

PRELIMINARY MEMORANDUM OF THE PRESIDENT OF
THE UNITED STATES CONCERNING REFERRAL OF
THE OFFICE OF THE INDEPENDENT COUNSEL AND
INITIAL RESPONSE OF THE PRESIDENT OF THE
UNITED STATES TO REFERRAL OF THE OFFICE OF
THE INDEPENDENT COUNSEL

COMMUNICATION

FROM

THE COMMITTEE ON THE JUDICIARY

TRANSMITTING

THE PRELIMINARY MEMORANDUM OF THE PRESIDENT OF THE
UNITED STATES CONCERNING THE REFERRAL OF THE OFFICE
OF THE INDEPENDENT COUNSEL AND THE INITIAL RESPONSE
OF THE PRESIDENT OF THE UNITED STATES TO THE REFERRAL
OF THE OFFICE OF THE INDEPENDENT COUNSEL

E:\Seals\Congress.#13

SEPTEMBER 28, 1998.—Ordered released by the Committee on the
Judiciary, and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

PRELIMINARY MEMORANDUM
CONCERNING REFERRAL OF
OFFICE OF INDEPENDENT COUNSEL

David E. Kendall
Nicole K. Seligman
Emmet T. Flood
Max Stier
Glen Donath
Alicia L. Marti
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, DC 20005

Charles F.C. Ruff
Cheryl Mills
Lanny A. Breuer
OFFICE OF THE WHITE
HOUSE COUNSEL
The White House
Washington, DC 20005

September 11, 1998

EXECUTIVE SUMMARY

SUMMARY OF KEY POINTS OF THE PRESIDENT'S CASE IN ANTICIPATION OF THE STARR REPORT

1. The President has acknowledged a serious mistake—an inappropriate relationship with Monica Lewinsky. He has taken responsibility for his actions, and he has apologized to the country, to his friends, leaders of his party, the cabinet and most importantly, his family.

2. This private mistake does not amount to an impeachable action. A relationship outside one's marriage is wrong—and the President admits that. It is not a high crime or misdemeanor. The Constitution specifically states that Congress shall impeach *only* for “treason, bribery or other high crimes and misdemeanors.” These words in the Constitution were chosen with great care, and after extensive deliberations.

3. “High crimes and misdemeanors” had a fixed meaning to the Framers of our Constitution—it meant wrongs committed against our system of government. The impeachment clause was designed to protect our country against a President who was using his official powers against the nation, against the American people, against our society. It was never designed to allow a political body to force a President from office for a very personal mistake.

4. Remember—this report is based entirely on allegations obtained by a grand jury—reams and reams of allegations and purported “evidence” that would never be admitted in court, that has never been seen by the President or his lawyers, and that was not subject to cross-examination or any other traditional safeguards to ensure its credibility.

5. Grand juries are not designed to search for truth. They do not and are not intended to ensure credibility, reliability, or simple fairness. They only exist to accuse. Yet this is the process that the Independent Counsel has chosen to provide the “evidence” to write his report.

6. The law defines perjury very clearly. Perjury requires proof that an individual knowingly made a false statement while under oath. Answers to questions that are literally true are *not* perjury. Even if an answer doesn't directly answer the question asked, it is not perjury if it is true—no accused has an obligation to help his accuser. Answers to fundamentally ambiguous questions also can never be perjury. And nobody can be convicted of perjury based on only one other person's testimony.

7. The President did not commit perjury. Most of the illegal leaks suggesting his testimony was perjurious falsely describe his testimony. First of all, the President never testified in the Jones deposition that he was not alone with Ms. Lewinsky. The President never testified that his relationship with Ms. Lewinsky was the same as

with any other intern. To the contrary, he admitted exchanging gifts with her, knowing about her job search, receiving cards and notes from her, and knowing other details of her personal life that made it plain he had a special relationship with her.

8. The President has admitted he had an improper sexual relationship with Ms. Lewinsky. In a civil deposition, he gave narrow answers to ambiguous questions. As a matter of law, those answers could not give rise to a criminal charge of perjury. In the face of the President's admission of his relationship, the disclosure of lurid and salacious allegations can only be intended to humiliate the President and force him from office.

9. There was no obstruction of justice. We believe *Betty Currie testified* that Ms. Lewinsky asked her to hold the gifts and that the President never talked to her about the gifts. The President admitted giving and receiving gifts from Ms. Lewinsky when he was asked about it. The President never asked Ms. Lewinsky to get rid of the gifts and he never asked Ms. Currie to get them. We believe that Ms. Currie's testimony supports the President's.

10. The President never tried to get Ms. Lewinsky a job after she left the White House in order to influence her testimony in the Paula Jones case. The President knew Ms. Lewinsky was unhappy in her Pentagon job after she left the White House and did ask the White House personnel office to treat her fairly in her job search. He never instructed anyone to hire her, or even indicated that he very much wanted it to happen. Ms. Lewinsky was never offered a job at the White House after she left—and it's pretty apparent that if the President had ordered it, she would have been.

11. The President did not facilitate Ms. Lewinsky's interview with Bill Richardson, or her discussions with Vernon Jordan. Betty Currie asked John Podesta if he could help her with her New York job search which led to an interview with Bill Richardson, and Ms. Currie also put her in touch with her longtime friend, Mr. Jordan. Mr. Jordan has made it clear that this is the case, and, as a private individual, he is free to offer job advice wherever he sees fit.

12. There was no witness tampering. Betty Currie was not supposed to be a witness in the Paula Jones case. If she was not called or going to be called, it was impossible for any conversations the President had with her to be witness tampering. The President testified that he did not in any way attempt to influence her recollection.

13. There is no "talking points" smoking gun. Numerous illegal leaks painted the mysterious talking points as the proof that the President or his staff attempted to suborn the perjury of Monica Lewinsky or Linda Tripp. The OIC's spokesman said that the "talking points" were the "key" to Starr even being granted authority to investigate the President's private life. Yet in the end, Ms. Lewinsky has apparently admitted the talking points were written by her alone [or with Ms. Tripp's assistance], and the President was not asked one single question about them in his grand jury appearance.

14. Invocation of privileges was not an abuse of power. The President's lawful assertion of privileges in a court of law was only made on the advice of his Counsel, and was in significant measure *validated* by the courts. The legal claims were advanced sparingly

and as a last resort after all attempts at compromise by the White House Counsel's office were rejected to protect the core constitutional and institutional interests of this and future presidencies.

15. Neither the President nor the White House played a role in the Secret Service's lawful efforts to prevent agents from testifying to preserve its protective function. The President never asked, directed or participated in any decision regarding the protective function privilege. Neither did any White House official. The Treasury and Justice Departments independently decided to respond to the historically unprecedented subpoenas of Secret Service personnel and to pursue the privilege to ensure the protection of this and future presidents.

16. The President did not abuse his power by permitting White House staff to comment on the investigation. The President has acknowledged misleading his family, staff and the country about the nature of his relationship with Ms. Lewinsky, and he has apologized and asked for forgiveness. However, this personal failing does not constitute a criminal abuse of power. If allowing aides to repeat misleading statements is a crime, then any number of public officials are guilty of misusing their office for as long as they fail to admit wrong doing in response to any allegation about their activities.

17. The actions of White House attorneys were completely lawful. The White House Counsel attorneys provided the President and White House officials with informed, candid advice on issues raised during this investigation that affected the President's official duties. This was especially necessary given the fact that impeachment proceedings against the President were a possible result of the OIC's investigation from Day One. In fact, throughout the investigation, the OIC *relied on* the White House Counsel's office for assistance in gathering information and arranging interviews and grand jury appearances. The Counsel's office's actions were well known to the OIC throughout the investigation and no objection was ever voiced.

