit removal from office, either because some acts occurred prior to the time of President Clinton’s assumption of office or because they do not rise to the level of impeachable offences.

As Justice Joseph Story has noted: “There is also much force in the remark that an impeachment is a proceeding purely of a political nature. It touches neither his person, nor his property; but simply divests him of his political capacity.” JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION*, §§ 406, at p. 289 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833).

⁶ *E.g.*, *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 260, 27 L.Ed. 171 (1882); *United States v. United Mine Workers of America*, 330 U.S. 258, 343, 67 S.Ct. 677, 720, 91 L.Ed. 884 (1947); *Malone v. Bowdoin*, 369 U.S. 643, 651, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting); *Malone v. Bowdoin*, 369 U.S. 643, 651, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting); *Johnson v. Powell*, 393 U.S. 920, 89 S.Ct. 250, 251, 21 L.Ed.2d 255 (1968) (Memorandum Opinion of Douglas, J., regarding application for a stay); *Branzburg v. Hayes*, 408 U.S. 665, 699, 92 S.Ct. 2646, 2665, 33 L.Ed.2d 626 (1972); *Gravel v. United States*, 408 U.S. 606, 615, 92 S.Ct. 2614, 2622, 33 L.Ed.2d 583 (1972); *United States v. Nixon*, 418 U.S. 683, 715, 94 S.Ct. 3090, 3111, 41 L.Ed.2d 1039 (1974); *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978); *Davis v. Passman*, 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 & n. 41, 102 S.Ct. 2690, 2705 & n.41, 73 L.Ed.2d 349 (1982); *Briscoe v. LaHue*, 460 U.S. 325, 358, 103 S.Ct. 1108, 1127, 75 L.Ed.2d 96 (1983); *United States v.*

(continued...)

1 criminal laws. Congress enacted the present law governing the appointment of
 2 Independent Counsel, at the specific request of President Clinton and Attorney
 3 General Janet Reno. All of the parties — the President, the Attorney General,
 4 Congress — knew that the specific and immediate purpose of this statute would
 5 result in the appointment of an Independent Counsel to investigate certain
 6 allegations of criminal activities that appeared to implicate the President of the
 7 United States and the First Lady. Since that time, the Attorney General has, on
 8 several occasions, successfully urged the Court to expand the jurisdiction of this
 9 particular Office of Independent Counsel (hereinafter, "OIC") to include other
 10 allegations involving the President and Mrs. Clinton.

11
 12 As the judiciary has noted in the past, the President "does not embody the
 13 nation's sovereignty. He is not above the law's commands . . ."7 The people "do not
 14 forfeit through elections the right to have the law construed against and applied to
 15 every citizen. *Nor does the Impeachment Clause imply immunity from routine court*
 16 *process.*"8

17
 18 In the remainder of this opinion letter I examine the case law, the legal
 19 commentators, the history and language of the relevant Constitutional provisions, the
 20 legislative history of the Independent Counsel law, the logic and structure of our
 21 Constitution, and the laws governing the Grand Jury's power to investigate and
 22 indict. As discussed in detail below, if the Constitution really provides that the
 23 President must be impeached before he can be prosecuted for breaking the criminal
 24 law — even if the President commits a crime prior to the time he became President,
 25 or if he commits a crime in his personal capacity, not in his official capacity as
 26 President —, the our Constitution has created serious anomalies.

27
 28 First, it is quite clear that a President may be impeached for actions that do

⁶ (...continued)

Stanley, 483 U.S. 669, 706, 107 S.Ct. 3054, 3076, 97 L.Ed.2d 550 (1987) (Brennan, J., joined by Marshall, J., concurring in part & dissenting in part); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 n. 2, 116 S.Ct. 1114, 1146 n. 2, 134 L.Ed.2d 252 (1996) (Souter, J., joined by Ginsburg & Breyer, JJ.); *Clinton v. Jones*, — U.S. —, —, 117 S.Ct. 1636, 1645, 137 L.Ed.2d 945 (1997).

⁷ *Nixon v. Sirica*, 487 F.2d 700 at 711 (footnote omitted).

⁸ *Nixon v. Sirica*, 487 F.2d at 711 (per curiam) (en banc) (footnote omitted)(emphasis added).

1 not violate any criminal statute.⁹ Acts that (a) constitute impeachable offenses and
 2 (b) are violations of a crime created by statute (our Constitution recognizes no
 3 common law crimes) are two different categories of acts. Moreover, if the President
 4 does commit a crime, that does not necessarily mean that he must be impeached,
 5 because some crimes do not merit impeachment and removal from office.
 6

7 For example, if the President in a moment of passion slugs an irritating
 8 heckler, he has committed a criminal battery. But no one would suggest that the
 9 President should be removed from office simply because of that assault. Yet, the
 10 President has no right to assault hecklers.¹⁰ If there is no recourse against the
 11 President, if he cannot be prosecuted for violating the criminal laws, he will be above
 12 the law. *Clinton v. Jones* rejected such an immunity; instead, it emphatically agreed
 13 with the Eight Circuit that: "the President, like other officials, is subject to the same
 14 laws that apply to all citizens."¹¹ The "rationale for official immunity 'is inapposite
 15 where only *personal, private conduct* by a President is at issue."¹² The President has
 16 no immunity in such a case. If the Constitution prevents the President from being
 17 indicted for violations of one or more federal criminal statutes, even if those statutory
 18 violations are not impeachable offences, then the Constitution authorizes the
 19 President to be above the law. But the Constitution creates an Executive Branch
 20 with the President under a sworn obligation to faithfully executive the law. The
 21 Constitution does not create an absolute Monarch above the law.
 22

23 In addition, as also discussed below, if the President must be impeached prior
 24 to being prosecuted for serious violations of the criminal law, then Congress would
 25 have the final determination of when a criminal prosecution must begin. But it
 26 violates the Doctrine of the Separation of Powers for the legislative branch of
 27 government to control when (or if) a criminal prosecution may occur. It would even
 28 violate the Separation of Powers if Congress were to make the decision of the

⁹ See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 405, at p. 288 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833): "Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize any impeachment of any official misconduct . . ."

¹⁰ Cf. Gary Borg, *Chretien is Charged Briefly with Assault*, CHI. TRIB., May 7, 1996, at A10, available in 1996 WESTLAW 2669290 (reporting that the Canadian Prime Minister — the first time this century that a sitting Canadian Prime Minister was faced with criminal charges — was charged with assault for grabbing a protester by the throat; the charge was later quashed).

¹¹ — U.S. —, 117 S.Ct. 1636, 1638. (1997).

¹² 117 S.Ct. 1636, 1641 (quoting Eight Circuit)(emphasis added).

1 Attorney General to refuse to seek (or to seek) the appointment of an independent
2 counsel subject to judicial review.¹³
3

4 Moreover, as the case law discussed below indicates, if the Grand Jury cannot
5 indict the President, it cannot constitutionally investigate him. But, in *Morrison v.*
6 *Olson*¹⁴ the Supreme Court upheld the constitutionality of the Independent Counsel
7 Act and the constitutionality of grand jury investigations under the direction of an
8 Independent Counsel appointed by the court. *Morrison* implicitly decided the issue
9 analyzed in this opinion letter.
10

11 The Constitution does grant limited immunity to federal legislators in certain
12 limited contexts, as discussed below, but those immunities do not exempt Senators
13 or Representatives from the application of the criminal laws. One looks in vain to
14 find any textual support in the Constitution for any Presidential immunity (either

¹³ *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). The Court made it quite clear that it was necessary, in order to save the constitutionality of the Independent Counsel statute, for the Court to conclude that it gave neither Congress nor the Special Division any power to force the Attorney General to appoint an Independent Counsel nor any power to direct or supervise the Independent Counsel once the appointment took place. For example, the Court in *Morrison* also said: "[T]he Special Division has *no power to appoint* an independent counsel *sua sponte*; it may do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment." 487 U.S. at 695, 108 S.Ct. at 2621. As to Congress, the Court said: "The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General *has no duty* to comply with the request, although he must respond within a certain time limit." 487 U.S. at 694, 108 S.Ct. at 2621. The Attorney General's decision not to appoint an Independent Counsel is "committed to his unreviewable discretion," even though the Act purports to require the Attorney General to appoint unless "he finds 'no reasonable grounds to believe that further investigation is warranted.'" 487 U.S. at 696, 108 S.Ct. at 2622.

Morrison also made clear that Congress could not remove or prevent the removal of the Independent Counsel, and the Special Division could not remove the Independent Counsel. In order to save the statute's constitutionality, the Court interpreted the statutory provision relating to termination to mean virtually nothing: "It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III." *Morrison*, 487 U.S. at 683, 108 S.Ct. at 2615. See, Ronald D. Rotunda, *The Case Against Special Prosecutors*, WALL STREET JOURNAL, Jan. 15, 1990, at p. A8.

¹⁴ 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

1 absolute or temporary) from the commands of the criminal laws. If the framers of our
2 Constitution wanted to create a special immunity for the President, they could have
3 written the relevant clause. They certainly knew how to write immunity clauses, for
4 they wrote two immunity clauses that apply to Congress.¹⁵ But they wrote nothing
5 to immunize the President. Instead, they wrote an Impeachment Clause treating the
6 President and all other civil officers the same way. Other civil officers, like judges,
7 have been criminally prosecuted without being impeached. Sitting Vice Presidents
8 have been indicted even though they were not impeached.
9

10 As *Nixon v. Sirica*¹⁶ carefully noted: "Because impeachment is available against
11 all 'civil officers of the United States,' not merely against the President, it is difficult
12 to understand how any immunities peculiar to the President can emanate by
13 implication from the fact of impeachability." Moreover, it would be anomalous and
14 aberrant to interpret the Impeachment Clause to immunize the President for alleged
15 criminal acts, some of which occurred prior to the time he assumed the Presidency
16 and all far removed from any of the President's enumerated duties: witness
17 tampering, destruction of documents, subornation of perjury, perjury, illegal pay-offs.
18

19 BACKGROUND.

20
21 The Office of Independent Counsel has investigated and continues to
22 investigate various matters that are loosely grouped under the name of "Whitewater,"
23 which is a particular real estate deal that involves land developed in Arkansas. The
24 "Whitewater" label is often used in the popular press. However, the investigative
25 mandate to this Office of Independent Counsel is broader than this title implies.
26 There are land deals other than Whitewater that are part of this investigation as well
27 as other matters, such as the scandal involving the White House Travel Office and
28 the misuse of FBI files by political operatives working in the White House. More
29 recently, the Attorney General petitioned the Court to expand OIC's mandate and
30 jurisdiction to include various allegations surrounding Ms. Monica Lewinsky and
31 involving obstruction of justice, witness tampering, perjury, and suborning of
32 perjury.¹⁷

¹⁵ U.S. Const., art. I, § 6, cl. 1 [limited privilege from arrest; speech or debate privilege]. Both of these immunities are *very limited* in scope, as discussed below.

¹⁶ 487 F.2d at 700, 711 n.50 (D.C. Cir. 1973) (en banc)(per curiam) (internal citation omitted, citing the Impeachment Clause, Art. II, § 4)..

¹⁷ In that case, when the OIC came upon the initial information, the OIC referred the matter to the Attorney General and suggested various alternatives: the Department of
(continued...)

1 Attorney General Janet Reno and the Department of Justice have rejected the
 2 claims of those who seek to narrow the jurisdiction of this OIC.¹⁸ In addition, the
 3 Attorney General has, at various times, *expanded* the original jurisdiction of the OIC
 4 to include matters beyond those originally within the OIC mandate.¹⁹ Indeed, the
 5 Attorney General has even gone to court in order to submit these matters to you and
 6 to expand the OIC's jurisdiction over your objection.²⁰ While she has expanded the

¹⁷ (...continued)

Justice could take over the investigation, or the DOJ could investigate together with the OIC, or the DOJ could turn over the entire matter to the OIC, or the DOJ could seek the appointment of a new Independent Counsel. The Attorney General chose the third alternative and promptly asked the Special Division to expand the jurisdiction of the OIC.

The Special Division granted this special request of the Attorney General. The OIC did investigate after it had received oral authorization to do so. This oral authorization was followed by written authorization.

¹⁸ When others have claimed that the OIC is acting outside of its jurisdiction (a claim, for example, that Governor Jim Guy Tucker advanced in court), the Attorney General has also *supported* the OIC's jurisdiction and the Eight Circuit agreed with this position.

¹⁹ The scandal and charges that have been collectively referred to as "Travel-gate" (involving the White House Travel Office) or the "FBI Files" (referring to FBI files sent to the White House and then used for partisan purposes) fit in this category.

The Attorney General's efforts to expand your jurisdiction are also significant because recent events show that she is often reluctant to seek the appointment of a Independent Counsel. She has *refused* to appoint an Independent Counsel in various matters relating to campaign finance, even when the Director of the FBI has supported the appointment of an Independent Counsel. And, in matters involving other Independent Counsel, she has *objected* to any expansion of jurisdiction, even when the courts have eventually ruled that her position was legally in error. *E.g.*, Terry Eastland, *How Justice Tried to Stop Smaltz*, Wall Street Journal, Dec. 22, 1997, at A19, col. 3-6 (Midwest ed.).

²⁰ It is unusual for the subject of an investigation by an Independent Counsel to attack the *bona fides* of the Independent Counsel. For example, neither Attorney General Meese nor his personal attorney ever personally attacked the people investigating him, even though the Independent Counsel was a member of the other political party. In fact, it has been typical for the Independent Counsel to be a member of the opposing political party.

I am aware that some supporters of President Clinton (including his wife and occasionally the President himself) have engaged in public attacks on the OIC and personal attacks on the *bona fides* of its attorneys. They accuse the OIC of partisanship and abuse of the prosecutorial powers. However, the fact that Attorney General Reno — who serves at the

(continued...)

1 jurisdiction of the OIC, President Clinton has refused on several occasions to testify
2 before the Grand Jury, had pled executive privilege to block his aides from testifying,
3 and has urged the creation of a new type of privilege to prevent Secret Service Agents
4 from testifying.

5
6
7
8
9
10 Notwithstanding these roadblocks, the investigation is proceeding to the point
11 that there is significant, credible, persuasive evidence that the President has been
12 involved in various illegal activities in a conspiracy with others (in particular his
13 wife), to tamper with witnesses, suborn perjury, commit perjury, hide or destroy
14 incriminating documents, and obstruct justice.

15
16 If the President were any other official of the United States, for example, a
17 Cabinet Officer or a Congressperson, I understand that the two Deputy Independent
18 Counsel (one, a former U.S. Attorney and the other, a former member of the Public
19 Integrity Section of the Department of Justice) have concluded that an indictment
20 would be proper and would issue given the evidence before the Grand Jury. The
21 Office of Independent Counsel is, in general, required to follow the Department of
22 Justice regulations governing other federal prosecutors. To refuse to indict the
23 President when the crimes are serious enough and the evidence strong enough that

20 (...continued)

pleasure of President Clinton and is the highest law enforcement official in the Department of Justice — has gone to court to *expand* your jurisdiction (even over your objection) is inconsistent with these attacks. If she thought that the OIC or any of its attorneys were acting improperly in investigating President Clinton, she would make no sense for her to be fighting to *expand* the OIC's jurisdiction. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), discussed below, made it quite clear that the Attorney General's decision not to seek the appointment of an Independent Counsel is *not* reviewable in any court.