This means that the OIC report is left with nothing but the details of a private sexual relationship, told in graphic details with the intent to embarrass. Given the flimsy and unsubstantiated basis for the accusations, there is a complete lack of any credible evidence to initiate an impeachment inquiry concerning the President. And the principal purpose of this investigation, and the OIC's report, is to embarrass the President and titillate the public by producing a document that is little more than an unreliable, one-sided account of sexual behavior.

Where's Whitewater? The OIC's allegations reportedly include *no* suggestion of wrongdoing by the President in any of the areas which Mr. Starr spent four years investigating: Whitewater, the FBI files and the White House travel office. What began as an inquiry into a 24 year old land deal in Arkansas has ended as an inquest into brief, improper personal encounters between the President and Monica Lewinsky. Despite the exhaustive nature of the OIC's investigation into the Whitewater, FBI files and travel office matters, and a constant stream of suggestions of misconduct in the media over a period of years, to this day the OIC has never exonerated the President or the First Lady of wrongdoing.

PRELIMINARY MEMORANDUM CONCERNING REFERRAL OF
OFFICE OF INDEPENDENT COUNSEL

This document is intended to be a preliminary response to the Referral submitted by the Office of Independent Counsel to The Congress. Because we were denied the opportunity to review the content, nature or specifics of the allegations made against the President by the Office of Independent Counsel (OIC), we do not pretend to offer a point-by-point refutation of those allegations, or a comprehensive defense of the President.

We commend the House of Representatives for the extraordinary steps it has taken to safeguard the secrecy of the OIC's allegations. Unfortunately, its efforts were thwarted by unnamed sources familiar with the details of the OIC's allegations—sources that could only come from the OIC itself—who saw fit to leak elements of the allegations to the news media.

Based on these illegal leaks, as well as our knowledge of the President's testimony, we offer this document as a summary outline of his side of the case. We will provide you with a specific rebuttal as soon as we have had a chance to review the materials that the OIC has already transmitted to you.

The simple reality of this situation is that the House is being confronted with evidence of a man's efforts to keep an inappropriate relationship private. A personal failure that the President has acknowledged was wrong, for which he apologized, and for which he accepts complete responsibility. A personal failure for which the President has sought forgiveness from members of his family, members of the Cabinet, Members of Congress, and the American people. Such a personal failing does not, however, constitute "treason, bribery and high crimes and misdemeanors" that would justify the impeachment of the President of the United States.

The President himself has described his conduct as wrong. But no amount of gratuitous details about the President's relationship with Ms. Lewinsky, no matter how salacious, can alter the fact that:

- (1) The President did not commit perjury;
- (2) The President did not obstruct justice;
- (3) The President did not tamper with witnesses; and
- (4) The President did not abuse the power of his office.

Impeachment is a matter of incomparable gravity. Even to discuss it is to discuss overturning the electoral will of the people. For this reason, the Framers made clear, and scholars have long agreed, that the power should be exercised only in the event of such grave harms to the state as "serious assaults on the integrity of the processes of government," or "such crimes as would so stain a president as to make his continuance in office dangerous to public order." Charles L. Black, *Impeachment: A Handbook* 38-39 (1974). We do not believe the OIC can identify any conduct re-

motely approaching this standard. Instead, from press reports, if true, it appears that the OIC has dangerously overreached to describe in the most dramatic of terms conduct that not only is not criminal but is actually proper and lawful.

The President has confessed to indiscretions with Ms. Lewinsky and accepted responsibility and blame. The allegations concerning obstruction, intimidation, perjury and subornation of perjury that we anticipate from the OIC are extravagant attempts to transform a case involving inappropriate personal behavior into one of public misconduct justifying reversal of the judgment of the electorate of this country.

I. STANDARDS FOR IMPEACHMENT

The Constitution provides that the President shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. Art. II, § 4. Of course, there is no suggestion of treason or bribery present here. Therefore, the question confronting the House of Representatives is whether the President has committed a "high Crime[] or Misdemeanor." The House has an obligation to consider the evidence in view of that very high Constitutional threshold. It should pursue the impeachment process only if there is evidence implicating that high standard.

The House must approach the question with solemnity and with care, for history teaches that an "impeachable offense" is no ordinary kind of wrongdoing. The Framers included specific provisions for impeachment in the Constitution itself because they understood that the most severe political remedy was necessary to remedy the most serious forms of public wrongdoing. Impeachment is a basic constitutional safeguard, designed both to correct harms to the system of government itself and to protect the people from ongoing malfeasance. Nothing less than the gravest executive wrongdoing can justify impeachment. The Constitution leaves lesser wrongs to the political process and to public opinion.

Presidential impeachment is thus a matter of incomparable gravity. As Professor Charles Black stated,

[t]he presidency is a prime symbol of our national unity. The election of the president (with his alternate, the vice-president) is the only political act that we perform together as a nation; voting in the presidential election is certainly the political choice most significant to the American people, and the most closely attended to by them. No matter, then, can be of higher political importance than our considering whether, in any given instance, this act of choice is to be undone, and the chosen president dismissed from office in disgrace. Everyone must shrink from this most drastic of measures.

Impeachment: A Handbook 1 (1974). Presidential impeachment is thus an "awful step." *Ibid.* The Framers knew this. For that reason they framed the constitutional procedure with precision and specified grounds for impeachment with great care.

The Framers deliberately chose to make "high Crimes and Misdemeanors" the standard of an impeachable offense. They were fa-

miliar with English common law and parliamentary history and they borrowed the expression directly from the English law of impeachment. They did so knowing that the expression was a term of art and they made the choice after deliberate rejection of alternative formulations of the impeachment standard.

The Framers intended the standard to be a high one. They rejected a proposal that the President be impeachable for “maladministration,” for, as James Madison pointed out, such a standard would “be equivalent to a tenure during the pleasure of the Senate.”¹ The Framers plainly did not intend to permit Congress to debilitate the executive by authorizing impeachment for something short of the most serious harm to the state. In George Mason’s apt phrase, impeachment was thought necessary to remedy “[a]ttempts to subvert the Constitution.”

In English practice, the term “high crimes and misdemeanors” had been applied to various offenses, the common elements of which were their severity and the fact that the wrongdoing was directed against the state.² The English cases included misappropriation of public funds, interfering in elections, accepting bribes, neglect of duty, and various forms of corruption. *Ibid.* These offenses all affected the discharge of public duties by public officials. In short, under the English practice, “the critical element of injury in an impeachable offense was *injury to the state.*”³

That is why, at the time of the ratification debates, Alexander Hamilton described impeachment as a “method of NATIONAL INQUEST into the conduct of public men.” The Federalist No. 65 at 331 (Gary Wills ed. 1982). This “inquest” is perhaps the gravest process known to our Constitution. No act touches more fundamental questions of constitutional government than does the process of Presidential impeachment. No act more directly affects the public interest. No act presents the potential for greater injustice—injustice both to the Chief Executive and to the people who elected him.

For these reasons, the impeachment process must be painstaking and deliberate. It must focus only on such harms as the Framers intended to be redressed by the incomparably severe act of impeachment. And most importantly, it must be understood for what it is—a process of inquiry. That process is itself the exercise of a public trust “of delicacy and magnitude.”⁴ Accordingly, if the process is begun it is only just that the members engaged in this solemn task withhold judgment until the process is complete and all the facts are known. Our Constitution’s most basic values and the requirements of simple justice together demand no less.

The President is sole head of one branch of our government—indeed, in a certain sense the President *is* the Executive Branch. The Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1. The President is the only government official to have been popularly elected by all the American people. When the people elect a President, the popular will is expressed in its most important, most

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

²See Raoul Berger, *Impeachment: The Constitutional Problems*, 67–73 (1973).

³Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 82 (1989) (emphasis added).

⁴Joseph Story, *Commentaries on the Constitution* § 745 (1st Ed. 1833); Federalist 65 at 331.

visible and most unmistakable form.⁵ The impeachment process, by definition, threatens to undo the popular will. Impeachment presents the prospect of reversing the electoral mandate that brought the executive to office. Conviction upon articles of impeachment actually does so.

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

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

Federalist 65 at 330–31.

The Framers and early commentators on the Constitution are in accord on the question of impeachment's intended consequence. In Justice James Wilson's words, impeachments are "proceedings of a political nature . . . confined to political characters" charging only "political crimes and misdemeanors" and culminating only in "political punishments." J. Wilson, *Works* 426 (R. McCloskey, ed. 1967) And as Justice Story put the matter, "the [impeachment] power partakes of a political character, as it respects injuries to the society in its political character." Joseph Story, *Commentaries on the Constitution* §744 (1st Ed. 1833).⁶ That understanding of the Framers and early commentators reflected the historical understanding of impeachable offenses in England. "'High crimes and misdemeanors' were a category of *political* crimes against the state." Berger, *Impeachment*, at 61 (emphasis in original). Therefore, the Framers "intended that a president be removable from office for the commission of *great offenses against the Constitution*."⁷

Impeachment therefore addresses public wrongdoing, whether denominated a "political crime[] against the state,"⁸ or "an act of malfeasance or abuse of office,"⁹ or a "great offense[s] against the federal government."¹⁰ In short, impeachment is a necessary Constitutional check by a coordinate branch of government upon serious and aggravated abuses of executive power that, given the President's four-year term, might otherwise go unchecked.

Holders of public office are therefore not to be impeached for private conduct, however wrongful. To the contrary, only "serious assaults on the integrity of the processes of government,"¹¹ and "such crimes as would so stain a president as to make his continuance

⁵ Of course that election takes place through the mediating activity of the Electoral College. See U.S.Const. art. II, §1, cl.2–3 and amend. XII.

⁶ At the time of the Constitution's framing, "[c]ognizable 'high Crimes and Misdemeanors' in England, . . . generally concerned perceived malfeasance—which may or may not be proscribed by common law or statute—that *damaged the state or citizenry in their political rights*." Julie O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L.J. 2193, 2210 (1998) (emphasis added) (forthcoming).

⁷ John R. Labovitz, *Presidential Impeachment* 94 (1978).

⁸ Berger, *Impeachment* at 61.

⁹ Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 724 (1987/1988).

¹⁰ Gerhardt, 68 Tex. L. Rev. at 85.

¹¹ Charles L. Black, *Impeachment: A Handbook* 38–39 (1974).

in office dangerous to public order”¹² should constitute impeachable offenses. Conduct which is not an “offense[] against the government,”¹³ or “malfeasance or abuse of office,”¹⁴ and which bears no “functional relationship”¹⁵ to public office, does not constitute grounds for impeachment. Allegations concerning private conduct—private sexual conduct in particular—simply do not implicate high crimes or misdemeanors.

Private misconduct, or even public misconduct short of an offense against the state, is not redressable by impeachment because that solemn process, in Justice Story’s words, addresses “offences[] which are committed by public men *in violation of their public trust and duties.*” Story, *Commentaries* § 744 (emphasis added). Impeachment is a political act in the sense that its aims are public; it attempts to rein in abuses of the public trust committed by public officeholders in connection with conduct in public office. As one scholar has put it, “[t]he nature of [impeachment] proceedings is dictated by the harms sought to be redressed—the misconduct of public men’ relating to the conduct of their public office—and the ultimate issue to be resolved—whether they have forfeited through that conduct their right to continued public trust.”¹⁶

Impeachment’s public character is further evidenced by the fact that, as Justice Story expressed it, the process is conducted “by the representatives of the nation, in their public capacity,” and “in the face of the nation.” Story, *Commentaries* § 686. Constitutionally, impeachment’s public function demands public accountability. Elected officials are no more qualified than ordinary voters to assess the private wrongs of public officeholders. The Constitution’s impeachment mechanism does not exist to punish such wrongs.

The public character of impeachable wrongs is also reflected in the fact that the remedy imposed for commission of impeachable acts is a wholly public one. Impeachment results in removal from office and possible disqualification from further office. U.S. Const. art. I, § 3, cl. 7.

To say that impeachment is fundamentally a “political” process, however, is not to say that it is “partisan” in nature. Indeed, the Framers warned against the spirit of partisanship in impeachment proceedings. In Federalist 65, Hamilton wrote that the impeachment process threatened to “agitate the passions of the whole community . . . to divide it into parties . . . [to] connect itself with pre-existing factions [and] to enlist their animosities, partialities, influence and interest.” *Id.* at 331. Justice Story warned of the danger that “the decision [to impeach] will be regulated more by the comparative strength of the parties, than by the strength of the proofs.” *Commentaries* § 744. Only substantial evidence of presidential wrongdoing that threatened the processes of government or the public order can justify this grave and ideally bipartisan process.

What is ultimately intended by impeachment’s truly “political” nature is the manner of limitation the Constitution allows one

¹² *Id.*

¹³ Labovitz at 26.

¹⁴ Rotunda at 726.

¹⁵ *Id.*

¹⁶ Julie O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L.J. at 2220.

elected (political) branch to place on the other elected (political) branch, the Presidency. Impeachment is necessarily a *public* act conducted by public bodies (the Houses of Congress exercising their constitutionally allotted portion of impeachment power) against a public officeholder (here, the President). Exercise of that limiting function is justified only when the people's representatives conclude that the people themselves must be protected from their own elected executive.

Impeachment must therefore be approached with the utmost solemnity. The process must focus on public acts, performed in the President's public capacity, and affecting the public interest. Cognizant of the enormous harm that must follow the bare suggestion of formal impeachment processes, the House should pursue an impeachment inquiry if and only if there is credible evidence of actions constituting fundamental injuries to the governmental process. Indeed, the Committee should consider and approve articles of impeachment *only* for such acts as have, in its judgment, so seriously threatened the integrity of governmental processes as to have made the President's continuation in office a threat to the public order.

Impropriety falling short of that high standard does not meet the constitutional measure. It must be left to the court of public opinion and the judgment of history.

II. THE RELEVANT FACTUAL BACKGROUND

The Monica Lewinsky investigation is the most recent phase of an amorphous, languorous, expensive, and seemingly interminable investigation into the affairs of a small Arkansas real estate firm, Whitewater Development Company, Inc. In January, 1994, Attorney General Reno made an administrative appointment (the Ethics in Government Act of 1978 having expired) of Robert B. Fiske, Jr., to investigate the relationship of the President and Mrs. Clinton to Whitewater, Madison Guaranty Savings & Loan Association, and Capital Management Services. After the reenactment of the Ethics in Government Act, the Special Division for the Purpose of Appointing Independent Counsels of the Court of Appeals appointed Kenneth W. Starr, a former high official in two Republican administrations, to replace Mr. Fiske on August 5, 1994, and gave him a generally similar grant of investigatory jurisdiction.