Recently, a bipartisan group of former Attorneys General of the United States have joined together to rebut the attacks on the integrity of the Independent Counsel. Their statement of March, 1998, was extraordinary. It said, in part:

“As former attorneys general, we are concerned that the severity of the attacks on Independent Counsel Kenneth Starr and his office by high-level government officials and attorneys representing their particular interests, among others, appear to have the improper purpose of influencing and impeding an ongoing criminal investigation and intimidating possible jurors, witnesses and even investigators.”

1 a Senator or Cabinet Secretary would be indicted would be inconsistent with the
2 OIC's obligations to exercise its prosecutorial discretion the same way that the
3 Department of Justice attorneys exercise their discretion to refuse to indict.
4

5 Moreover, there is the apparent injustice that would result if the Grand Jury
6 would seek to indict the various members of this conspiracy (*e.g.*, Hillary Rodham
7 Clinton) while refusing to indict the center of the conspiracy.²¹
8

9 If the Grand Jury simply issues a report of the facts that it has found, but does
10 not indict even though it concludes that there is substantial evidence that the
11 President has committed serious crimes, then the President has no judicial forum to
12 present his side of the story and seek vindication in the judicial system. As then
13 Solicitor General Robert Bork said, in arguing that a sitting Vice President can be
14 indicted:
15

16 "An officer may have co-conspirators and even if the officer

21

1 were immune [from indictment], his co-conspirators would not be.
2 The result would be that the grand and petit juries would receive
3 evidence about the illegal transactions and that evidence would
4 inevitably name the officer. The trial might end up in the
5 conviction of the co-conspirators for their dealings with the
6 officer, yet the officer would not be on trial, would not have the
7 opportunity to cross-examine and present testimony on his own
8 behalf. The man and his office would be slandered and
9 demeaned without a trial in which he was heard. The individual
10 might prefer that to the risk of punishment, but *the courts should*
11 *not adopt a rule that opens the office to such a damaging*
12 *procedure.*"²²
13

14 Consequently, you have asked my legal opinion as to whether it is
15 constitutional to indict a sitting President for actions that occurred both before he
16 became President and while he was under investigation.
17

18 In order to answer the question, it is important to understand the
19 constitutional issue in context. The question is not, as an abstract matter, whether
20 any sitting President is immune from the criminal laws of the state or federal
21 governments as long as he is in office. Rather, the question is whether — given the
22 enactment of the Independent Counsel law under which the OIC operates, given the
23 historical background that led to that law, and given the constitutionality of that law
24 as determined by *Morrison v. Olson*²³ — it is constitutional for a grand jury to indict
25 this President if the evidence demonstrates beyond a reasonable doubt that the
26 President is part of an extensive and continuing conspiracy, stretching over many
27 years, involving witness tampering, document destruction, perjury, subornation of
28 perjury, obstruction of justice, and illegal pay-offs — all serious allegations that in
29 no way relate to the President Clinton's official duties, even though some of the

²² *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 21 (emphasis added). Judge Bork concluded that a sitting Vice President could be indicted prior to impeachment but he also said (in dictum) that the President would be immune from indictment prior to impeachment. While Judge Bork argued that the President should be immune from indictment, his reasoning at this point supports the opposite conclusion. His point is well-taken: the Office of Independent Counsel should not cast a charge against the President without giving him a judicial forum within which to vindicate himself.

²³ 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

1 alleged violations occurred after he became President.

2
3 Before turning to this particular question, it is useful to consider some
4 background matters.

5
6 **CRIMINAL PROSECUTIONS OF CHIEF EXECUTIVES OF OTHER COUNTRIES.**
7

8 First, it is interesting that democracies in other countries do not recognize a
9 principle that an individual would be above the law and privileged to engage in
10 criminal activities simply because he or she is the President, Premier, Prime
11 Minister, Chief Executive, or Head of State. In fact, heads of state are not immune
12 from criminal prosecution even if we only look at countries with a tradition of living
13 under the rule of law that is much weaker than the tradition that exists in the United
14 States. I have been unable to find any instances where a democracy — even a
15 democracy that also recognizes a King or Queen — has immunized its Chief
16 Executive Officer from criminal conduct simply because he or she is the Chief
17 Executive Officer.
18

19 On the other hand, it is quite easy to find examples of foreign heads of state
20 subject to prosecution for allegedly criminal activities. Even if one confines a search
21 to the relatively short time period since 1980, it is not difficult to find various
22 examples of heads of state who have been subject to the possibility of criminal
23 prosecution (what we call “indictment” in this country) in a wide variety of
24 countries.²⁴
25

26 Other countries are governed by their own Constitutions, and the fact that
27 their chief executives (like their other citizens) are subject to the criminal law does
28 not, of course, mean that the chief executive officer of the United States is subject to
29 its federal criminal laws. Each of these instances is, in a sense, unique and one can
30 therefore distinguish them from the present circumstance.
31

32 Consequently, I do not rely on the examples discussed below in reaching the
33 conclusions of the opinion letter. I simply present these examples as suggesting that
34 the claim that the chief executive officer of the United States is immune from
35 criminal prosecution and above the law as long as he holds the chief executive office
36 is a claim that other countries (at least those who are not governed by a dictatorship)
37 would find curious if not peculiar.
38

39 ▶ In VENEZUELA, in 1993, President Carlos Andres Perez was ordered to stand trial on

²⁴ In this case, I used a computerized search of WESTLAW for the period since 1980.

1 embezzlement charges. Perez has the dubious distinction of being the first incumbent
 2 Venezuelan president charged with a crime since the country shed a military dictatorship and
 3 became a democracy in 1958. The provisional government of Octavio Lepage was sworn
 4 in to replace Mr. Perez.²⁵

5 ▶ In PAKISTAN, in 1997, Prime Minister Nawaz Sharif was charged with contempt of court
 6 after criticizing the judiciary, which is a crime in Pakistan. Sharif pleaded innocent. A
 7 conviction could lead to his removal from office.²⁶ The fact that he held the office of Prime
 8 Minister did not immunize him from the rule of law.

9 ▶ In ITALY, prosecutors requested the indictment of Prime Minister Romano Prodi on charges
 10 of corrupt management of the country's state industries. The charges arose from the transfer
 11 of a food production company from state to private hands in 1993. Prodi was accused of
 12 fixing the sale of a large package of shares in the company by offering it to a politically
 13 well-connected private concern at a cut-price rate. The fact that he was Prime Minister did
 14 not immunize him from the rule of law. A preliminary magistrate was in charge of deciding
 15 whether to order Prodi to stand trial.²⁷

16 ▶ In CANADA, Prime Minister Jean Chretien was charged with assault for manhandling a
 17 protester. His office of Prime Minister did not immunize him from the rule of law. Of
 18 course, the fact that he could be charged does not mean that he would be convicted, and, in
 19 fact, the charges were quashed. This was the first time this century that a sitting Canadian
 20 prime minister faced criminal assault charges. Kenneth Russell, brought the charge against
 21 the prime minister for grabbing a demonstrator by the throat during a Flag Day ceremony.²⁸

22 ▶ In FRANCE, traders said that "one of the major reasons for the enactment of emergency
 23 money market measures has been removed with Wednesday's decision not to pursue
 24 criminal charges against the Prime Minister for illegally acquiring cheap apartments for
 25 himself and his son." However, if the evidence warranted, Prime Minister Alain Juppe
 26 would not be immunized from the rule of law and could have been prosecuted.²⁹

27 ▶ In ISRAEL, in 1995, Shekem workers asked Attorney General Michael Ben-Yair to open a

²⁵ *Venezuela Ponders Next Move as President Ordered to Stand Trial*, ATLANTA JOURNAL & CONSTITUTION, May 23, 1993, A 10, available in 1993 WESTLAW 3364034.

²⁶ *Sharif Warns Crisis Taking Pakistan Near Destruction*, DOW JONES INT'L NEWS SERV., Nov. 19, 1997. Raymond Bonner, *Pakistan's Army May Settle Political Feud*, N.Y. TIMES, Dec. 1, 1997, at A4.

²⁷ *Italian PM Faces Accusations*, VANCOUVER SUN, Nov. 26, 1996, A7, available in 1996 WestLaw 5031681; Andrew Gumbel, *Prosecutors Turn Sights on Italian PM*, THE INDEP. (London), Nov. 26, 1996, at 15, International Section.

²⁸ Gary Borg, *Chretien is Charged Briefly with Assault*, CHI. TRIB., May 7, 1996, at A10, available in 1996 WESTLAW 2669290.

²⁹ Capital Markets Report, Oct. 12, 1995; Reuters World Service, Oct. 11, 1995.

1 criminal investigation against Prime Minister Yitzhak Rabin for allegedly violating sub
2 judice laws. Rabin charged that "Shekem's fired workers are parasites." Israel's laws forbid
3 publishing information on an issue negotiated in court if it could influence the court's
4 ruling.³⁰ Rabin's office of Prime Minister did not serve to immunize him from the rule of
5 law.

- 6 ▶ In JAPAN, prosecutors ultimately refused to press charges against Prime Minister Noboru
7 Takeshita or any other major political leader being investigated for criminal activity in
8 connection with an influence-peddling scandal. Former prime minister Yasuhiro Nakasone
9 and at least three cabinet members in Takeshita's government also escaped indictment. The
10 scandal, however, forced Takeshita to announce on April 25, 1989, that he would resign.³¹
11 Once again, the Prime Minister was subject to the rule of law, and if the evidence had
12 warranted could have been criminally prosecuted.
- 13 ▶ In PAPUA NEW GUINEA, a judge recommended that Prime Minister Bill Skate face criminal
14 charges if evidence that he failed to stop a mutiny was confirmed.³² The fact that he was
15 Prime Minister did not immunize him from the rule of law.
- 16 ▶ In SLOVAKIA, in 1996, President Michael Kovac filed criminal slander charges against
17 Prime Minister Vladimir Meciar.³³ The fact that Meciar held the office of Prime Minister

³⁰ Galit Lipkis Beck, *Shekem Workers: Investigate Rabin*, JERUSALEM POST, Feb. 21, 1995, A8, available in 1995 WESTLAW 7552690; Galit Lipkis Beck, *Shekem Workers Protest Rabin's Insults*, JERUSALEM POST, Feb. 24, 1995, at p. 15, in Economics Section.

In another instance, ISRAEL, the Prime Minister, Benjamin Netanyahu, faced a parliamentary no confidence vote after an inquiry found "insufficient evidence to link him to an alleged plot to subvert the investigation of a right-wing coalition ally on corruption charges by appointing a loyal but unqualified attorney general, Mr. Roni Bar On." Julian Borger, *Confidence Vote Can Only Be Bad News for Netanyahu*, IRISH TIMES, Jun. 24, 1997, A10, available in 1997 WESTLAW 12011461; Anton La Guardia, *Netanyahu Vows to Battle on After Escaping Charges*, DAILY TELEGRAPH, Apr. 21, 1997, at 13, International Section. If the inquiry had found sufficient evidence, he would have been subject to indictment. His office of Prime Minister did not immunize him from the rule of law.

³¹ *Probe Ends, Japan's PM Not Charged in Scandal*, MONTREAL GAZETTE, May 30, 1989, B6, available in 1989 WESTLAW 5664899; Steven R. Weisman, *Japanese Prosecutors End Scandal Inquiry Without Indicting Major Figures*, N.Y. TIMES, May 30, 1989, at A3.

³² *Papua New Guinea's PM Could Face Criminal Charges in Mutiny*, DOW JONES INT'L NEWS SERV., Dec. 15, 1997. *Around the World*, SEATTLE TIMES, Dec. 15, 1997.

³³ *Slovakia President Files Charges Against Prime Minister*, DOW JONES INT'L NEWS SERV., May 30, 1996.

1 did not serve to immunize him from the rule of law.³⁴

2
3 These examples should not be surprising. As Chief Justice Marshall stated
4 nearly two centuries ago, in *Marbury v. Madison*,³⁵ the case that has become the
5 fountainhead of American constitutional law: "The government of the United States
6 has emphatically termed a government of laws, and not of men."³⁶ And, he added, "In
7 Great Britain the king himself is sued in the respectful form of a petition, and he
8 never fails to comply with the judgment of his court."³⁷

9
10 Let us now turn specifically to American law. The first item to consider is the
11 language and structure of our Constitution.

12
13 **THE STRUCTURE AND LANGUAGE OF THE UNITED STATES CONSTITUTION.**

14
15 Chief Justice Marshall explained that the Constitution "assigns to different

³⁴ Cf. THAILAND, in 1992, where Prime Minister Suchinda Kraprayoon resigned after "accepting responsibility for the deaths of at least 40 people and the wounding of more than 600 when army troops opened fire on unarmed pro-democracy demonstrators." Demonstrators demanded that trials be held for Suchinda and top military officers who were responsible for ordering troops to fire on unarmed demonstrators. A decree granted the Prime Minister amnesty from criminal charges arising from the repression of the protests. If there were no decree, the Prime Minister would be subject to the rule of law, and the fact that he was Prime Minister would not serve to immunize him. Even after the pardon, an effort was under way to have the amnesty decree declared illegal by a constitutional tribunal. Charles P. Wallace, *Long-Awaited Constitutional Reforms Made in Thailand*, COURIER-JOURNAL (Louisville, Ky.), May 26, 1992, A3, available in 1992 WESTLAW 7837659; William Branigin, *Amnesty Opposition Building in Thailand*, HOUSTON CHRONICLE, May 25, 1992, A24.

Also in THAILAND, in 1996, criminal fraud charges were leveled against Prime Minister Banharn Silpa-archa. His office of Prime Minister did not immunize him from the rule of law. The *Bangkok Post* said that "the charges involved allegations about the sale of land by Mr. Banharn's daughter, Ms. Kanchana, to the state and the diversion of a seven-billion-baht (\$393-million) fund from the environment to the Interior Ministry, which Mr. Banharn heads as minister." *Banharn Faces Criminal Charges: Opposition*, STRAITS TIMES (Sing.), Sept. 4, 1996, available in 1996 WESTLAW 11723429; *PM Faces Criminal Charges: Move to Show Banharn's Zero Credibility*, THE BANGKOK POST, June 3, 1997, at p. 1.

³⁵ 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

³⁶ 5 U.S. (1 Cranch) at 163.

³⁷ 5 U.S. (1 Cranch) at 163. Cf. Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. L. FORUM 1 (1975), cited, e.g. in *Clinton v. Jones*, — U.S. —, —, 117 S.Ct. 1636, —, 137 L.Ed.2d 945 (1997).