During the past four and a half years, the President has cooperated extensively with this investigation. He has given testimony by deposition at the White House to the Independent Counsel on four separate occasions, and on two other occasions, he gave videotaped deposition testimony for Whitewater defendants and was cross-examined by the Independent Counsel. He has submitted written interrogatory answers, produced more than 90,000 pages of documents and other items, and provided information informally in a variety of ways. The OIC subpoenaed from the President, and reviewed, virtually *every* personal financial record and gubernatorial campaign finance record that exists for the period from the mid-1980s to the present, in its endless search to find something to use against the President. This comprehensive and thorough financial review yielded the OIC nothing.

In May 1994, President Clinton was sued civilly by Ms. Paula Jones, who made various claims arising out of an encounter on May 8, 1991, when the President was Governor of Arkansas. Various constitutional questions were litigated, and it was not until the Supreme Court's decision on May 27, 1997¹⁷ that the case proceeded to discovery. The Independent Counsel had no jurisdiction with respect to the *Jones* case, but there were occasional press reports that the OIC was in fact investigating the President's personal life.¹⁸

III. THE PRESIDENT'S TESTIMONY ABOUT MS. LEWINSKY

In his grand jury testimony on August 17, 1998, the President acknowledged having had an improperly intimate relationship with Ms. Lewinsky. This is enormously difficult for any person to do even in private, much less in public.

It is important to recognize that the improper relationship with Ms. Lewinsky *ended* in early 1997, at the President's behest. It therefore had been over for almost a year at the time of the President's deposition in the *Jones* case. From feelings both of friendship and responsibility, the President remained in touch with Ms. Lewinsky after the improper relationship ended and tried to help her: none of this help was improper or conditioned on her behaving (or testifying) in any particular way.

It is not true that the President had an improper 18-month relationship with Ms. Lewinsky, as several media reports have alleged. In his grand jury deposition, he testified that on certain occasions in early 1996 and once in early 1997, he engaged in improper conduct with Ms. Lewinsky. These encounters did not consist of sexual intercourse, and they did not consist of "sexual relations" as he understood that term to be defined at his *Jones* deposition on January 17, 1998 (explained *infra*), but they did involve inappropriate intimate contact. These inappropriate encounters ended, at the President's insistence, in early 1997, not because of the imminence of discovery, not because of the *Jones* case (which the Supreme Court had not yet decided), but because he knew they were *wrong*. On August 17, 1998, the President expressed regret to the grand jury and, later, to the country, that what began as a friendship came to include this conduct, and he took full responsibility. He has frequently, to different audiences, made similar expressions of regret and apology.

In this investigation, no stone has been left unturned—or (we believe) unthrown. In simple fairness, therefore, it is important to distinguish between what the President has acknowledged and what the OIC merely alleges (on the basis of evidence we have not yet seen).

IV. THE NATURE OF THE OIC'S EVIDENCE

Use of a federal grand jury to compile evidence for possible impeachment proceedings in Congress raises numerous troubling questions regarding the credibility of that evidence. Indeed, given

¹⁷ *Clinton v. Jones*, _____ U.S. _____, 117 S.Ct. 1636 (1997).

¹⁸ See, e.g., "Starr Probes Clinton Personal Life—Whitewater Prosecutors Question Troopers About Women," *The Washington Post* (June 25, 1997), at A1.

the limited role of a grand jury in our system and the total absence of procedural protections in the process, the Independent Counsel's insistence that his investigation has been a search for "truth" is deeply misleading. In fact, it has been a one-sided effort to present the worst possible version of a limited set of facts.

Section 595(c) requires the OIC to provide the House with "substantial and credible information . . . that may constitute grounds for impeachment." But a grand jury is a totally unsuitable vehicle for generating information that can, without more, be taken as credible beyond challenge. The grand jury's historic role is not to determine the truth but rather to act as an accusatory body. *United States v. Williams*, 504 U.S. 36, 51 (1992). The process excludes contrary views of the information gathered and fails to identify the kinds of exculpatory information that might have been elicited or presented had a targeted individual, and not just the OIC, had an opportunity to cross-examine and the ability to compel responses.

Because it is inherently so one-sided and untested by cross-examination, it normally is not permissible to use grand jury testimony as a basis for anything other than permitting a grand jury to indict or decline to indict. It may constitute nothing more than hearsay, *Costello v. United States*, 350 U.S. 359, 364 (1956), or even multiple hearsay—evidence which would likely be excluded from a trial. Indeed, the information a grand jury gathers is not circumscribed by the Federal Rules of Evidence at all, *see* Fed. R. Evid. 1101(d)(2), nor delimited by the other safeguards of reliability which would be enforced at trial. The testimony a grand jury elicits is not subject to impeachment by interested parties, and such testimony may come from immunized witnesses, from witnesses who fear prosecution, from witnesses prepared by the prosecution, from witnesses with a history of untruthfulness—or from disinterested witnesses. On the record of the grand jury there need be no distinction among these sources, despite the fact that their reliability varies greatly.

In its day-to-day operations, no judge presides over grand jury proceedings. *United States v. Williams*, 504 U.S. 36, 48 (1992). Grand jury witnesses do not have counsel present. Fed. R. Crim P. 6(d). The Double Jeopardy Clause does not prevent a grand jury from returning an indictment after a first grand jury has declined to do so. *Ex Parte United States*, 287 U.S. 241, 250–51 (1932). The exclusionary rule does not apply to grand jury proceedings. *United States v. Calandra*, 414 U.S. 338, 349 (1974). Grand jury witnesses have no right to respond with information, however related, if it is not called for by the prosecution, and targets and subjects of its inquiry have no compulsory process to gather and present their side of the matter. Nor does the target of a grand jury inquiry have any right to offset potentially incriminating information with exculpatory information in his possession. *Williams*, 504 U.S. at 55. In short, the most basic techniques our adversary system of justice employs for testing and assuring the reliability of evidence are completely missing in the grand jury context.

As a consequence, "reliability" simply is not the touchstone of a grand-jury inquiry. The Supreme Court itself has said that "the mere fact that evidence is unreliable is not sufficient to require a dismissal of [an] indictment." *Bank of Nova Scotia v. United States*,

487 U.S. 250, 261 (1988). The same is true of “inadequate or incompetent” evidence. Its presence will not justify dismissal of an indictment. *Calandra*, 414 U.S. at 345; *see also Holt v. United States*, 218 U.S. 245 (1910) (same).

It must therefore be recognized that it is not the grand jury’s function to provide information about anything that can be taken as true on its face. Its function is not to get at the ultimate truth. The grand jury’s inquisitorial powers serve but one end: to empower a body of citizens to make a threshold decision whether to initiate the search for truth that is the purpose of adversarial proceedings or to decline to indict and thereby forego that search altogether. Only after the grand jury renders that threshold decision does the search for truth really commence because only then are the adversary system’s credibility-assessing mechanisms available.

The grand jury secrecy rule, Rule 6(e), Fed. R. Crim. P., is justified—indeed, mandated—by this reality. Grand jury information is to be kept secret largely because it has been generated without the protections of the adversarial system. Unlike information presented in a trial setting, grand jury information presents an enormous risk that persons’ reputations will be injured or destroyed on the basis of non-credible or insubstantial assertions. That harm may damage both witnesses and persons who are subjects of witness testimony. That is why, when a grand jury elects to indict, grand jury materials are sealed and withheld from the petit jury ultimately convened to find the truth and render a verdict.

Accordingly a fair report from the OIC would, *inter alia*, provide all exculpatory evidence, assess the credibility of witnesses in terms of bias, reason to falsify, prior inconsistent statements, etc., and draw reasonable inferences. A fair report would identify shortcomings in the investigation itself, including any excesses, mistakes, errors in judgment, or impermissible tactics. A fair report would demonstrate that every possible effort had been made to identify all possibly exculpatory evidence, and that all such evidence had been given appropriate weight. And a fair report would address honestly and answer truthfully the following questions:

(1) What were Linda Tripp’s motives in seeking out the OIC in January, 1998? Did she articulate a fear of being prosecuted in Maryland under that State’s anti-taping laws? Why did she request immunity from prosecution? Why was she given immunity?

(2) What role did the OIC play in arranging for Ms. Tripp to meet with the *Jones* lawyers on Friday, January 16, 1998, the evening before the President’s deposition? Did anyone from the OIC drive Ms. Tripp to this meeting? Did the OIC warn Ms. Tripp about the criminal law pertaining to sharing with third parties the fruits of illegal tapings or even communicating the fact that illegal tapes exist? Has anyone at the OIC made any assessment of what impact Ms. Tripp’s conduct might have on any federal immunity deal Ms. Tripp might have obtained from the OIC?

(3) What authority did the OIC have to wire Linda Tripp and attempt to develop evidence *before* obtaining permission to expand its jurisdiction from the Attorney General or the Special Division? What prevented the OIC from going directly to the Attorney General upon receiving the tapes from Ms. Tripp? If the primary basis for the expansion of the OIC’s jurisdiction was evidence that was

obtained in an *ultra vires* manner by the OIC, does that taint other information obtained by the OIC?

(4) What assessment has the OIC made of Ms. Tripp's ideological motivations? Was the OIC aware she had submitted an anti-Clinton book proposal to avowed Clinton hater Lucianne Goldberg? Was the OIC aware of Goldberg's role in Ms. Tripp's taping and arrangement for Ms. Lewinsky's use of a messenger service?

(5) How many statements on the Tripp-Lewinsky tapes are false or exaggerated? How many statements contradict assertions in the OIC's report?

(6) When Ms. Tripp was asked to record Ms. Lewinsky surreptitiously, was this because the OIC was concerned about the legality of Ms. Tripp's previous telephone tapes of Ms. Lewinsky?

(7) What was Ms. Tripp's motivation in initiating the surreptitious recording of her conversations with Ms. Lewinsky? Did Tripp steer the taped conversations with Ms. Lewinsky to obtain details about Ms. Lewinsky's sexual activities? Was the taping connected in any way to her relationship with Lucianne Goldberg? If Ms. Tripp began to tape Ms. Lewinsky with an unlawful purpose, did she commit a violation of the federal wiretapping statute (Title III)? If the tapes were obtained in violation of federal law, can the tapes or evidence derived from them be part of any official proceeding in Congress (*see* 18 U.S.C. § 2515)?

(8) What, if anything, did the OIC offer the press to keep secret its investigation into Ms. Lewinsky?

(9) Why was the OIC in such haste to petition the Attorney General for an expansion of jurisdiction? Precisely what was the Attorney General told about Ms. Tripp's telephone taping of Ms. Lewinsky? Did the "talking points" play any role in the application? What particular alleged crimes did the OIC seek authorization to investigate?

(10) Ms. Lewinsky's lawyers, William Ginsburg and Nathaniel Speights, wrote in an essay in *Time* (Feb. 16, 1998) that the OIC informed them on Friday, January 16, 1998, "We've got a deal, and we want to wire her and record some phone calls;" these lawyers also wrote in that essay that "[The OIC] wanted her [Ms. Lewinsky] wired, and they wanted her to record telephone calls with the President of the U.S., Vernon Jordan and others—at their will." What persons did the OIC intend Ms. Lewinsky to record surreptitiously?

(11) In a letter from the Independent Counsel to the President's personal counsel, dated February 6, 1998, the Independent Counsel wrote: "From the beginning, I have made the prohibition of leaks a principal priority of the Office. It is a firing offense, as well as one that leads to criminal prosecution." However, Chief Judge Johnson has entered a series of orders finding *prima facie* reason to believe that persons in the OIC violated Rule 6(e), Fed. R. Crim. P., by illegal leaking (for example, "[t]he Court finds that the serious and repetitive nature of disclosures to the media of Rule 6(e) material strongly militates in favor of conducting a show cause hearing" (June 19, 1998, Order, at 5)). Has anyone been fired or disciplined by the OIC for illegal leaking? What steps have been taken to investigate and discipline OIC personnel who have engaged in illegal leaking?

V. LIKELY OIC ALLEGATIONS OF OBSTRUCTION OF JUSTICE,
SUBORNATION OF PERJURY, AND INTIMIDATION OF WITNESSES

The OIC obtained jurisdiction on January 16, 1998 to investigate possible obstruction of justice, subornation of perjury, and intimidation of witnesses in the *Jones* case. These crimes are quite specifically defined in the law, and the elements do not always have an obvious meaning. We consider first the definition and then the possible conduct to which these definitions might be applied.

The term “obstruction of justice” usually refers to violations of 18 U.S.C. §1503, the “Omnibus Obstruction Provision,” which prohibits the intimidation and retaliation against grand and petit jurors and judicial officers and contains a catch-all clause making it unlawful to “influence, obstruct, or impede the due administration of justice.” It may also refer to 18 U.S.C. §1512, which proscribes intimidating, threatening, or corruptly persuading, through deceptive conduct, a person in connection with an official proceeding.

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

It is critical to note which actions cannot fall under the ambit of §1503. First, false statements or testimony alone *cannot* sustain a conviction under §1503. *See United States v. Thomas*, 916, F.2d 647, 652 (11th Cir. 1990); *United States v. Rankin*, 870 F.2d 109, 111 (3d Cir. 1989). For instance, in *United States v. Wood*, 6 F.3d 692, 697 (10th Cir. 1993), the United States Court of Appeals for the Tenth Circuit found that a defendant’s false statements to the Federal Bureau of Investigation during a grand jury investigation did not violate §1503, because they did not have the natural and probable effect of impeding the due administration of justice. Moreover, §1503 does *not* apply to a party’s concealing or withholding discoverable documents in *civil* litigation. *See, e.g., Richmark v. Timber Falling Consultants*, 730 F. Supp. 1525, 1532 (D. Or. 1990) (because of the remedies afforded by the Federal Rules of Civil Procedure, §1503 does not cover party discovery in civil cases, and

“[t]he parties have not cited and the court has not found any case in which a person was charged with obstruction of justice for concealing or withholding discovery in a civil case”).¹⁹ Most cases that have found §1503 applicable to civil cases do not involve the production or withholding of documents. *See United States v. London*, 714 F.2d 1558 (11th Cir. 1983) (attorney forged court order and attempted to enforce it), *cited in Richmark*, 730 F. Supp. at 1532; *Sneed v. United States*, 298 F. 911 (5th Cir. 1924) (influencing juror in civil case); *cited in Richmark*, 730 F. Supp. at 1532. While §1503 can apply to concealment of subpoenaed documents in a grand jury investigation, the defendant must have knowledge of the pending grand jury investigation, must know that the particular documents are covered by a subpoena, and must willfully conceal or endeavor to conceal them from the grand jury with the specific intent to interfere with its investigation. *See United States v. McComb*, 744 F.2d 555 (7th Cir. 1984).