1 departments their respective powers."³⁸ So that —

2
3 "those limits may not be mistaken or forgotten, the constitution is
4 written. To what purpose are powers limited, and to what purpose is
5 that limitation committed to writing; if these limits may, at any time, be
6 passed by those intended to be restrained? The distinction between a
7 government with limited and unlimited powers is abolished, if those
8 limits do not confine the persons on whom they are imposed, and if acts
9 prohibited and acts allowed are of equal obligation."³⁹

10
11 Because we live under a *written* constitution, and the Constitution was written
12 so that we would be governed by the written words, it is useful to look at what that
13 writing says about immunities from prosecution. Let us look at the language of the
14 Constitution.

15
16 Our written Constitution has two specific sections that refer to what may be
17 categorized as some type of "immunity" from the ordinary reach of the laws.

18
19 **THE PRIVILEGE FROM ARREST.**

20
21 First, Senators and Representatives are "privileged from Arrest during their
22 Attendance at the Session of their respective Houses, and in going to and returning
23 from the same . . .," except in cases of "Treason, Felony and Breach of the Peace . . ."⁴⁰

24
25 This section illustrates several important factors. First, the Framers of our
26 Constitution thought about immunity, and when they did, they gave a limited immunity to
27 the Senators and Representatives. No similar clause applies to any member of the Executive
28 Branch nor any member of the Judicial Branch. Second, the immunity granted is really quite
29 narrow. It only applies during a legislative session. Moreover, it is limited to arrest in *civil*
30 cases, an obsolete form of arrest that no longer exists.⁴¹

31
32 The Privilege from Arrest Clause does *not* apply at all to criminal cases. It
33 does not protect the Senator or Representative from service of process in a criminal

³⁸ 5 U.S. (1 Cranch) at 176.

³⁹ 5 U.S. (1 Cranch) at 176-77.

⁴⁰ U.S. CONST., ART. I, § 6, cl. 1.

⁴¹ See discussion in, 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 8.9, "Privilege from Arrest" (West Pub. Co., 2d ed. 1992). See also, *Williamson v. United States*, 207 U.S. 425, 435-46, 28 S.Ct. 163, 166, 52 L.Ed. 278 (1908).

1 case.⁴² It does not even protect the Senator or Representative from service of process
 2 in a civil case.⁴³ In other words, this clause immunizes a Senator or Representative
 3 against a procedure that no longer exists — arrest in a *civil* case.
 4

5 As Justice Brandeis, speaking for the Supreme Court, has warned us, this
 6 narrow privilege should be narrowly construed:
 7

8 “Clause 1 [the privilege from arrest clause] defines the extent of the
 9 immunity. Its language is exact and leaves no room for a construction
 10 which would extend the privilege beyond the terms of the grant.”⁴⁴
 11

12 THE SPEECH OR DEBATE CLAUSE.

13
 14 The same clause of the Constitution contains the only other reference to a
 15 privilege or immunity from the criminal law. It provides that, “for any Speech or
 16 Debate in either House, they shall not be questioned in any other Place.”⁴⁵
 17

18 The Supreme Court has interpreted this “Speech or Debate” Clause, like the
 19 Privilege from Arrest Clause, quite narrowly. For example, if the Executive Branch
 20 seeks to prosecute a Member of Congress for taking a bribe to vote a certain way, the
 21 prosecution cannot introduce into the trial the vote of the Representative, but the
 22 prosecution can introduce into evidence the “[p]romises by a Member to perform an
 23 act in the future,” because “a *promise* to introduce a bill is not a legislative act.”⁴⁶ In
 24 other words, Members of Congress can be criminally prosecuted for taking a bribe to
 25 introduce legislation into Congress, notwithstanding the supposed protections of the
 26 Speech or Debate Clause.
 27

28 In addition, the Speech or Debate Privilege, like the Arrest Privilege, only
 29 applies to the legislative branch, not the executive branch. The Constitutional
 30 language makes that quite clear. The existence of these two privileges and the
 31 absence of any similarly clear language creating any sort of Presidential privilege is

⁴² *United States v. Cooper*, 25 Fed. Cases 626, (4 Dall.) 341, 1 L.Ed. 859 (C.C.Pa. 1800).

⁴³ *Long v. Ansell*, 293 U.S. 76, 82, 55 S.Ct. 21, 22, 79 L.Ed. 208 (1934).

⁴⁴ *Long v. Ansell*, 293 U.S. 76, 82, 55 S.Ct. 21, 22, 79 L.Ed. 208 (1934).

⁴⁵ U.S. CONST. ART. I, § 6, cl. 1.

⁴⁶ *United States v. Helstoski*, 442 U.S. 477, 489-90, 99 S.Ct. 2432, 2439-40, 61 L.Ed.2d 12 (1979)(emphasis in original).

1 significant. If the Framers of our Constitution had wanted to create some
2 constitutional privilege to shield the President or any other member of the Executive
3 Branch from criminal indictment (or to prevent certain officials from being indicted
4 before they were impeached), they could have drafted such a privilege. They
5 certainly know how to draft immunity language, for they drafted a very limited
6 immunity for the federal legislature.
7

8 Yet, even in the case of federal legislators, the Constitution gives no immunity
9 from indictment. As then Solicitor General Robert Bork concluded, in rejecting the
10 argument that the United States could not indict a sitting Vice President:
11

12 "The Constitution provides no explicit immunity from
13 criminal sanctions for any civil officer. The only express
14 immunity in the entire document is found in Article I, Section 6,
15 which provides [here he quotes the "arrest clause"].
16

17 "Since the Framers knew how to, and did, spell out an
18 immunity, the natural inference is that no immunity exists where
19 none is mentioned. Indeed, any other reading would turn the
20 constitutional text on its head: the construction advanced by
21 counsel for the Vice President requires that the explicit grant of
22 immunity to legislators be read as in fact a partial withdrawal of
23 a complete immunity legislators would otherwise have possessed
24 in common with other government officers. The intent of the
25 Framers was to the contrary."⁴⁷
26

27 THE IMPEACHMENT CLAUSE.

28

29 **The Language.** There is only one impeachment clause in the Constitution.
30 It does not purport to distinguish the impeachment of a federal judge from the Vice
31 President, nor does it distinguish the impeachment of the Vice President from the
32 President. The clause provides:
33

34 "Judgment in Cases of Impeachment shall not extend further
35 than to removal from Office, and disqualification to hold and
36 enjoy any Office of honor, Trust, or Profit under the United
37 States: but the Party convicted shall nevertheless be liable and

⁴⁷ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 5.*

1 subject to Indictment, Trial, Judgment, and Punishment,
2 according to Law."⁴⁸
3

4 This clause indicates that Congress should not be entrusted with the power to
5 impose any penalty on an impeached official other than (or no greater than) removal
6 from office and disqualification from further office. Criminal penalties would be left
7 to the judiciary. In addition, the clause makes clear that double jeopardy would not
8 bar a criminal prosecution. The clause does not state that criminal prosecution must
9 come after an impeachment, nor does it state that the refusal of the House to impeach
10 (or the Senate to remove from office) would bar a subsequent criminal prosecution.
11

12 **The Commentators and the Case Law.** The available historical evidence
13 as to the meaning of this clause is sparse. One can find various historical references
14 that *assume* that impeachment would precede indictment, but these references, as
15 Professor John Hart Ely concluded, "did not argue that the Constitution *required* that
16 order."⁴⁹ Professor Ely, at the time, was a consultant to Archibald Cox, then the
17 Watergate Special Prosecutor, when he made these comments and concluded that the
18 Constitution does not require that impeachment and removal precede a criminal
19 indictment, even of the President. In 1996, in the midst of the Whitewater
20 investigation, he reaffirmed his analysis.⁵⁰
21

22 Judge Robert Bork agrees with Professor Ely, his former colleague at the Yale
23 Law School. While Solicitor General, Judge Bork concluded, when "the Constitution
24 provides that the 'Party convicted' is nonetheless subject to criminal punishment,"
25 that language does "not establish the sequence of the two processes, but [exists] *solely*
26 to establish that conviction upon impeachment does not raise a double jeopardy
27 defense in a criminal trial."⁵¹

⁴⁸ U.S. Const., art. I, § 3, cl. 7. Clause 6 provides that if the President is subject to impeachment, the Chief Justice of the United States shall preside. The framers evidently thought that the person who normally presides over the Senate [*i.e.* the Vice President of the United States] should not preside in the case of a Presidential impeachment because he would be in a conflict of interest.

⁴⁹ JOHN HART ELY, ON CONSTITUTIONAL GROUND 138 (Princeton University Press 1996) (emphasis added).

⁵⁰ JOHN HART ELY, ON CONSTITUTIONAL GROUND 138-39 (Princeton University Press 1996).

⁵¹ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, (continued...)

1 Of course, impeachment by the House and conviction by the Senate is the only
2 constitutional way to *remove* the President or Vice President or federal judges from
3 office. A criminal conviction in an Article III federal court of a federal official does not
4 remove this official from office, even if the criminal act would also constitute "high
5 crimes or misdemeanors."
6

7 The debates surrounding the drafting of the Constitution are "rife with
8 assertions that the president is not a monarch above the law. and so the argument
9 must proceed along the line that the president must be impeached before he can be
10 criminally prosecuted."⁵² Let us consider some of these historical sources.
11

12 For example, in one of the FEDERALIST PAPERS, Alexander Hamilton says, "The
13 punishment which may be the consequence of conviction upon impeachment, is not
14 to terminate the chastisement of the offender."⁵³ Another FEDERALIST PAPER (also
15 penned by Hamilton) states the President can be impeached for "treason, bribery, or
16 other high crimes or misdemeanors, removed from office; and would afterwards be
17 liable to prosecution and punishment in the ordinary course of law."⁵⁴ Perhaps this
18 language only means that if the President is being charged with actions that are
19 peculiarly and uniquely contrary to Presidential responsibility (like treason
20 committed while President, or acceptance of bribes while President), then
21 impeachment must precede indictment. But that interpretation would mean that
22 other crimes (assault and battery, witness tampering, obstruction of justice, perjury,
23 suborning perjury in a civil case, etc.) can be prosecuted prior to impeachment and
24 removal from office.
25

26 Against this sparse language (which nowhere asserts that impeachment and

⁵¹ (...continued)

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 10 (emphasis added). Solicitor General Bork, in this Memorandum, by way of dictum, also concluded, based on the case law that existed at the time, that the President was immune from criminal prosecution prior to indictment.

⁵² JOHN HART ELY, ON CONSTITUTIONAL GROUND 138 (Princeton University Press 1996).

⁵³ THE FEDERALIST PAPERS, No. 65, 8th paragraph (Alexander Hamilton). In No. 69.

⁵⁴ THE FEDERALIST PAPERS, No. 69, 4th paragraph (Alexander Hamilton).

1 removal *must* precede criminal indictment in *all* cases)⁵⁵ is other specific historical
 2 language that goes the other way and indicates that the Framers of our Constitution
 3 concluded that, unlike federal legislators, no special constitutional immunity should
 4 attach to the President.⁵⁶
 5

6 Consider, for example, the remarks of James Wilson, in the course of the
 7 Pennsylvania debates on the Constitution. He said: "far from being above the laws,
 8 he [the President] is amenable to them in his private character as a citizen, and in
 9 his public character by impeachment."⁵⁷ That quotation implies that the President
 10 can be criminally prosecuted like any other citizen, without regard to impeachment.
 11 Similarly, Iredell, in the course of the North Carolina debates on the Constitution,
 12 said: "If he [the President] commits any misdemeanor in office, he is impeachable .
 13 . . . If he commits any crime, he is punishable by the laws of his country, and in
 14 capital cases may be deprived of his life."⁵⁸
 15

16 Wilson was hardly a solitary voice. Charles Pinckney, a contemporary
 17 observer, also stated:
 18

19 "Let us inquire, why the Constitution should have been so
 20 attentive to each branch of Congress, so jealous of their [*i.e.*,
 21 Congressional] privileges [Pinckney had just referred to the
 22 Congressional privilege from arrest, discussed above], and have
 23 shewn so little to the President of the United States in this
 24 respect. . . . *No privilege of this kind was intended for your*

⁵⁵ Professor John Hart Ely, who examined the historical references for Watergate Special Prosecutor Archibald Cox, also concluded that the historical references do not require that impeachment and removal precede a criminal indictment, even of the President. JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 139 (Princeton University Press 1996).

⁵⁶ See, e.g., MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at p. 1066 (1911)(comments of Charles Pinckney); 10 *ANNALS OF CONGRESS* 71 (1800)(Senator Pinckney, stating that "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, and subject to all the passions, and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried . . ."); Eric M. Freedman, *Achieving Political Adulthood*, 2 *NEXUS* 67, 68 (Spring, 1997), also discussing account of Charles Pinckney, a delegate to the Constitutional Convention.

⁵⁷ 2 *ELLIOTT'S DEBATES* 480, quoted in *WATERGATE SPECIAL PROSECUTION FORCE*, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 7-8.

⁵⁸ 4 *ELLIOTT'S DEBATES* 109, quoted in *WATERGATE SPECIAL PROSECUTION FORCE*, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 8 n.7.

1 *Executive*, nor any except that which I have mentioned for your
 2 Legislature. The Convention which formed the Constitution well
 3 knew that this was an important point, and *no subject had been*
 4 *more abused than privilege*. They therefore determined so set the
 5 example, in merely limiting privilege to what was necessary, *and*
 6 *no more.*"⁵⁹

7
 8 Tench Coxe, in his *Essays on the Constitution*, published in the *Independent*
 9 *Gazetteer* in September, 1787, agreed. He concluded, in discussing the President:

10
 11 "His person is not so much protected as that of a member of
 12 the House of Representatives; for he may be proceeded against like
 13 any other man in the ordinary course of law." (emphasis in
 14 original).⁶⁰

15
 16 When those who argue that the President is immune from the criminal law
 17 until after he has been impeached look to the historical sources, the very most that
 18 they could draw from the historical debates in support of their view is that there
 19 certainly was no agreement to create any Presidential immunity from criminal
 20 indictment (either absolute or temporary), for the easiest way to create it (temporary
 21 or otherwise) would have been to add a clause to the Constitution defining its
 22 existence and extent. In fact, the contemporary sources suggest that the Constitution
 23 provides no criminal immunity for any President who commits crimes in his personal
 24 capacity.

25
 26 This analysis should not be surprising; it is the same conclusion reached in
 27 *Nixon v. Sirica*,⁶¹ where the Court — after examining the Constitutional debates and
 28 the views of the Framers of our Constitution — said:

⁵⁹ 10 ANNUALS OF CONGRESS 74 (1800). Also quoted in, 3 MAX FARRAND, THE
 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385, also cited in JOHN HART ELY, ON
 CONSTITUTIONAL GROUND 415 (Princeton University Press 1996).

⁶⁰ Quoted in, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE
 CONSTITUTION 141 (1976), quoted with approval in *Nixon v. Sirica*, 487 F.2d 700, — (D.C. Cir.
 1973)(per curiam)(en banc).

⁶¹ *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973)(per curiam)(en banc). President
 Nixon chose not to appeal this ruling.