Section 1512 specifically applies to “witness tampering.” However, by its terms, it does not purport to reach all forms of witness tampering, but only tampering by specified means. In order to obtain a conviction under §1512, the government must prove that a defendant knowingly engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion with intent to influence, delay, or prevent testimony or cause any person to withhold objects or documents from an official proceeding. While there is no “pending proceeding” requirement for convictions under §1512, it is clear that a defendant must be aware of the possibility of a proceeding and his efforts must be aimed specifically at obstructing that proceeding, whether pending or not; §1512 does not apply to defendants’ innocent remarks or other acts unintended to affect a proceeding. *See United States v. Wilson*, 565 F. Supp. 1416, 1431 (S.D.N.Y. 1983).

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

Subornation of perjury is addressed in 18 U.S.C. §1622. The elements of subornation are that the defendant must have persuaded another to perjure himself, and the witness must have actually committed perjury. *See, e.g. United States v. Hairston*, 46 F.3d 361, 376 (4th Cir. 1995), *rev’d on other grounds*, 361 U.S. 529 (1960).

¹⁹*Cf. United States v. Lundwall*, 1 F. Supp. 2d 249, 251–54 (S.D.N.Y. 1998) (noting that “[c]ases involving prosecutions for document destruction during civil pre-trial discovery are notably absent from the extensive body of reported §1503 case law,” and that “there are a great many good reasons why federal prosecutors should be reluctant to bring criminal charges relating to conduct in ongoing civil litigation,” but concluding that systematic destruction of documents sought during discovery should satisfy §1503).

If actual perjury does not occur, there is simply no subornation. *See id.* at 376 (reversing conviction for subornation because of conclusion that, in applying *Bronston*, witness did not commit perjury due to his literally truthful testimony). Moreover, §1622 requires that the defendant know that the testimony of witness will be perjurious—*i.e.*, knowing and willful procurement of false testimony is a key element of subornation of perjury. *See Rosen v. NLRB*, 735 F.2d 564, 575 n.19 (D.C. Cir. 1984) (“a necessary predicate of the charge of subornation of perjury is the suborner’s belief that the testimony sought is in fact false”).

Based upon illegal OIC leaks and press reports, we believe that the OIC’s principal claims of obstruction, intimidation and subornation—the three prongs of the January 1998 expansion of jurisdiction—appear to arise out of:

(1) “Talking Points”

The so-called “talking points”²⁰ have been widely hailed as the linchpin of any charge of subornation of perjury or obstruction of justice. Not only were they touted as the “smoking gun” of the investigation, they were instrumental in the OIC efforts to secure an expansion of its jurisdictional authority. Charles Bakaly, the OIC spokesman, appearing on Meet the Press, emphasized the critical nature of this document to the expansion of the OIC jurisdiction:

Tim Russert. How important is it that we find out who is the author of those talking points?

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

NBC Meet the Press, July 5, 1998 (emphasis added).

The “talking points” were the basis of thinly veiled smears, groundless speculation, and allegations against President Clinton, White House aides and others close to the President:

“And NBC News has learned more about another critical piece of evidence. A memo first discovered by Newsweek that Linda Tripp claims was given to her by Monica Lewinsky. . . . *Sources in Starr’s office* and close to Linda Tripp say they believe the instructions came from the White House. If true, that could help support a case of obstruction of justice.”—NBC Nightly News, February 4, 1998.

“Prosecutors suspect the President and his longtime friend, Vernon Jordan, tried to cover up allegations that Mr. Clinton was involved sexually with former White House intern Monica Lewinsky and other women—which is why this document, obtained last night by NBC News, could be a smoking gun. It’s called ‘Points to Make in Affidavit.’ Prosecutors say it might as well be called ‘How to Commit Perjury in the Paula Jones Case.’”—NBC News at Sunrise, January 22, 1998.

²⁰The term “talking points” refers to a document apparently provided by Ms. Lewinsky to Ms. Tripp in January 1998 regarding possible testimony in the *Jones* case.

“A three page summary telling Linda R. Tripp how to lie in the Paula Jones sexual misconduct lawsuit remains a key reason why independent counsel Kenneth Starr wants to question top White House aides in the Monica Lewinsky sex-and-lies grand jury investigation. Mr. Starr, according to lawyers and other close to the grand jury probe, wants to know what White House Deputy Counsel Bruce R. Lindsey and senior aide Sidney Blumenthal know about the source of the summary, or ‘talking points,’ that were given to Mrs. Tripp by Miss Lewinsky, the former White House intern. The summary, which prosecutors are convinced was not written by Miss Lewinsky, could corroborate accusations of a White House attempt to obstruct justice and suborn perjury in the Jones suit, sources said.”—Washington Times, May 18, 1998.

“Because of Lindsey’s earlier discussions with Tripp about the Willey incident, prosecutors appear to be trying to learn whether he had any role in helping Lewinsky prepare the three-page document. Lindsey, who has been summoned to the grand jury twice, has denied any connection to the talking points.”—Washington Post, March 10, 1998.

“‘If the author of the talking points is anywhere near the president,’ said Jonathan Turley, law professor at George Washington University in Washington, ‘this case will take a dramatic turn against the White House.’”—USA Today, July 1, 1998.

“The document has emerged as possible evidence of obstruction of justice as Starr investigates whether Clinton or his associates made attempts to conceal the president’s encounters with women.”—USA Today, June 29, 1998.

“Based largely on two pieces of evidence—those talking points and the secret tapes made by Ms. Tripp of her conversations with Ms. Lewinsky—Mr. Starr is trying to determine whether the President, Mr. Jordan, Ms. Lewinsky or others set about to obstruct justice in the Jones case by lying, concealing evidence and tampering with witnesses. These are the central charges in the case, and the participants’ versions appear to diverge.”—New York Times, March 7, 1998.

“Starr wants to find out if anyone in the White House was involved in preparing the talking points.”—The Plain Dealer, February 19, 1998.

“The evidence that strikes dread in the White House is a three-page document called ‘the talking points.’ . . . The author of the talking points will most likely be found, is in real danger of going to jail and may not want to go alone for long.”—William Safire, New York Times, February 12, 1998.

The memo is a critical piece of evidence to Whitewater independent counsel Kenneth Starr because it could be proof of an effort to induce Tripp to lie under oath. Starr’s investigators are exploring whether anyone close to Clin-

ton prepared or knew about the talking points.—USA Today, February 6, 1998.

And the “talking points” were regarded throughout the investigation as the critical piece of evidence in any charge of subornation of perjury or obstruction of justice:

“It seems clear that Starr’s focus is now on building a case that Clinton or his agents tried to sway the testimony of witnesses in the Jones case. A critical piece of evidence is the ‘talking points’ memo that Lewinsky gave her friend Linda Tripp, apparently advising Tripp on how to fudge her testimony. *The document is the only known physical evidence of witness tampering*, and its authorship remains one of the great mysteries of the Lewinsky matter.”—Chicago Tribune, April 3, 1998 (emphasis added).

“The talking points, which seemed intended to coach Ms. Tripp in possible testimony about Mr. Clinton, are central to Mr. Starr’s effort to determine whether obstruction of justice occurred.”—New York Times, July 27, 1998.

“Prosecutors regard the legalistic, three-page talking points—intended to guide Tripp’s testimony in the Jones lawsuit—as a key piece of evidence in a possible case of obstruction of justice. . . . ‘Anyone who wrote a document like that is out of his mind,’ one prosecutor said. *‘Those talking points are the smoking gun.’*—Pittsburgh Post-Gazette, February 8, 1998 (emphasis added).

“*Leakers from the Starr chamber have implied that the talking points are instructions to lie.* But lawyers routinely give their clients talking points before a grand jury. The Lewinsky case is about something else, spelled S-E-X.”—Clarence Page, Sun-Sentinel, June 4, 1998 (emphasis added).