Samuel Dash (also a special consultant to the Office of Independent Counsel) and I were
 two of the attorneys who filed a brief in this case on behalf of the Senate Watergate
 Committee.

1 “The Constitution makes no mention of special presidential
2 immunities. Indeed, the Executive Branch generally is afforded
3 none. This silence cannot be ascribed to oversight.”⁶²
4

5 Later, this same Court said:

6
7 “Lacking textual support, counsel for the President nonetheless
8 *would have us infer immunity from the President’s* political
9 mandate, or from his *vulnerability to impeachment*, or from his
10 broad discretionary powers. *These are invitations to refashion the*
11 *Constitution and we reject them.*”⁶³
12

13 Professor John Hart Ely — a distinguished Constitutional scholar, a former
14 chaired Professor of Constitutional Law at Harvard Law School, a former chaired
15 Professor and the Dean of Stanford Law School, a special consultant to Watergate
16 Prosecutor Archibald Cox, and now a chaired Professor at the University of Miami
17 School of Law — concluded, after analyzing the debates at the Constitutional
18 Convention, that it would be “misleading” to argue that there was a special
19 Presidential immunity from criminal indictment or prosecution until the President
20 was first impeached. He concluded that “there was no immunity contemplated by the
21 framers — or if they contemplated it they didn’t say so . . .” As Professor Ely went
22 on to explain:
23

⁶² *Nixon v. Sirica*, 487 F.2d 700, 710-11 (D.C. Cir. 1973)(per curiam)(en banc):

 “Thus, to find the President immune from judicial process, we must read out of [*United States v. Burr*, [25 Fed. Cases p. 30 (Case No. 14,6962d) (1807)] and *Youngstown [Sheet & Tube v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952)], the underlying principles that the eminent jurists in each case thought they were establishing. *The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight.* James Madison raised the question of Executive privilege during the Constitutional Convention, and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning ‘Speech and Debate’ on the floors of Congress.”

[footnotes omitted; emphasis added.]

⁶³ 487 F.2d at 711 [emphasis added].

1 “To the extent that they [the Constitutional debates] suggest
 2 anything on the subject, the debates suggest that the immunities
 3 the Constitution explicitly granted members of Congress (which
 4 do not, incidentally, include this sort of immunity [from criminal
 5 prosecution]) were not intended for anyone else. The argument
 6 for presidential immunity from indictment is one that must be
 7 based on necessity — and perhaps, but only perhaps, the
 8 presidency *and vice presidency* are distinguished on that score —
 9 *but not* on anything the framers said either in the Constitution
 10 itself or during the debates.”⁶⁴

11
 12 Consider also some remarks that Joseph Story made in his COMMENTARIES ON
 13 THE CONSTITUTION:

14
 15 “There are other incidental powers, belonging to the
 16 executive department, which are necessarily implied from the
 17 nature of the functions, which are confided to it. Among these
 18 must necessarily be included the power to perform them, without
 19 any obstruction or impediment whatsoever. The president
 20 cannot, therefore, be liable to arrest, imprisonment, or detention,
 21 while he is in the discharge of the duties of his office; and for this
 22 purpose his person must be deemed, in civil cases at least, to
 23 possess an official inviolability. In the exercise of his political
 24 powers he is to use his own discretion . . . But he has no
 25 authority to control other officers of the government, in relation
 26 to the duties imposed on them by law, in cases not touching his
 27 political powers.”⁶⁵

28
 29 Some people focus on the phrase: “The president cannot, therefore, be liable to arrest,
 30 imprisonment, or detention . . .” However, they forget to read the rest of the
 31 sentence, which gives him this immunity only when pursuing his official duties:
 32 “*while he is in the discharge of the duties of his office . . .*” Obstruction of justice,
 33 witness tampering, destruction of documents, accepting pay-offs — none of this is
 34 part of the President’s official duties. In fact, as Justice Story states, the President:
 35 “has no authority to control *other officers of the government*, in relation to the duties

⁶⁴ JOHN HART ELY, ON CONSTITUTIONAL GROUND 141 (Princeton University Press 1996) (emphasis added).

⁶⁵ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 814, at p. 579 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 1563, at 418-19 (1833 ed.).

1 imposed on them by law, in cases not touching his political powers.”
2

3 Justice Story explained that these “other officers of the government” — judges,
4 federal prosecutors, the Independent Counsel — are supposed to do their jobs, to
5 perform the duties imposed on them by law. The duties imposed on the Independent
6 Counsel are duties imposed by the Independent Counsel statute and by the decision
7 of Attorney General Janet Reno to petition the court to appoint an Independent
8 Counsel. The statute provides that Independent Counsel must, in general, comply
9 with the regulations of the Department of Justice.⁶⁶ If President Clinton’s alleged
10 criminal acts would be criminally prosecuted by the Department of Justice if a
11 Cabinet Officer or Senator or Representative committed those crimes, and if the
12 alleged crimes are serious enough and the evidence of criminality is substantial so
13 that a federal prosecutor believes that he or she would secure a conviction beyond a
14 reasonable doubt by a fair-minded jury, then the Independent Counsel, following his
15 statutory duty, should allow the Grand Jury to indict.
16

17 The prosecution in this case does to relate to any political dispute between
18 Congress and the President. It does not relate to claims that the President should,
19 or should not have, exercised political discretion in a particular way. There is no
20 issue as to whether the President should have deployed a new Air Force bomber, or
21 whether the President should not have sent troops to Bosnia. The issues in this case
22 do not relate to the President’s official duties. In fact, some of the issues occurred
23 before he became President, and all of the issues (obstruction, conspiracy, witness
24 tampering, etc.) have nothing to do with the President’s official duties to take care
25 that the law be faithfully executed.⁶⁷
26

27 The language that I have quoted from Justice Story is often quoted in the
28 relevant case law. The courts have placed the same interpretation on that language
29 that I have. In *Nixon v. Fitzgerald*,⁶⁸ for example, the Court quoted this language
30 from Justice Story⁶⁹ and held that the President had no immunity from civil damages
31 for matters that were outside the outer perimeter of his official duties. In fact, in that

⁶⁶ CITE

⁶⁷ The facts here are not like the situation in *Morrison v. Olson*, where a criminal prosecution of a high-level political appointee of the President arose out of “a bitter power dispute between the President and the Legislative Branch . . .” 487 U.S. 654, 703, 1087 S.Ct. 2597, 2625, 101 L.Ed.2d 569 (1988)(Scalia, J., dissenting).

⁶⁸ 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

⁶⁹ 457 U.S. at 749, 102 S.Ct. at 2701.

1 case, Justices White, Brennan, Marshall, and Blackmun said explicitly that “there
2 is no contention that the President is immune from criminal prosecution in the courts
3 under the criminal laws . . . [n]or would such a claim be credible. . . . Similarly, our
4 cases indicate that immunity from civil damage actions carries no protection from
5 criminal prosecution.”⁷⁰ By the way, Vice President Gore, while a U.S.
6 Representative, agreed with the dissent in this case and argued that the President
7 should not even be immune from civil damage suits for acts does in his official
8 capacity.⁷¹

9
10 The majority opinion in *Fitzgerald* did not dispute this conclusion that the
11 President is subject to criminal indictment. On the contrary, the majority appeared
12 to agree with the dissent on this point. Justice Powell, joined by Justices Rehnquist,
13 Stevens, O'Connor & Chief Justice Burger, responded that absolute immunity from
14 civil damages “does not leave the public powerless to deter misconduct or to punish
15 that which occurs.”⁷² This is so because the judge or prosecutor — who, like the
16 President is absolutely immune from a civil damage lawsuit brought by a private
17 litigant in certain cases — can still be criminally prosecuted.⁷³

18
19 *Clinton v. Jones*⁷⁴ also quotes this same passage from Justice Story. Justice
20 Stevens, for the Court, italicizes part of this quotation. The President —

21
22 “cannot, therefore be liable to arrest, imprisonment, or detention,
23 while he is in the discharge of the duties of his office; and *for this*
24 *purpose* his person must be deemed, in civil cases at least, to
25 possess an official inviolability.” (emphasis in original).⁷⁵

26
27 The Court went on to say: “Story said only that ‘*an official inviolability,*’

⁷⁰ 457 U.S. at 780, 102 S.Ct. at 2717 (dissenting opinion).

⁷¹ See discussion in, Ronald D. Rotunda, *Paula Jones Day in Court*, 17 LEGAL TIMES (OF WASHINGTON, D.C.) 24, 27 (May 30, 1994), reprinted, e.g., 10 TEXAS LAWYER 24, 27 (June 13, 1994), referring to Amicus Brief that Representative Gore joined.

⁷² 457 U.S. at 757 n.38, 102 S.Ct. at 2705 n. 38, quoting *Imbler v. Pachtman*, 424 U.S. at 428-29, 96 S.Ct. at 994.

⁷³ 457 U.S. at 757 n.38, 102 S.Ct. at 2705 n. 38, quoting *Imbler v. Pachtman*, 424 U.S. at 428-29, 96 S.Ct. at 994.

⁷⁴ — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

⁷⁵ — U.S. at — n. 23; 117 S.Ct. at 1645 n. 23 (emphasis in original).

1 [emphasis by the Court] was necessary to preserve the President's ability to perform
 2 the functions of his office; he did not specify the dimensions of the necessary
 3 immunity."⁷⁶ Once again the Court made clear that there is no need to give the
 4 President absolute immunity from criminal prosecution when he is charged with
 5 offenses that do not relate to the discharge of the duties of his office because criminal
 6 activities are not in the discharge of the President's *official* duties.

7
 8 As the Court explicitly stated: "With respect to acts taken in his 'public
 9 character' — that is official acts — the President may be disciplined principally by
 10 impeachment, not by private lawsuits for damages. But *he is otherwise subject to the*
 11 *laws for his purely private acts.*"⁷⁷ For private acts, acts taken in his private capacity,
 12 the President is "otherwise subject to the laws." That has to mean "all" of the laws,
 13 including the criminal laws. If a President suborns perjury, tampers with witnesses,
 14 destroys documents, he is not acting in his official capacity as President. The fact
 15 that some of these acts occurred prior to the time he became President does not
 16 bolster his claim of immunity from the criminal laws.

17
 18 If the President is indicted for acts that occurred prior to the time he became
 19 President and for acts that were not taken as part of his official constitutional duties,
 20 then, as *Clinton v. Jones* states: "the fact that a federal court's exercise of its tradition
 21 Article III jurisdiction may significantly burden the time and attention of the Chief
 22 Executive is not sufficient to establish a violation of the Constitution."⁷⁸ The Court
 23 added:

24
 25 "it must follow that the federal courts have power to determine
 26 the legality of his [the President's] unofficial conduct."⁷⁹

27
 28 If a President were indicted for acts not taken in his official capacity as
 29 President, a federal court would only be exercising its traditional Article III
 30 jurisdiction. Article III courts have the power to determine the legality of the
 31 President's unofficial conduct, even though the exercise of that traditional jurisdiction
 32 may significantly burden the time and attention of the Chief Executive.

33
 34 If public policy and the Constitution allow a private litigant to sue a sitting

⁷⁶ *Id.*

⁷⁷ — U.S. at —, 117 S.Ct. 1645 (emphasis added).

⁷⁸ — U.S. at —, 117 S.Ct. at 1648-49.

⁷⁹ — U.S. at —, 117 S.Ct. at 1650.

1 President for alleged acts that are not part of the President's official duties (and are
2 outside the outer perimeter of those duties) — and that is what *Clinton v. Jones*
3 squarely held — then one would think that an indictment is constitutional because
4 the public interest in criminal cases is *greater than* the public interest in civil cases.⁸⁰

5
6 **IMPLIED PRIVILEGE?**

7
8 Although the Constitution, by its own terms, does not create a privilege, that
9 does not end the discussion, because the Supreme Court may create a common law
10 privilege or derive such a privilege from its earlier precedent. Let us now consider
11 this issue.

12
13 **EXECUTIVE PRIVILEGE.** First, one should look at the role that Executive
14 Privilege has played in the case law. The President, over the course of two centuries,
15 has sometimes raised a claim of Executive Privilege *when Congress* demands certain
16 information. But that was not the fact pattern involved in *United States v. Nixon*.⁸¹

⁸⁰ *Nixon v. Fitzgerald*, the Supreme Court held that the President was *absolutely* immune for civil damages involving actions taken within his official duties, but also emphasized that this was “merely a private suit for damages” and that there is “a lesser public interest in actions for civil damages *than, for example, in criminal prosecutions.*” 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37.

⁸¹ 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

For a discussion of prior incidences where Presidents provided personal testimony, under oath, pursuant to subpoena, *see*, Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILLINOIS LAW FORUM 1 (1975).

The earlier cases — where the President complied with a subpoena in a criminal case — did not reach the U.S. Supreme Court. *See also*, 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7-1(a)-(d) (West Pub. Co., 2d ed. 1992)(and corresponding pages in 1998 pocket part).

However, the Supreme Court, *prior to United States v. Nixon*, did explicitly approve of *United States v. Burr*, 25 Federal Cases 30, 34 (No. 14,6962d)(C.C.Va. 1807), the decision that required President Jefferson to comply with a subpoena issued by an Article III court. After stating that “the public has a right to every man's evidence” the Court, in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972), added this footnote:

“In *United States v. Burr* Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.”

(continued...)

1 Instead, the question was quite different: whether the President could refuse to
2 disclose information relevant to a federal criminal prosecution brought in an Article
3 III court. President Nixon was the first President in history to litigate the use of
4 Executive Privilege in the court system and the U.S. Supreme Court and to refuse to
5 turn over evidence based on this theory. President Clinton is only the second
6 President in history to raise and litigate Executive Privilege in an effort to block
7 evidence relevant to a criminal investigation.⁸²
8

9 The main case on this question, *United States v. Nixon*, recognized a very
10 limited form of an evidentiary privilege in the case where the President pleads
11 Executive Privilege to a subpoena issued under the authority of an Article III court
12 in connection with a criminal case.⁸³
13

14 While the Supreme Court recognized Executive Privilege in *United States v.*
15 *Nixon* it did not apply it to shield the President; it did not allow President Nixon to
16 assert it in order to prevent disclosure of Presidential tapes regarding confidential
17 conversations. As Judge Robert Bork recently explained: "Nixon's claim, being based
18 only on a generalized interest in confidentiality was overcome by the need of the

⁸¹ (...continued)

Branzburg v. Hayes, 408 U.S. at 688 n.26, 92 S.Ct. at 2660 n.26.

⁸² Thus far, President Clinton has lost on this issue. He raised, and then abandoned, the Executive Privilege claim in his unsuccessful effort to prevent the Independent Counsel from subpoenaing notes taken by Government lawyers (various White House counsel) of conversations with Hillary Clinton. See discussion in, Ronald D. Rotunda, *Lips Unlocked: Attorney Client Privilege and Government Lawyers*, LEGAL TIMES (OF WASHINGTON, D.C.) 21-22, 28 (June 30, 1997).