“But a three page document known as the ‘talking points’ may prove to be the most important . . . ‘The talking points are the closest thing to a smoking gun in this case . . .’ legal scholar Paul Rothstein said Tuesday.”—USA Today, July 1, 1998.

“The talking points memorandum and the Tripp-Lewinsky tapes form the backbone of the independent counsel’s inquiry into whether anyone lied or obstructed justice over Ms. Lewinsky’s relationship with President Clinton.”—New York Times, June 11, 1998.

“The talking points memo, whose authorship is unknown, is of keen interest to Starr.”—Baltimore Sun, February 26, 1998.

“It is unclear who wrote the talking points and whether they were given to Ms. Tripp on Jan. 14 to encourage her to give false testimony in the Paula Corbin Jones sexual misconduct lawsuit against the President. These are questions of intense interest to the independent counsel Kenneth W. Starr, said lawyers close to his investigation. . . . The talking points could be an important piece of physical evidence showing that there were unlawful efforts to en-

courage false testimony in the Jones case.”—New York Times, February 19, 1998.

“That suggests one particular piece of evidence will play a huge role: the list of written talking points Lewinsky gave her friend Linda Tripp on how to testify in the Paula Jones sexual harassment case. Who wrote the document is one of the key questions, whoever did could be charged with obstruction of justice.”—Chicago Tribune, February 15, 1998.

After all of the rumor and speculation regarding a connection between the White House and the “talking points,” President Clinton was not asked one single question relating to the talking points during his August 17 deposition. Ms. Lewinsky is reported to have testified that she wrote the document without any assistance other than conversations she had with Linda Tripp. In the venerable tradition of Whitewater allegations, the “talking points” were surfaced as important and damning evidence of wrongdoing, but in the fullness of time and after investigation, have apparently vanished entirely. Only the stigma remains.

(2) *Ms. Lewinsky’s Transfer of Gifts to Betty Currie*

The President frequently gives gifts to and receives gifts from friends and supporters; he gave Ms. Lewinsky the same kind of gifts he has shared with others. He was not concerned about the Jones lawyers’ knowledge of the gifts. In the Jones deposition, he acknowledged knowing Ms. Lewinsky, acknowledged seeing her, acknowledged she had given him gifts, and acknowledged he had given her gifts. Moreover, in his grand jury testimony, he acknowledged giving Ms. Lewinsky good-bye gifts on December 28, 1997, shortly before she moved to New York, a date which we believe to be *after* Ms. Currie picked up the box of gifts from Ms. Lewinsky. The gifts simply were not a concern to him.

It is our understanding that Ms. Lewinsky may have testified that she raised with the President a concern about the Jones lawyers’ request for gifts from the President and that, shortly thereafter, Ms. Currie appeared at her home stating that she understood Ms. Lewinsky had something for her. Ms. Lewinsky apparently testified that she then provided to Ms. Currie for safekeeping a box containing some of the gifts received from the President.

For Ms. Lewinsky’s account to be credible, Ms. Currie must have been asked by the President to contact Ms. Lewinsky for the box. However, her account conflicts directly both with that of the President and with what we believe to be Ms. Currie’s testimony. The President told Ms. Lewinsky she would have to produce what she had in response to a request. He did not ever suggest that gifts from him should be disposed of, and he did not ever ask or instruct Ms. Currie to pick up the gifts from Ms. Lewinsky. We believe that Ms. Currie’s testimony corroborates this recollection. Ms. Currie has apparently testified that Ms. Lewinsky initiated the contact with her about the box, asking Ms. Currie to come by her apartment building, giving a sealed box to her, and asking her to hold on to it. Ms. Currie has no knowledge that the President ever even knew about the box prior to public disclosures about it, and the

President testified that he did not learn about the box until after the OIC investigation became public.

(3) *Job Assistance to Ms. Lewinsky*

The President made certain efforts to try to assure that Ms. Lewinsky had a fair shot at a job other than her Pentagon position, where she was not happy, and he generally was aware of other efforts by his secretary Ms. Currie and his friend Mr. Jordan. These actions were totally appropriate. At no time did the President ask that Ms. Lewinsky be accorded specially favorable or unfavorable treatment because of his relationship with her or for any other reason. These actions began well before Ms. Lewinsky was ever named a witness in the *Jones* litigation, and they were in no way intended to influence Ms. Lewinsky to keep secret what was at that time an already terminated relationship. There is no evidence of any link whatsoever between the President's actions and possible testimony by Ms. Lewinsky in the *Jones* case.

In April 1996, Ms. Lewinsky was reassigned from the White House to the Pentagon. Although the transfer was viewed as a promotion, the President became aware that Ms. Lewinsky was upset about it, did not see it as a positive change, and feared that the transfer would appear to be a demotion or "black mark" on her resume. To the extent that Ms. Lewinsky was criticized for spending more time in the West Wing than was required by her responsibilities in the Office of Legislative Affairs, the President felt responsible.

In the summer of 1997, the President spoke to Marsha Scott, the deputy personnel director at the White House, and inquired about the possibility of a position being available for Ms. Lewinsky in the White House. He never ordered Ms. Scott or anyone else to provide her special treatment or directed that she be given a job at the White House. He simply wanted to assure that she had been treated fairly and asked only that Ms. Scott look into the possibility of a position at the White House for Ms. Lewinsky if it was appropriate. Ms. Lewinsky was never offered an opportunity to return to the White House—as a result of that conversation or otherwise.

In the fall of 1997, Ms. Betty Currie spoke to Mr. John Podesta about finding a job for Ms. Lewinsky in New York, and Mr. Podesta ultimately spoke to Ambassador Bill Richardson about the matter. The Ambassador agreed to interview Ms. Lewinsky for a position in his New York office. The President was not involved in arranging the Richardson interview. When Ms. Lewinsky indicated to Ms. Currie that she preferred a job in the private sector, Ms. Currie contacted Mr. Jordan, her long-time friend, to see whether he would be willing to make inquiries regarding a job opportunity for Ms. Lewinsky in the private sector. Mr. Jordan referred her for interviews at American Express and Revlon, and to the advertising agency of Young & Rubicam. As Mr. Jordan said in his January 22, 1998 statement on the matter:

Throughout my professional career, I have been privileged to assist people with their vocational aspirations. I have done so for two reasons. first, I stand on the shoulders of many individuals who have helped me. Second, I

believe “to whom much is given much is required” so I have tried to lend a helping hand.

For many years now . . . I am consulted by individuals, young and old, male and female, black and white, Hispanic and Asian, rich and poor, cabinet members and secretaries, for assistance. And I have met with some success, from paralegals to mailroom clerks, to corporate directors, to CEO’s. I was pleased to be helpful to Ms. Lewinsky whose drive, ambition, and personality were impressive. She was referred by Ms. Betty Currie, a secretary to the president.

Mr. Jordan is a private individual who is free to offer job assistance to whomever he chooses.