President Clinton also unsuccessfully raised Executive Privilege in an effort to prevent Bruce Lindsey and Sidney Blumenthal from testifying before the Grand Jury. *In re Grand Jury Proceedings*, Misc. Action 98-095, 98-096 & 98-097 (NHJ), *filed under seal*, May 4, 1998 (D.D.C.Cir.) (Judge Norma Holloway Johnson).

⁸³ 418 U.S. at 712, n.19, 94 S.Ct. at 3109 n.19:

"We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and the congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."

1 courts and parties in a criminal case for relevant evidence.”⁸⁴ The Court, in short,
 2 recognized Executive Privilege and then ordered the President to turn over the
 3 evidence. The Court rejected any claim of a general Executive Privilege in criminal
 4 proceedings. If the matter involved military secrets — where the missile silos are
 5 buried in Montana — or diplomatic secrets — the contents of a secret cable from the
 6 Ambassador to China — the courts are likely to recognize a privilege in the
 7 appropriate case. But the issues that surrounded President Nixon, and the issues
 8 now surrounding President Clinton, do not fall in these categories.

9
 10 In addition, the Supreme Court, in its reasoning in *United States v. Nixon*,
 11 relied on the “necessary and proper” clause of Article I.⁸⁵ That clause gives Congress
 12 the power to expand on other powers — to “make all Laws which shall be necessary
 13 and proper for carrying into Execution the foregoing Powers.”⁸⁶ This power is
 14 granted to Congress, not to the President. *United States v. Nixon* suggests that
 15 Congress may well have the power, under the necessary and proper clause, to create,
 16 explicitly, some sort of immunity from criminal prosecution for the President —
 17 assuming that this immunity (whether temporary or absolute) is not so broad that it
 18 violates other provisions of the Constitution.⁸⁷ But Congress has not done so. It has
 19 enacted no statute giving any sort of immunity from the criminal laws to the
 20 President.
 21

⁸⁴ Robert H. Bork, *Indict Clinton? — How I Wish It Were Possible*, WALL STREET JOURNAL, March 18, 1998, at A22, col. 3 (Midwest ed.).

⁸⁵ 418 U.S. at 706 n.16, 94 S.Ct. at 3106 n.16, citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

⁸⁶ U.S. CONST. ART. I, § 8, cl. 18.

⁸⁷ Congress could, if it wished, provide for what is known as “protective jurisdiction” so that criminal actions that states bring against federal officials must be tried in federal court rather than state court.

However, it is an open question whether it would be constitutional for Congress to enact a statute that, either explicitly or in effect, immunizes the President from the application of federal criminal laws. All of the acts of Congress must comply with the limitations of the Bill of Rights. For example, could Congress provide that the President is immune from criminal law if he kills someone, or takes that person’s property by theft or deception, or imprisons that person? The due process clause of the Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law.” If the President (like an absolute Monarch) has immunity from the criminal law, will we really be a nation of laws and not of men? Did our predecessors revolt from one king only to install another?

1 **RELEVANT FEDERAL STATUTE REJECTS CRIMINAL IMMUNITY.** No federal
 2 statutes recognize, or purport to recognize, any Presidential immunity from criminal
 3 indictment. Indeed, Congress has done quite the opposite: it has created an
 4 Independent Counsel statute for the express purpose of investigating alleged criminal
 5 activities of the President. In fact, it enacted this statute with a specific background
 6 of criminal allegations surrounding *this particular President*. And this particular
 7 President not only signed the law, he and his Attorney General lobbied for the law
 8 so that the Special Division of the District of Columbia Circuit could appoint an
 9 Independent Counsel to investigate alleged criminal activities of this President.⁸⁸
 10 Attorney General Janet Reno testified that "President Clinton and the Department
 11 of Justice *strongly supported* reauthorization" of the Independent Counsel Act.⁸⁹
 12

13 The legislative history of the Independent Counsel law nowhere states that the
 14 President cannot be indicted, or is above the law or is immune from the criminal law
 15 as long as he is a sitting President. The official Legislative History of the Ethics in
 16 Government Act of 1978, creating the first independent law, does not suggest that the
 17 President is immune from indictment. In fact, it takes pains to reject any such
 18 suggestion. The relevant legislative history provides the following:
 19

20 "Subsection (c) simply gives the special prosecutor, who has
 21 information which he wants to turn over to the House of
 22 Representatives because it involves potentially impeachable offenses
 23 against the individuals names in this subsection, the authority to so
 24 turn over that information.
 25

26 "*This section should in no way be interpreted as identifying*
 27 *individuals who are not subject to criminal prosecution prior to being*
 28 *impeached and removed from office.* In fact, a number of persons
 29 holding the positions identified in this subsection have been subject to
 30 criminal prosecution while still holding such an office."⁹⁰
 31

32 **THE BORK MEMORANDUM.** The distinguished constitutional scholar and then

⁸⁸ See generally, Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 809-1 (1994).

⁸⁹ 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 753 (1994)(emphasis added).

⁹⁰ Legislative History of Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. at Large 1824, U.S. CODE CONGRESSIONAL AND LEGISLATIVE NEWS 41216, 4287-88 (emphasis added)..

1 Solicitor General, Robert Bork, concluded in a Memorandum he filed in the criminal
 2 prosecution of Vice President Agnew, that the Vice President could be indicted and
 3 tried prior to impeachment but the President, in contrast, would be immune from
 4 criminal prosecution prior to impeachment. Judge Bork relied on several arguments.
 5 One of the most significant was that —

6
 7 “The Framers could not have contemplated prosecution of an
 8 incumbent President because they vested him complete power
 9 over the execution of the laws, which includes, of course, the
 10 power to control prosecutions.”⁹¹

11
 12 If President Clinton had the complete “power to control prosecutions” today,
 13 Judge Bork’s analysis would be applicable. But President Clinton made sure that he
 14 does not have the “complete power” to “control prosecution.” President Clinton and
 15 Attorney General Reno lobbied for the Independent Counsel Act, and President
 16 Clinton signed it.⁹² This law places important limitations on the Attorney General’s
 17 power to remove the Independent Counsel. The Independent Counsel can, in brief,
 18 only be removed for cause. President Clinton signed the law and decided to give up
 19 his “complete power” to “control prosecution.” Under the statute, the Independent
 20 Counsel can only be removed “for cause.” The Supreme Court upheld the
 21 constitutionality of limiting the removal power in *Morrison v. Olson*.⁹³

22
 23 Judge Bork’s reasoning implies that the President is subject to indictment if

⁹¹ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President’s Claim of Constitutional Immunity, Oct. 5, 1973, at p. 20.

⁹² The fact that the President has signed this law is relevant in determining whether this law — and its implicit authorization of a grand jury to investigate alleged criminal acts by President Clinton “disrupts the proper balance between the coordinate branches” and “prevents the Executive Branch from accomplishing its constitutionally assigned functions.” *Nixon v. Administrator of General Services*, 433 U.S. 425, —, 97 S.Ct. 2777, —, 53 L.Ed.2d 867 (1977), quoting *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). In deciding that the law was constitutional, *Nixon v. Administrator* emphasized: “The Executive Branch became a party to the Act’s regulation when President Ford signed the Act into law . . .” In that case, the Act was applied against a *former* President. In this case, the Executive Branch became a party to the Independent Counsel Act when the present President — President Clinton — signed a law that was written to create an Independent Counsel to investigate that *same* President — President Clinton.

⁹³ 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

1 he gives up the power to control prosecutions. And that is exactly what President
2 Clinton did.

3
4 Judge Bork, in his Memorandum concluding that the Vice President — but not
5 the President — can be indicted prior to impeachment, also relied on the TWENTY-
6 FIFTH AMENDMENT in support of his conclusion.⁹⁴ Judge Bork argued that “the
7 President is the only officer from whose temporary disability the Constitution
8 provides procedures to qualify a replacement.” From that he concludes: “This is
9 recognition that the President is the only officer whose temporary disability while in
10 office incapacitates an entire branch of government.”

11
12 However, the Twenty-Fifth Amendment suggests the opposite conclusion,
13 especially after the decision in *Jones v. Clinton*. Because of this Amendment, the
14 temporary disability of the President does *not* incapacitate an entire branch of
15 government because the Constitution itself recognizes the problems and deals with
16 it in a structural way, not by creating an immunity but by providing for a temporary
17 replacement. In addition, the indictment of the President does not incapacitate either
18 the President or entire Executive Branch. Aaron Burr was quite able to function as
19 a Vice President although indicted. Indictment does not incapacitate the indicted
20 individual.

21
22 In the unlikely event that the defense of a civil case (*e.g.*, *Jones v. Clinton*) or
23 the defense of a criminal case would prevent the President from performing his
24 duties, the Executive Branch does not simply shut down. The Twenty Fifth
25 Amendment, § 3, provides a procedure for the Executive Branch to continue to
26 function “[w]henver the President transmits . . . his written declaration that is
27 unable to discharge the powers and duties of his office . . .” This procedure is clearly
28 not limited to cases of illness.

29
30 One should also note that it is easy to make a claim that the Executive Branch
31 will simply “shut down,” but that claim is difficult to accept. President Clinton,
32 during the pendency of the *Jones* case, said repeatedly that the looming civil case was
33 not affecting his duties as President. Nonetheless, while he was making those
34 statements, the defense attorneys claimed that a delay was necessary because of the
35 burdens on the President. The trial judge in *Jones v. Clinton* refused to change the
36 date of the civil trial. When attorneys cry “wolf” too often, they lose their credibility.
37 (Subsequently, the trial judge granted summary judgment to the defendant.)

⁹⁴ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President’s Claim of Constitutional Immunity, Oct. 5, 1973, at p. 18.

1 **TEMPORARY IMMUNITY CREATED BY STATUTE.** Perhaps Congress could enact
 2 a statute creating some sort of temporary immunity, — that is, providing that there
 3 shall be no trial of a sitting President until after he has finished his term of office as
 4 President. However, enactment of such a law would raise important constitutional
 5 and policy issues.
 6

7 First, in terms of the Constitution, the Sixth Amendment grants the accused
 8 a right to a “speedy and public trial.” If Congress were to enact a statute that
 9 immunizes a sitting President from any criminal indictment as long as he holds
 10 office, then the delay in the indictment (and resulting delay in any trial) will run
 11 afoul of the speedy trial guarantee. Presumably the President could waive this right,
 12 in any particular case. However, if the President could waive this right, then he
 13 should be able to waive his other rights. If one of his rights is the right to temporary
 14 immunity, then he should be able to waive that right as well.
 15

16 And, if the President has a right to temporary immunity, he appears that he
 17 may have waived this right by signing the Independent Counsel Act — which was
 18 enacted only *after this President* and his Attorney General advocated its passage.
 19 Janet Reno stated that President Clinton “*strongly supported* reauthorization” of this
 20 Independent Counsel Act.⁹⁵ President Clinton lobbied for, and signed,⁹⁶ the present
 21 Independent Counsel Act, with full knowledge that the Act’s first court-appointed
 22 counsel would be specifically charged with investigating criminal allegations against
 23 President Clinton.
 24

25 As President Clinton stated when he signed the law:

26
 27 “[This law] ensures that no matter what party controls the
 28 Congress or the executive branch, an independent, nonpartisan
 29 process will be in place to guarantee the integrity of public
 30 officials and ensure that *no one is above the law.*”⁹⁷

⁹⁵ 4 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, at 753
 (1994)(emphasis added).

⁹⁶ In *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53
 L.Ed.2d 867 (1977) the Court found it significant — in deciding the case involving the
 Presidential Recordings and Materials Preservation Act against former President Nixon —
 that the “Executive Branch became a party to the Act’s regulation when President Ford signed
 the Act into law . . .” 433 U.S. at 426, 97 S.Ct. at 2781. In this case, President Clinton
 himself, not a subsequent President, signed the Act into law.

⁹⁷ Statement by President William J. Clinton upon Signing S.24, June 30, 1994,
 (continued...)

1 President Clinton was correct. As Lloyd Cutler, the former Counsel to President
 2 Clinton, said in supporting the concept of an Independent Counsel, President Nixon
 3 was "certainly not a fluke. The qualities that betrayed him and us are far from
 4 unique, and we will see them in future administrations again."⁹⁸
 5

6 Second, in terms of policy, if Congress were to enact temporal immunity from
 7 criminal liability for the President, it would first have to consider the costs. The old
 8 proverb, "justice delayed is justice denied," applies with special vigor in the context
 9 of a criminal prosecution. The statute of limitations may prevent prosecution. As
 10 veteran prosecutors know, if a trial is delayed, then the memories of witnesses will
 11 fade, documents may be destroyed. It is an axiom that delaying a criminal trial —
 12 especially delaying for years — may result in, or be tantamount to creating, a *de facto*
 13 immunity.
 14

15 In any event, even if Congress could enact a statute immunizing the President
 16 from the federal criminal laws, it has not done so. Instead, it has enacted a statute
 17 that authorized an Independent Counsel to use the federal grand jury system to
 18 investigate alleged criminal activities of this President.
 19

20 LEGAL PRECEDENT

21
 22 THE CASE LAW AND LEGAL OPINIONS. No legal precedent has ever concluded
 23 that the President is immune from the federal criminal laws. In fact, the cases have
 24 suggested the contrary.
 25

26 For example, in 1972, *Gravel v. United States*⁹⁹ noted: "The so-called executive
 27 privilege has never been applied to shield executive officials from prosecution for
 28 crime"
 29

30 In 1982, in *Nixon v. Fitzgerald*,¹⁰⁰ the Supreme Court held that the President
 31 was *absolutely* immune for civil damages involving actions taken within his official
 32 duties, but also emphasized that this was "merely a private suit for damages" and

⁹⁷ (...continued)
 in, 30 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1383, July 4, 1994.

⁹⁸ Lloyd Cutler, *A Permanent "Special Prosecutor,"* WASHINGTON POST, Dec. 2, 1974, at A24, col. 4.

⁹⁹ 408 U.S. 606, 627, 92 S.Ct. 2614, 2628, 33 L.Ed.2d 583 (1972).

¹⁰⁰ 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

1 that there is “a lesser public interest in actions for civil damages *than, for example,*
2 *in criminal prosecutions.*”¹⁰¹ This Court also made clear that there would be no
3 immunity from civil damage claims, for actions that were not “within the outer
4 perimeter of his [the President’s] authority.”¹⁰² There is only “absolute Presidential
5 immunity from damages liability for acts within the ‘outer perimeter’ of his official
6 responsibility.”¹⁰³

7
8 In 1994, Lloyd Cutler, the White House Counsel to President Clinton, issued
9 his official legal opinion that it was against the Clinton Administration policy to
10 invoke Executive Privilege for cases involving “personal wrongdoing” by any
11 government official.¹⁰⁴

12
13 Later, in *Clinton v. Jones*,¹⁰⁵ the Court rejected any notion of Presidential
14 immunity (even a temporary immunity) for the President who is sued by a private
15 civil litigant for damages involving acts not within his Presidential duties. In that
16 case, President Clinton’s “strongest argument” supporting his claim for immunity on
17 a temporary basis, the Court said, was the claim that the President occupies a
18 “unique office” and burdening him with litigation would violate the constitutional
19 separation of powers and unduly interfere with the President’s performance of his
20 official duties.¹⁰⁶

21
22 In language of remarkable breadth, the *Jones* Court repeatedly stated that *no*
23 amount of this kind of burden would violate the Constitution. The President, the
24 Court held: “errs by presuming that interactions between the Judicial Branch and the
25 Executive, *even quite burdensome interactions*, necessarily rise to the level of
26 constitutionally forbidden impairment of the Executive’s ability to perform its
27 constitutionally mandated functions.”¹⁰⁷ The opinion, which had no dissents, quoted
28 with approval James Madison’s view that separation of powers “does not mean that

¹⁰¹ 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37 (emphasis added).

¹⁰² 457 U.S. at 757, 102 S.Ct. at 2705.

¹⁰³ 457 U.S. at 756, 102 S.Ct. at 2704.

¹⁰⁴ Lloyd Cutler Legal Opinion of Sept. 28, 1994, discussed in, T.R.Goldman, *Cutler Opined Against Broad Use of Privilege*, LEGAL TIMES (OF WASHINGTON, D.C.) 14 (Feb. 9, 1998).

¹⁰⁵ — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

¹⁰⁶ — U.S. at —, 117 S.Ct. at 1645-46.

¹⁰⁷ — U.S. at —, 117 S.Ct. at 1648.

1 the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each
2 other."¹⁰⁸

3
4 And, if that were not clear enough, Justice Stevens' opinion added this
5 clincher:

6 "The fact that a federal court's exercise of its traditional Article III
7 jurisdiction may significantly burden the time and attention of
8 the Chief Executive is not sufficient to establish a violation of the
9 Constitution."¹⁰⁹

10
11 The Court explained that it "has the authority to determine whether he has acted
12 within the law."¹¹⁰ And, "it is also settled that the President is subject to judicial
13 process in appropriate circumstances."¹¹¹

14
15 In the Watergate Tapes case (*United States v. Nixon*¹¹²), President Nixon
16 argued that a President could not be subject to the criminal process because, "if the
17 President were indictable while in office, any prosecutor and grand jury would have
18 within their power the ability to cripple an entire branch of the national government
19 and hence the whole system."¹¹³ The Court did not reach that question, but *Clinton*

¹⁰⁸ — U.S. at —, 117 S.Ct. at 1648 (emphasis in original), quoting THE FEDERALIST PAPERS, Federalist No. 47, pp. 325-36 (J. Cooke ed. 1961), which also has emphasis in the original.

¹⁰⁹ — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added). I tentatively explored the implications of the strong language of the *Jones* case in, Ronald D. Rotunda, *The True Significance of Clinton vs. Jones*, CHICAGO TRIBUNE, July 8, 1997, at 12, col. 1-6; Rotunda, *Can a President Be Imprisoned?*, 20 LEGAL TIMES (OF WASHINGTON, D.C.) 22-23 (July 21, 1997). However, my earlier writing mainly quoted from that case. Now I have investigated this issue fully. Based on my evaluation of the Constitutional history, the Constitutional language, legal precedent, the relevant statutes and case law, and the view of commentators, and I am reaching the conclusion of this legal opinion.

¹¹⁰ — U.S. at —, 117 S.Ct. at 1649.

¹¹¹ — U.S. at —, 117 S.Ct. at 1649-50, citing and relying on, Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. OF ILL. L. FORUM 1 (1975); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 7.1 (West. Pub. Co., 2d ed. 1992) & 1997 Pocket Part.

¹¹² 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

¹¹³ Brief for the Respondent, Richard M. Nixon, President of the United States, in
(continued...)

1 *v. Jones* later rejected the argument that the uniqueness of the Presidential Office
 2 requires that the Court recognize some sort of immunity from the law. *Clinton v.*
 3 *Jones* held that, even if the burden of litigation is heavy, the Constitution gives the
 4 President no special redress from that burden.

5
 6 If even a *private* party instituting *civil* litigation may impose special litigation
 7 burdens on a sitting President, then the President's argument for a relief from the
 8 burdens of litigation is much less when the Federal Government initiates a criminal
 9 case, where the public interest of justice is much greater¹¹⁴ because the party is the
 10 United States,¹¹⁵ and the action is criminal, not civil.

11
 12 **ARGUMENTS OF PRESIDENT NIXON AND OTHERS THAT THE PRESIDENT IS**
 13 **IMMUNE FROM THE CRIMINAL LAW.** President Nixon's argument — that "any
 14 prosecutor and grand jury would have within their power the ability to cripple an
 15 entire branch of the national government" — is inapplicable here. Neither "any"
 16 prosecutor nor "any" grand jury cannot institute criminal charges against a sitting
 17 President. The Independent Counsel Act does not authorize anyone to institute
 18 charges; it only gives its authority to the Independent Counsel, who can only be
 19 appointed if the Attorney General (who serves at the discretion of the President) asks
 20 the Special Division for an appointment.

21
 22 Nor can it be argued that an indictment would close down the entire Executive
 23 Branch of the Federal Government. The President can continue his duties, and "*a*
 24 *federal court's exercise of its traditional Article III jurisdiction may significantly*
 25 *burden the time and attention of the Chief Executive is not sufficient to establish a*
 26 *violation of the Constitution.*"¹¹⁶ If the President is indicted, the government will not
 27 shut down, any more than it shut down when the Court ruled that the President must
 28 answer a civil suit brought by Paula Jones.
 29

¹¹³ (...continued)

United States v. Nixon, Nos. 73-1766 & 73-1834 (October term, 1973), at p. 97.

¹¹⁴ Recall, in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), the Court specifically noted that, when there is "merely a private suit for damages," then there is "a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." 457 U.S. 731, 754 & n.37, 102 S.Ct. 2690, 2703 & n.37.

¹¹⁵ The Independent Counsel institutes its criminal litigation in the name of the United States. *E.g.*, *United States v. Webster Hubbell, et al.*, Crim. No. 98-0151 (JRJ).

¹¹⁶ — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added).

1 President Clinton may well argue that a criminal indictment of the President
2 would inevitably place the nation in turmoil and bring the entire government to a
3 halt. Oddly enough, those same people argue that the solution is to impeach the
4 President. Would not an impeachment place the nation in even more turmoil?
5

6 Moreover, this argument was rejected in *Nixon v. Sirica*,¹¹⁷ which stated, over
7 a quarter of a century ago, that the President "does not embody the nation's
8 sovereignty. He is not above the law's commands . . ." ¹¹⁸ A criminal proceeding
9 would take no more time than a civil case against the President (and we know that
10 is Constitutional). Moreover, any sanction if there is a conviction can be postponed
11 until after the President is no longer a sitting President.
12

13 In short, to the extent that case law discusses this issue, the cases do not
14 conclude that the President should have any immunity, either absolute or temporary,
15 from the law. On the contrary, they point to the conclusion that, since the birth of the
16 Republic, our constitutional system rejected the fiction that the King can do no
17 wrong. In fact, in the *Clinton v. Jones* case, President Clinton himself specifically did
18 not place any reliance on the claim that the President enjoyed the prerogatives of a
19 monarch.¹¹⁹ He has not stated that he would now embrace such a claim, and, if he
20 did, there is no reason to believe that a court would accept that claim any more than
21 the courts accepted President Nixon's claims of immunity.
22

23 IMPEACHMENT, INDICTMENT, AND THE COMMENTATORS

24

¹¹⁷ 487 F.2d 700, 711 (D.C. Cir. 1973)(per curiam)(en banc).

¹¹⁸ 487 F.2d at 711:

"Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . .'. Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." (footnotes omitted).

In light of this case, it should be clear that the President is subject to a grand jury subpoena to give evidence. The President can, of course, plead the Fifth Amendment and refuse to testify, as could any other witness.

¹¹⁹ — U.S. at — n.24, 117 S.Ct. at 1646 n.24.

1 A few commentators have questioned whether the impeachment process must
2 be completed before an indictment can issue. No case has ever ruled that any officer
3 subject to the criminal law must be impeached before he or she is prosecuted
4 criminally. In fact, whenever the issue has been litigated, the cases have held that
5 impeachment need not precede criminal indictment.¹²⁰ As early as 1796, when the
6 Constitution and the nation were less than a decade old, Attorney General Lee
7 advised Congress that a territorial court judge could be indicted for criminal offenses
8 while in office although he had not been impeached. Lee, by the way, gave no
9 suggestion that the President should be treated differently.¹²¹

10
11 There certainly is no suggestion in the language of the Constitution that the
12 President is otherwise to be treated any differently than other civil officers. If the
13 Framers wanted to treat the President differently — for example, if they wanted to
14 make sure that the President is immune from indictment until after he has been
15 impeached — then they could have written such language. They certainly knew how
16 to write such language. Our Constitution refers to “impeachment” several times, and
17 creates no special rules for the President except it provides a different procedural rule
18 in one specific instance: when the President is tried in the Senate, the Constitution
19 provides that the Chief Justice of the United States (rather than the Vice President)

¹²⁰ As the Seventh Circuit noted in upholding the criminal conviction of Federal
Judge Otto Kerner:

“The Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office. The provision of Art. I, § 3, cl. 7, that an impeached judge is ‘subject to Indictment, Trial, Judgment and Punishment, according to Law’ does not mean that a judge may not be indicted and tried without impeachment first. The purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment.”

United States v. Issacs, 493 F.2d 1124, 1142 (7th Cir. 1974). Cf. Ronald D. Rotunda, *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE: THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 359 (1989); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW REVIEW 707 (1988).

¹²¹ 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 982-83 (Washington, 1907).

1 presides over an impeachment trial.¹²² The Framers made the decision to treat the
2 President differently on one issue only: they explicitly provided that the Chief Justice
3 shall preside only in the case of a Presidential impeachment.¹²³ The Framers did not
4 want the Vice President from presiding over the impeachment of the President
5 because he would be in a conflict of interest: if the President were to be impeached,
6 the Vice President would become President.¹²⁴

7
8 It is generally recognized, as Justice Joseph Story noted, that an impeachable
9 offense is not limited to a criminal or statutory offense.¹²⁵ Moreover, not all crimes
10 are impeachable. To determine what are "high crimes and misdemeanors" Justice
11 Story advised that one must look to the common law, but it is not necessary to look
12 to the list of statutory crimes. He added:

13
14 "Congress have unhesitatingly adopted the conclusion,
15 that no previous [violation of] statute is necessary to authorize an
16 impeachment for any official misconduct; and the rules of
17 proceeding, and the rules of evidence, as well as the principles of
18 decision, have been uniformly regulated by the known doctrines
19 of the common law and parliamentary usage. In the few cases of

¹²² U.S. CONST. ART. I, § 2, cl. 5 (House has "sole Power of Impeachment"); ART. I, § 3, c. 6 (Senate has "sole Power to try all Impeachments" and, in an impeachment trial of the President, the Chief Justice shall preside); ART. I, § 3, cl. 7 (impeachment sanctions cannot impose criminal penalties, but criminal sanctions may be imposed by separate criminal trials); ART. II, § 4 ("all civil Officers of the United States" are subject to impeachment).

¹²³ One can look at quotations by various of the Framers of the Constitution, but, in "dealing with these historical materials a serious danger exists of reading into statements made two hundred years ago a meaning not intended by the speaker." WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 4. See also various memoranda attached to this Memorandum and marked as "confidential."

This WATERGATE SPECIAL PROSECUTION FORCE, Memorandum — after examining the historical record — concludes that the historical sources of two centuries ago "are equivocal lending little firm support for or against the proposition that the Framers intended to immunize a sitting President from criminal liability." *Id.* at 9.

¹²⁴ See discussion in, Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW REVIEW 707 (1988).

¹²⁵ See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 403-07, at pp. 287-90 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833).

1 impeachment, which have hitherto been tried, no one of the
 2 charges has rested upon any statutable misdemeanour. It seems,
 3 then, to be the *settled doctrine* of the high court of impeachment,
 4 that though the common law cannot be a foundation of a
 5 jurisdiction not given by the constitution, or laws, that
 6 jurisdiction, when given, attaches, and is to be exercised
 7 according to the rules of the common law; and that, *what are, and*
 8 *what are not high crimes and misdemeanours, is to be ascertained*
 9 *by a recurrence to that great basis of American jurisprudence.*¹²⁶

10
 11 Story's judgement has stood the test of time. Impeachment charges have not
 12 been limited to violations of federal criminal statutes. Federal judges have been
 13 indicted *before* they are impeached.¹²⁷ Indeed, to emphasize the distinction and
 14 separation of impeachment and criminal indictment, one judge was impeached *after*
 15 he had been *acquitted* in a criminal trial.¹²⁸
 16

¹²⁶ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, §§ 405, at p. 288 (RONALD D. ROTUNDA & JOHN E. NOWAK, eds., Carolina Academic Press, 1987, originally published, 1833)(emphasis added).

¹²⁷ This has long been the rule. In 1796, Attorney General Lee informed Congress that a judge of a territorial court, a civil officer of the United States subject to impeachment, was indictable for criminal offenses while in office. 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 982-83 (Washington, 1907). The "Framers did not intend civil officers generally to be immune from criminal process." *In re Proceedings of the Grand Jury Impaneled Dec. 9, 1972, Memorandum for the Unites States Concerning the Vice President's Claim of Constitutional Immunity*, at p. 99, quoting 3 HINDS' PRECEDENTS, *supra*.

For example, Judge Otto Kerner was indicted and convicted *before* there was any impeachment. His resignation ended the need for a subsequent impeachment. *See United States v. Isaccs*, 493 F.2d 1124, 1142 (7th Cir. 1974), citing the 1796 Attorney General Opinion upholding the conviction of Judge Kerner even though he had not been impeached and removed by Congress. Kerner then resigned from the bench and was not impeached.

Judge Walter Nixon (who did not resign from the bench) was impeached *after* he was convicted. *See, Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993).

¹²⁸ Judge Alcee Hastings falls in this category. *See, Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987). *See generally*, WILLIAM H. REHNQUIST, GRAND INQUESTS (1992). The House impeached Judge Hastings by a lopsided vote of 413 to 3; the Senate removed him in 1989. Hastings was subsequently elected to the U.S. House of Representatives. Joe Davidson, *Ex-Judge Is Likely To Join the Congress That Impeached Him*, Wall Street Journal, Nov. 2, 1992, at A1, 1992 WESTLAW-WSJ 629646.

1 **INDICTABILITY OF THE VICE PRESIDENT.** Similarly, history demonstrates that
 2 the Vice President can be indicted and criminally prosecuted before being impeached
 3 (and whether or not he has been impeached). New Jersey, for example, indicted Vice
 4 President Aaron Burr for the death of Alexander Hamilton in a duel.¹²⁹ Burr did not
 5 act as if he were immunized from indictment. Instead, he fled the jurisdiction to
 6 avoid arrest.¹³⁰ Burr continued functioning as Vice President while under indictment;
 7 in fact, Burr (as President of the Senate) even presided over the impeachment trial
 8 of Justice Chase.¹³¹ Vice President Spiro Agnew also argued, unsuccessfully, that he
 9 was immune from indictment prior to impeachment, but he ended up being indicted
 10 on corruption charges, pleading guilty, and resigning from office.¹³²

11
 12 President Clinton, like President Nixon, may wish to argue that the Presidency
 13 is "unique," and that the President alone represents "the Executive Branch."
 14 Consequently, it is argued, the President alone is immune from the criminal laws
 15 while he is sitting as President.

16
 17 The Court, in *Nixon v. Sirica*,¹³³ explicitly rejected that argument. "Because
 18 impeachment is available against all 'civil Officers of the United States,' not merely
 19 against the President, U.S. Const. art. II, § 4, it is difficult to understand how any
 20 immunities peculiar to the President can emanate by implication from the fact of
 21 impeachability."¹³⁴ A criminal indictment and even a trial do not "compete with the
 22 impeachment device by working a constructive removal of the President from
 23 office."¹³⁵ If the President is acquitted, there is no "constructive removal" from office.

¹²⁹ 1 MILTON LOMASK, AARON BURR 329, 349-55 (1979).

¹³⁰ *Id.*

¹³¹ See, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 29-30.

¹³² *E.g.*, RICHARD D. COHEN & JULES WITCOVER, A HEARTBEAT AWAY (1974).

¹³³ 487 F.2d at 700 (D.C. Cir. 1973)(per curiam)(en banc).

¹³⁴ 487 F.2d at 711 n.50.

¹³⁵ 487 F.2d at 711:

"Nor does the Impeachment Clause imply immunity from routine court process. While the President argues that the Clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case

(continued...)

1 If the President is convicted, the punishment may not include imprisonment, and —
 2 if it does — any imprisonment can be stayed until he no longer is a sitting President.
 3

4 The test that *Nixon v. Sirica* adopted is directly applicable here. A criminal
 5 indictment and even a trial do not “compete with the impeachment device by working
 6 a constructive removal of the President from office.” However, imprisonment may be
 7 a “constructive removal of the President from office,” and, if it is, that sanction cannot
 8 be imposed on a sitting President. But indictment and trial are not the same as
 9 imprisonment. If there is a trial, the President may be acquitted. If he is convicted,
 10 the sanction may not include imprisonment, and if it does, that sanction can be
 11 stayed until after the Presidential term has ended.
 12

13 CONGRESSIONAL POWER TO CONTROL THE DECISION TO INDICT. If an official
 14 subject to impeachment (such as the President, Vice President, or a federal judge)
 15 could not be indicted until after he or she had been impeached, then Congress would
 16 control the decision whether to prosecute. But such a power would be inconsistent
 17 with the doctrine of separation of powers, which does not give Congress a role in the
 18 execution of the laws.¹³⁶
 19

20 The decision to prosecute or not prosecute is a decision that cannot lie with the
 21 legislature. In the instant case, it lies with the Independent Counsel, who, under the
 22 statute, stands in the shoes of the Attorney General. The decision to appoint the
 23 Independent Counsel rests in the *unreviewable discretion* of the Attorney General.
 24 The U.S. Supreme Court has made clear that neither the courts nor Congress can
 25 require the appointment of an Independent Counsel.¹³⁷
 26

27 The decision to indict a sitting President lies with the Grand Jury, not with the
 28 House of Representatives or Senate. As *Nixon v. Sirica* eloquently stated: “The
 29 federal grand jury is a constitutional fixture in its own right, legally independent of

¹³⁵ (...continued)
 before us. The order entered below, and approved here in modified form,
 is not a form of criminal process. *Nor does it compete with the
 impeachment device by working a constructive removal of the President
 from office.*”

487 F.2d 700 at 711(emphasis added).

¹³⁶ See *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

¹³⁷ *Morrison v. Olson*, 487 U.S. 654, 694-95, 108 S.Ct. 2597, 2621, 101 L.Ed.2d 569
 (1988). This point is discussed in detail in note 10, *supra*.

1 the Executive. . . . If a grand jury were a legal appendage of the Executive, it could
 2 hardly serve its historic functions as a shield for the innocent and *a sword against*
 3 *corruption in high places.*"¹³⁸ The Court went on to state that, as "a *practical*, as
 4 opposed to legal matter, the Executive may, of course cripple a grand jury
 5 investigation," but even though the President may have the practical power to
 6 handicap the grand jury in various ways, "it is he who must exercise them. the court
 7 will not assume that burden by eviscerating the grand jury's independent legal
 8 authority."¹³⁹

9
 10 **THE WATERGATE EXPERIENCE.** The Watergate Special Prosecution Force did
 11 not indict President Nixon but named him an unindicted coconspirator. President
 12 Nixon resigned from office, was pardoned by his successor, President Ford, and the
 13 issue was never tested in court. Some modern day commentators assume that the
 14 Watergate Special Prosecutor concluded that a sitting President is immune from
 15 indictment. That assumption is simply wrong.

16
 17 The Watergate Special Prosecutor only argued that, in the narrow
 18 circumstances of that case — where the House of Representatives had already made
 19 the independent judgment to begin impeachment proceedings, when the House of
 20 Representatives, prior to any turnover of Grand Jury evidence, had independently
 21 decided to consider the very matters that were before the Grand Jury — the President
 22 should not be indicted until after the impeachment process had concluded.¹⁴⁰

¹³⁸ 487 F.2d at 712 n.54 (emphasis added)(internal citations omitted).

¹³⁹ 487 F.2d at 713 n.54 (emphasis in original).

¹⁴⁰ See LEON JAWORSKI, *THE RIGHT AND THE POWER* 100 (1976). Jaworski argued that his Watergate Special Prosecution Force could seek an indictment against the President for some crimes (like murder), but, Jaworski said, he questioned whether it was appropriate to indict the President for other crimes, like obstruction of justice, "especially when the House Judiciary Committee was then engaged in an inquiry into whether the President should be impeached on that very ground."

Of course, Jaworski's comments must be read in context. First, no case law reaches the conclusion that Jaworski and other lawyers working for him reached at the time. His ambivalent opinions are not legal precedent.

More importantly, Jaworski's decision was quite nuanced. The distinctions he drew argue that an indictment would be appropriate in the present case because no impeachment is under way. In addition, Jaworski conclusion that the President should not be indicted was tentative ("grave doubts," not firm conclusions), and those conclusions, he emphasized, were

(continued...)

¹⁴⁰ (...continued)

made in the specific factual and historical context within which the Watergate Special Prosecution Force operated. That factual and historical context is different today.

That factual and historical context is important. It is significant that the Watergate Special Prosecution Force was a very different animal than the present Office of Independent Counsel. Unlike the present Office of Independent Counsel, the Watergate Special Prosecution Force was not a creature of statute. It was merely a creation of executive regulation. Until the U.S. Supreme Court ruled on the issue, it was unclear if the courts could even rule on an evidentiary dispute between the Special Prosecutor and a "superior officer of the Executive Branch." *United States v. Nixon*, 94 U.S. 683, 692-93, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974). The decision of the Watergate Special Prosecutor not to seek to indict President Nixon was made in the context where even the powers of the Special Prosecutor to subpoena evidence from the President were unclear. I have examined the series of memoranda dealing with the issue of the amenability of President Nixon to indictment. The various memoranda are not of one opinion (some favored indictment), and they specifically raised concerns about the permissibility of an indictment brought by a Special Prosecutor who was appointed by, and could be fired by, the Attorney General, when the Special Prosecutor was protected only by a regulation signed by the Attorney General, and the validity of this entire arrangement had not been tested in court. See, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 33-34.

Significantly, the regulations that created the Watergate Special Prosecutor provided that the "Prosecutor will not be removed from his duties . . . without the President's first consulting the Majority and Minority Leaders and the Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action." 38 FED. REG. 30739, quoted in, *United States v. Nixon*, 418 U.S. 683, 695 n.8, 94 S.Ct. 3090, 3101 n.8. The *Nixon* Court did not specifically rule on this provision. We know now that a law that gives Congress (or certain members of Congress) a role in limiting the removal of executive branch officials is unconstitutional. As *Bowsher v. Synar*, 478 U.S. 714, 722-23, 106 S.Ct. 3181, 3186, 92 L.Ed.2d 583 (1986) held:

"The Constitution does not contemplate an active role for Congress in the supervision of officers charged with execution of the laws its enacts. . . . Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one [of impeachment] is inconsistent with separation of powers."

One could see why the Watergate Prosecutor was hesitant to claim a power to indict, when the very existence of the Watergate Prosecutor was constitutionally in doubt (a doubt (continued...))

140 (...continued)

that bore fruit in *Synar*). No such doubt applies to the present Office of Independent Counsel, for Congress has no role to play in the removal of the Independent Counsel, and the Supreme Court has upheld the constitutionality of this statute. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

At the time that Jaworski wrote his tentative conclusions, the U.S. Supreme Court had not even decided that a President could be sued for damages in a civil case. The Court later answered yes to that question in, *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

Moreover, the Memoranda on this issue show that the attorneys in the Watergate Special Prosecution Force divided on this issue. *E.g.*, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 43, 44:

"The issue is close. Respectable arguments derived from history and contemporary policy exist on both sides of the issue. . . . [M]y conclusion is that the Constitution does not preclude indictment, and the issue is really whether the incumbent President should be indicted." [emphasis added.]

See also, JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his memorandum to Special Prosecutor Archibald Cox that argued that the President could be indicted.

Commentators prior to *Morrison v. Olson*. The view of legal commentators regarding the indictment of a sitting President was mixed, prior to *Morrison v. Olson*. Those commentators claiming that the President is immune from criminal prosecution have typically discussed the issue in a vacuum, not in the context of a specific investigation of a President pursuant to a statute, enacted at the President's request, authorizing a criminal investigation of the President. *See* George E. Danielson, *Presidential Immunity from Criminal Prosecution*, 63 GEORGETOWN L.J. 1065 (1975) (arguing that the President is immune from criminal prosecution); PHILIP KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) (arguing that the President is immune from criminal prosecution). Note that these commentators wrote without benefit of the Supreme Court decision in, *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Other commentators have argued that the President and all other officials are subject to indictment prior to impeachment — in part because some acts may not be impeachable but are certainly indictable. *See*, RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 215 (2d ed. 1829):

"the ordinary tribunals, as we shall see, are not precluded, either before or after impeachment, from taking cognizance of the public and official delinquency."

(continued...)

1
2
3 However, *prior to that situation* — in the case where the House of
4 Representatives had not already begun impeachment process — historians forget that
5 the Watergate Special Prosecution Force was advised that the President could be

140 (...continued)
(emphasis added).

Quoted in, WATERGATE SPECIAL PROSECUTION FORCE, Memorandum of Dec. 26, 1973, from Richard Weinberg to Philip Lacovara, at 13. *See also* other authorities cited therein. *Accord*, JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his 1973 memorandum to Special Prosecutor Archibald Cox arguing that President could be indicted.

Commentators after *Morrison v. Olson*. Post-*Morrison v. Olson* commentators have tended to conclude that the President is not above the law. *See*, Gary L. McDowell, *Yes, You Can Indict the President*, WALL STREET JOURNAL, March 9, 1998, at A19, col. 3-6 (Midwest ed.); Edwin B. Firmage & R.C. Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023 (arguing that President is not immune from the criminal process); Eric 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 (1992) (thorough article concluding that the President is not immune); Terry Eastland, *The Power to Control Prosecution*, 2 NEXUS 43, 49 (Spring, 1997)(referring to *Morrison v. Olson* and concluding that the President is not immunized from prosecution); Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67, 84 (Spring, 1997), concluding:

“To the extent that the belief that the President should have a blanket immunity from criminal prosecutions manifests itself in legal form, legal decisionmakers should reject it. The argument is inconsistent with the history, structure, and underlying philosophy of our government, at odds with precedent, and unjustified by practical considerations.”

See also, Scott W. Howe, *The Prospect of a President Incarcerated*, 2 NEXUS 86 (Spring, 1997), arguing that the President has no constitutional immunity from criminal prosecution, but Congress may wish to create some limited immunity by statute.

Jay S. Bybee, *Who Executes the Executioner?*, 2 NEXUS 53 (Spring, 1997) argues that before the President, or federal judges, can be tried, they first must be impeached, an argument that is more in the nature of a polemic, because it uproots two centuries of practice regarding the prosecution of federal judges. *See also* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (Spring, 1997), which presents such a broad argument for Presidential immunity that it is inconsistent with *Clinton v. Jones*, — U.S. —, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

1 indicted.¹⁴¹

2
3 **USE OF GRAND JURY TO COLLECT EVIDENCE FOR AN IMPEACHMENT.**

4
5 **INTRODUCTION.** If it is unconstitutional for a federal grand jury, acting
6 pursuant to the Independent Counsel statute to indict a President for engaging, in
7 his private capacity, in serious violations of federal law, then it would be a gross
8 abuse of the grand jury powers and a violation of federal statutory and constitutional
9 law for that grand jury to investigate whether the President has committed any
10 criminal law violations. But we know, after *Morrison v. Olson*,¹⁴² that it is
11 constitutional for the Independent Counsel to use the grand jury to investigate the
12 President. That conclusion was implicit in the holding of *Morrison*. Hence it should
13 be constitutional to indict a sitting President because it would not be constitutional
14 to use the grand jury to investigate if it could not constitutionally indict.

15
16 Let us analyze this argument in more detail. First, as all the legal
17 commentators acknowledge:

18
19 “The grand jury is authorized only to conduct criminal investigations.
20 Accordingly, it is *universally acknowledged* that the grand jury cannot
21 be used to conduct an investigation — or *even explore a particular line*
22 *of inquiry* — solely in order to collect evidence for civil purposes.”¹⁴³

23
24 Thus, as the U.S. Supreme Court has stated, the federal government may not “start
25 or continue a grand jury inquiry where no criminal prosecution seem[s] likely.”¹⁴⁴ If
26 the grand jury investigation “is merely a pretext for a civil evidence-gathering

¹⁴¹ JOHN HART ELY, ON CONSTITUTIONAL GROUND 133 *et seq.* (Princeton University Press 1996), reprinting his: *Memorandum to Special Prosecutor Archibald Cox on the Legality of Calling President Nixon before a Grand Jury* (1973). Professor Ely explains that “prosecution of a sitting (non-impeached) president must be possible, or else there would be no way to reach” crimes that do not rise to the level of impeachment. *Id.* at 139. Ely expanded on those arguments in *id.* at 140-41.

¹⁴² 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

¹⁴³ 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.01 at 2 (Callaghan & Co., 1986)(emphasis added).

¹⁴⁴ *United States v. Sells Engineering Inc.*, 463 U.S. 418, 432, 103 S.Ct. 3133, 3142, 77 L.Ed.2d 743 (1983). See also, 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 10.14 at 51 (Callaghan & Co., 1986)

1 mission, the grand jury process is clearly being abused under any standard."¹⁴⁵
2

3 There are few cases where the courts have found that the Government has
4 abused the grand jury system in order to gain evidence that would or could not be
5 used in a criminal prosecution. But, where the courts find a bad motive, they do not
6 allow an illegal use of the grand jury system.
7

8 In the present case, it is quite clear that one of the purposes of the grand jury
9 investigation conducted by the Office of Independent Counsel is to investigate
10 President Clinton. Of course, the OIC and the grand jury have other persons whom
11 it is investigating and whom it may indict (or already have indicted). And, to that
12 extent, the actions of the several Grand Juries in this investigation are proper.
13 Moreover, to the extent that it is conducting a valid criminal investigation, it may
14 disclose the fruits of its investigation for civil purposes to the extent that statutes or
15 rules governing such disclosure so authorize.¹⁴⁶
16

17 However, in this case it is clear that *some* of the grand jury's subpoenas, some
18 of the energy of the OIC, and a portion of the mandate of the OIC are intended *solely*
19 *to investigate criminal allegations against the President* in connection with issues
20 such as Whitewater, Castle Grande, the FBI White House files, the alleged illegal
21 abuses involving the Travel Office of the White House, and — most recently —
22 allegations involving possible Presidential perjury, subordination of perjury,
23 tampering of witnesses, and obstruction of justice in the litigation captioned as *Jones*
24 *v. Clinton*.
25

26 The purpose of the OIC investigation and the grand jury investigation is to
27 determine whether the President has, or has not, engaged in serious crimes. If the
28 grand jury cannot indict the President for such crimes, then it has no business
29 investigating the President's role in such crimes. Impeachment, after all, is an

¹⁴⁵ 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.03
at 9 (Callaghan & Co., 1986).

See also United States v. Proctor & Gamble Co., 187 F. Supp. 55, 57-58 (D. N.J. 1960).
This case was on remand from, *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct.
983, 2 L.Ed.2d 1077 (1958), and it applied the test adopted in that case.

¹⁴⁶ *E.g.*, *United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785
(1983); RULE 6(E), FEDERAL RULES OF CRIMINAL PROCEDURE.

1 admittedly *noncriminal* proceeding.¹⁴⁷ If the purpose of the grand jury investigation
2 of President Clinton is not to indict even if the evidence commands indictment (or if
3 its purpose is simply to investigate possible impeachable offenses on behalf of the
4 House of Representatives and then turn over this information to the House), then, in
5 either case, the grand jury is being misused.¹⁴⁸
6

7 **WHEN THE GRAND JURY IS USED TO TURN OVER INFORMATION TO ANOTHER**
8 **UNIT OF GOVERNMENT.** It would be wrong, for example, to use the grand jury solely
9 to gather information to be used by another governmental unit. If the grand jury is
10 investigating in good faith to determine if the President has engaged in any criminal
11 conduct, it may turn over, to the House of Representatives, information that it has
12 gathered in its investigation of alleged criminality that also is relevant to the House
13 even if the grand jury ultimately concludes that it is not relevant to a criminal
14 inquiry.
15

16 The important point is that the grand jury must act in good faith and not as
17 the agent of another entity of the government. "It is sufficient if the agencies are
18 engaged in good faith investigations within their respective jurisdictions, and that
19 one agency is not simply serving as a cat's paw for another, under the pretext of
20 conducting its own investigation."¹⁴⁹ Grand Juries cannot be used as a short cut for
21 the House of Representatives to collect information that otherwise would be more
22 difficult to secure.¹⁵⁰ The OIC cannot use the grand jury to investigate alleged
23 criminal activity by the President if an indictment (assuming that the evidence
24 warranted it) is "merely an unexpected bare possibility."¹⁵¹ The OIC (which sits in
25 the shoes of the Attorney General) must have an open mind whether to seek an
26 indictment, but it cannot have an open mind about this issue if it would be illegal or

¹⁴⁷ *E.g.*, the sanction cannot result in imprisonment or fine. The standard of proof is not beyond a reasonable doubt. There is no jury of twelve people drawn from the general public. An impeachment and removal do not prevent a criminal prosecution.

¹⁴⁸ On the other hand, it would be proper to turn over information secured in good faith for purposes of securing an indictment but that is also relevant to impeachment.

¹⁴⁹ 2 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 8.02 at 6 (Callaghan & Co., 1986), citing, *United States v. Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N.J. 1960).

¹⁵⁰ *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683-84, 78 S.Ct. 983, 987, 2 L.Ed.2d (1957).

¹⁵¹ *United States v. Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N.J. 1960).

1 unconstitutional to indict the President.¹⁵²

2
3 In other words, if the statute creating the OIC and authorizing it to investigate
4 the President and turn over relevant information to the House of Representatives
5 does not authorize or permit the OIC to seek an indictment of the President, the
6 statute is authorizing an abuse of the grand jury powers, an unconstitutional
7 perversion of the Fifth Amendment, which created the grand jury. It is clearly
8 improper to use the grand jury, a creature of the criminal process, to collect evidence
9 for noncriminal purposes. It is unconstitutional to use the grand jury solely as a tool
10 of a House impeachment inquiry to investigate in an area where it could not indict
11 even if the evidence warranted an indictment.

12
13 **WHEN THE GRAND JURY IS USED TO INVESTIGATE A CRIMINAL DEFENDANT**
14 **WHO CANNOT BE INDICTED FOR A CRIME BECAUSE HE ALREADY HAS BEEN**
15 **INDICTED.** It is improper for the Government to use the grand jury to investigate a
16 target's role in a matter after the grand jury has indicted the target. If the grand jury
17 has already indicted a target, it is an abuse of the grand jury system to use the grand
18 jury to investigate further on that matter. Because the grand jury cannot indict the
19 target on the matter in question — the target, after all, has already been indicted —
20 it cannot use its investigatory powers to further investigate the target.¹⁵³

21
22 That logic applies here too. If the grand jury cannot indict the target (because
23 he is President) then it cannot use its investigatory powers to further investigate the
24 target.

¹⁵² **Grand Jury Presentments.** In some instances, a Grand Jury can issue a report, a "presentment" without issuing any indictments. But such a Grand Jury is investigating alleged criminal activities and could indict. Even in these circumstances, civil libertarians have raised serious objections to such presentments.

No Grand Jury should be the alter ego of the House Judiciary Committee or any other House entity investigating possible impeachment. The House of Representatives has the "sole" power to impeach [U.S. CONST., ART. I, § 2, cl. 5 (House has "sole Power of Impeachment")] and should not treat the Office of Independent Counsel as its alter ego or tool.

¹⁵³ *E.g., United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964), *cert. denied*, 379 U.S. 845, 85 S.Ct. 50, 13 L.Ed.2d 50 (1964); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26, 29-30 (2d Cir. 1985) (To protect the grand jury from being "abused," where defendant makes a "strong showing that the government's dominant purpose [in issuing a subpoena] was pretrial preparation," for an already pending indictment the court will quash the subpoena. In this case, the Court of Appeals reversed the trial court and quashed the subpoena.) *See also In re National Window Glass Workers*, 287 F. 219 (N.D. Ohio 1922).

1 **WHEN THE GRAND JURY IS USED TO INVESTIGATE A MATTER WHERE IT**
2 **WOULD BE UNCONSTITUTIONAL TO INDICT.** As discussed above, the Speech or
3 Debate Clause gives an absolute constitutional privilege that will protect a Member
4 of Congress from being questioned about his or her vote on a legislative matter.
5 Assume that a grand jury was investigating a matter where it could not
6 constitutionally indict, given the narrow, but absolute protections of the Speech or
7 Debate Clause. It would be unconstitutional for the grand jury to inquire into
8 matters where it could not constitutionally indict.¹⁵⁴ If the grand jury cannot
9 constitutionally indict for particular actions because of the Speech or Debate Clause,
10 then it cannot constitutionally ask questions regarding this matter.¹⁵⁵ Courts should
11 “not hesitate to limit the grand jury’s investigative power in deference to this
12 congressional privilege.”¹⁵⁶
13

14 If the grand jury cannot indict the President (because it would be
15 unconstitutional to do so), then the Independent Counsel certainly cannot use the
16 grand jury to investigate President Clinton. If the President is somehow immune
17 from indictment and above the law, then the grand jury (whether in Arkansas or in
18 Washington, D.C. or elsewhere) would be acting unconstitutionally, as would the
19 federal trial judges who supervise these Grand Juries. If it is unconstitutional to
20 indict the President, it is unconstitutional for the grand jury to investigate him.
21

22 But, we know that it is constitutional for the Independent Counsel to
23 investigate the President to determine if he should be indicted for criminal acts. That
24 was what *Morrison v. Olson*¹⁵⁷ was all about.
25

26 *Morrison* upheld the constitutionality of the Independent Counsel Act. That
27 case decided, implicitly, that it must be constitutional to indict the President if the
28 evidence warrants and demands such an indictment. That conclusion was implied
29 in the holding of *Morrison v. Olson*, and it explains why the Court later issued its
30 strong language in *Clinton v. Jones*, rejecting the notion that the federal judiciary’s
31 exercise of jurisdiction over the President creates a problem of separation of powers.

¹⁵⁴ *Gravel v. United States*, 408 U.S. 606, 628-29, 92 S.Ct. 2614, 2628-29, 33
L.Ed.2d 583 (1972).

¹⁵⁵ *Gravel v. United States*, 408 U.S. 606, 629 n.18, 92 S.Ct. 2614, 2629 n.18, 33
L.Ed.2d 583 (1972).

¹⁵⁶ PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 6.04 at
6-31 (Aspen Publishers, Inc. 1995). See also *id.* at § 4.01[D].

¹⁵⁷ 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

1 *"The fact that a federal court's exercise of its traditional Article III*
 2 *jurisdiction may significantly burden the time and attention of*
 3 *the Chief Executive is not sufficient to establish a violation of the*
 4 *Constitution.*"¹⁵⁸
 5

6 As discussed above, distinguished Constitutional scholar, former Federal
 7 Judge, and former Yale Law Professor Robert Bork concluded, in a famous
 8 Memorandum he filed when he was Solicitor General of the United States, that
 9 Federal prosecutors could investigate and indict a sitting Vice President. It is
 10 noteworthy to recall the first sentence of that Memorandum:
 11

12 "The motion by the Vice President [Spiro T. Agnew] poses
 13 a grave and unresolved constitutional issue: whether the Vice
 14 President of the United States is subject to federal grand jury
 15 investigation and possible indictment and trial while still in
 16 office."¹⁵⁹
 17

18 Solicitor General Bork properly concluded that, if the Vice President could not be
 19 indicted, the grand jury could not subject him to an investigation. Because, he
 20 concluded, the grand jury could constitutionally indict the Vice President, therefore
 21 it could constitutionally investigate the Vice President.
 22

23 CONCLUSION

24
 25 We must keep in mind the following:
 26

- 27 ▶ the decision of the U.S. Supreme Court in *Morrison v. Olson* upholding
- 28 the constitutionality of the Independent Counsel Act and the authority
- 29 it bestows on a grand jury to investigate criminal charges involving the
- 30 President of the United States;
- 31 ▶ the decision of President Clinton to lobby for and sign this legislation
- 32 with full knowledge that a prime focus of that Act would be allegations
- 33 surrounding his own conduct;
- 34 ▶ the decision of Congress not to enact any legislation conferring

¹⁵⁸ — U.S. at —, 117 S.Ct. at 1648-49 (emphasis added).

¹⁵⁹ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 1.*

1 immunity from criminal prosecution but, on the contrary, to enact
2 legislation to create the Office of Independent Counsel to investigate
3 allegations of criminal conduct involving President Clinton;

- 4 ▶ the legislative history of the law creating an Independent Counsel
5 indicating specifically that Congress did not intend to bestow any
6 criminal immunity to any person covered by that Act;
- 7 ▶ President Clinton's full knowledge that the Act's first court-appointed
8 counsel would be specifically charged with investigating President
9 Clinton;
- 10 ▶ the decision of President Clinton's Attorney General to petition the
11 Special Division to appoint such an Independent Counsel;
- 12 ▶ the subsequent decision of President Clinton's Attorney General on
13 several occasions to petition the Special Division to expand the
14 jurisdiction of the Independent Counsel to include other allegations of
15 criminal conduct involving President Clinton.
- 16 ▶ the counts of an indictment against President Clinton would include
17 serious allegations involving witness tampering, document destruction,
18 perjury, subornation of perjury, obstruction of justice, conspiracy, and
19 illegal pay-offs — counts that in no way relate to the President
20 Clinton's official duties, even though some of the alleged violations
21 occurred after he became President.

22
23 These factors all buttress and lead to the same conclusion: it is proper,
24 constitutional, and legal for a federal grand jury to indict a sitting President for
25 serious criminal acts that are not part of, and are contrary to, the President's official
26 duties. In this country, no one, even President Clinton, is above the law.

27
28 This conclusion does not imply that a President must be required to serve an
29 actual prison term before he leaves office. The defendant President could remain free
30 pending his trial,¹⁶⁰ and the trial court could defer any prison sentence until he leaves
31 office.¹⁶¹ The defendant-President may petition the courts to exercise its discretion
32 in appropriate cases. It is one thing for the President to petition the court to exercise
33 its discretion; it is quite another for the President to announce that he is above the
34 law and immune from criminal prosecution.

¹⁶⁰ There is, after all, no risk of flight to avoid prosecution.

¹⁶¹ See Ronald D. Rotunda, *When Duty Calls, Courts Can Be Flexible*, WASHINGTON
POST, January 29, 1997, at p. A21, col. 2-3.

1 Before or after indictment, Congress could exercise its independent judgment
 2 as to whether to begin impeachment proceedings or await the conclusion of the
 3 criminal proceedings.¹⁶² Or, if Congress did not wish to postpone the impeachment
 4 proceedings, Congress if it wished (and if the President agreed), could ask the
 5 Independent Counsel to delay the criminal trial. The President could also petition
 6 the court to stay or postpone the criminal trial until the impeachment proceedings
 7 were concluded.

8
 9 Neither the criminal proceeding nor the impeachment proceeding will control
 10 the other. As Solicitor General Bork pointed out a quarter of a century ago:

11 "Because the two processes have different objects, the
 12 considerations relevant to one may not be relevant to the other."
 13

14
 15 For that reason, neither conviction nor acquittal in one trial, though it may be
 16 persuasive, need automatically determine the result in the other trial."¹⁶³

17
 18 And, the House or Senate may conclude that "a particular offense, though
 19 properly punishable in the courts, did not warrant" either impeachment or removal
 20 from office.¹⁶⁴

21
 22
 23 Sincerely,

24
 25
 26
 27
 28 Ronald D. Rotunda
 29 ALBERT E. JENNER, JR. PROFESSOR OF LAW

¹⁶² Of course, if Congress decides to institute impeachment proceedings, it will decide whether a penalty is to be imposed, and, if so, what penalty is appropriate (e.g., removal from office, or a lesser penalty, such as a public censure).

¹⁶³ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 9 (Robert Bork, Solicitor General).

¹⁶⁴ *In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States*, Case Number Civil 73-965, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, Oct. 5, 1973, at p. 9 (Robert Bork, Solicitor General).