Questions have been raised about a connection between the timing of Ms. Lewinsky’s affidavit (which was executed January 7 and filed January 16) and the timing of any job offer. There was no connection. Francis Carter, Esq., Ms. Lewinsky’s attorney at the time she executed the affidavit, apparently has stated that Ms. Lewinsky never asked him to delay the filing of an affidavit until after she had secured a job in New York and never suggested when the affidavit should be filed. *The Washington Post*, June 19, 1998. Indeed, Mr. Carter has reported that he himself delayed the filing of the affidavit while he attempted to persuade the *Jones* attorneys to withdraw the subpoena to Ms. Lewinsky. *Ibid.*

Indeed, it was totally appropriate for Mr. Jordan to refer Ms. Lewinsky to Francis Carter to represent her in the *Jones* litigation. Mr. Carter is a highly respected lawyer who would owe his duty to Ms. Lewinsky and represent her interests. Assuring a witness has her own counsel in whom she may confide is the surest and most appropriate way to protect the integrity of the process. As Mr. Jordan indicated in his January 22 statement, the referral was “at her request” and Mr. Jordan simply “took her to Mr. Carter’s office, introduced them, and returned to my office.” Ms. Lewinsky paid Mr. Carter herself. Mr. Carter has said that Mr. Jordan brought Ms. Lewinsky to his office, introduced them, and told him that she had been subpoenaed in the *Jones* case and needed an attorney. *The Washington Post*, June 19, 1998. According to Mr. Carter, Mr. Jordan did not suggest what should be done or how the matter should be handled, but promptly left. *Ibid.* Mr. Carter has stated, “I never received any kind of information from [Ms. Lewinsky] at any time that contradicted anything that’s in that affidavit.” *Ibid.*

Finally, in January of 1998, the President asked Mr. Erskine Bowles whether the legislative affairs office where Ms. Lewinsky once had worked would be able to give Ms. Lewinsky a reference that would not be negative. The President understood from Ms. Lewinsky that she thought she could get a good reference from The Department of Defense but hoped for a White House reference that was at least neutral. The President did not instruct anyone to provide such a reference and did not follow up on the inquiry. This innocuous query for an honest reference cannot conceivably be a basis for any charge of wrongdoing.

VI. "ABUSES OF POWER"

From the very beginning, the Lewinsky investigation has been about potential impeachment—a direct attack by the OIC on the constitutional status of the President. It is in that context that the OIC's allegations of abuse of power must be judged.

Any charge the OIC might make that the President has abused the powers of his office through the assertion of privileges—privileges that were asserted at the initiation and recommendation of the Counsel's Office, not by the President himself—is utterly baseless. Indeed, those charges are more a reflection of the OIC's unfettered abuse of his authority and his wholesale abandonment of any prosecutorial judgment in his campaign to prevent the President from consulting with his most senior advisors in confidence. No prosecutor, not even during Watergate, *ever* has contemplated the sort of sweeping intrusion into the President's ability to obtain advice that has been undertaken by the OIC. At bottom, the Independent Counsel believes that, merely because he demands confidential information, the President may not defend himself against impeachment without raising a charge that he is thereby abusing his power.

Before moving to these issues, one other point is worthy of note. It has been suggested in media reports that one of the grounds for impeachment advanced by the OIC is that the President abused his power by denying to his staff, in the days immediately following disclosure of the Lewinsky investigation, that he had engaged in any improper conduct when he knew that they might be called as witnesses before the grand jury and knew that they were making public statements in his defense. If this allegation were not so serious, such a suggestion would be ludicrous.

Implicit in the allegation is the notion that any official, in any branch of the government, who makes a statement about his own conduct, or indeed any other matter, that is not absolutely true is liable for misusing his office for so long as he fails to admit wrongdoing, for the official's staff will inevitably repeat his explanation in any number of forums. It would follow, therefore, according to what appears to be the OIC's reasoning, that no official could mount a defense to impeachment, or to ethics charges, or to a criminal investigation while remaining in office, for anything other than an admission of guilt will be treated as an abuse of his official powers.

1. The President's Decision to Litigate Privilege Issues Cannot Be Compared to the Abuses of Power Alleged during Watergate

The Independent Counsel apparently attempts to evoke images of Watergate by charging that the President has abused the powers of his office. This allegation is simply meritless. In the *Federalist Papers*, Alexander Hamilton described abuse of power as the "corrupt use of the office for personal gain or some other improper purpose." Former President Nixon's use of the Central Intelligence Agency (CIA) to thwart a major criminal investigation by the Federal Bureau of Investigation (FBI) of a crime in which he was involved, to take but one example, fits squarely within that definition. President Clinton's lawful assertion of privileges in a court of

law and the Counsel's Office conduct of its official duties plainly does not.

There is no comparison between the claimed abuses of power by President Nixon and the public and lawful assertion of privileges during the OIC investigation. Indeed, comparing this White House with President Nixon's diminishes the historical significance of the unprecedented claims of abuse of power by the Nixon administration and attempts to criminalize the proper exercise of presidential prerogatives. The specious nature of the OIC's allegations reveal the OIC's true motive: to create an offense where none exists.

In July 1974, the House Judiciary Committee lodged serious and significant abuse of power charges against President Nixon, alleging that President Nixon, among other things:

- Engaged in an elaborate cover-up scheme that included using his secret intelligence operation to pay both for illegal activities and subsequent blackmail money for the cover-up;

- Paid hush money to his advisor;

- Instructed administration officials on how to commit perjury;

- Violated grand jury secrecy rules by obtaining 6(e) material from the Justice Department and passing it on to presidential advisors, who were targets of the investigation;

- Attempted to subvert the IRS and CIA;

- Authorized illegal intelligence gathering activities;

- Directly interfered with the Justice Department's ITT investigation; and,

- Pressured the CIA to interfere with the FBI's investigation of the Watergate break-in—a conversation caught on tape.

In contrast, the OIC apparently has made such charges of abuse against President Clinton, however erroneously, for purportedly encouraging the Secret Service to assert privilege claims over their testimony and invoking attorney-client and executive privileges. President Clinton's privilege claims have been open and lawful, and were reviewed and in significant measure *validated* by the courts. Thus, the Nixon investigation and precedent stand in sharp contrast to the OIC's investigation and baseless charges in this matter.

2. The United States Secret Service's Decision to Pursue A Protective Privilege Was the Proper Exercise of Its Own Authority And In No Way an Abuse of Power By the President

The assertion of a protective function privilege by the Secret Service cannot possibly serve as a basis for the OIC's allegations of abuse of power. As a factual matter, the President never asked, directed, or participated in any decision regarding the protective function privilege. Moreover, no one at the White House asked, directed, participated or had any role in such decisions. The Treasury and Justice Departments independently decided to pursue a privilege for the Secret Service to ensure the protection of this and future presidents.

Second, ignoring significant security concerns expressed by the Secret Service, the Independent Counsel sought testimony from

agents about *non-criminal* events they may have witnessed as well as *non-criminal* conversations they may have overheard in the course of protecting the President. For the first time in the history of the Independent Counsel statute, the Independent Counsel sought to use the protective service as a source of intelligence for admittedly non-criminal activities of a protectee. In the wake of this unprecedented demand, it was and continues to be the reasoned judgment of career professionals in the Secret Service that the absence of a protective privilege would severely impair agents' ability to fulfill their mission to protect this and future Presidents (as well as other protectees). The Secret Service's position was supported by former presidents and by former agents assigned to protect presidents in both Republican as well as Democratic administrations.

Thus, the Justice and Treasury Departments' assertion of a protective privilege advanced valid concerns about the Secret Service's ability to perform its function. The OIC's suggestion that the assertion of this privilege constituted an abuse of power not only insults the integrity of career law enforcement officials, but that of congressional policy makers too. Indeed, because of the Independent Counsel's unorthodox overreaching, Senator Hatch vowed to seek legislation to enact the type of limited privilege asserted by the Secret Service in response to the Independent Counsel's sweeping actions. Congressional Press Releases, Senator Orrin Hatch, July 17, 1998.

3. *The President's Assertions of Executive and Attorney/Client Privilege were Valid and Necessary*

Any charge by the OIC that the President's assertion of privileges constitutes an abuse of power is equally baseless. The White House advanced claims of privilege only sparingly and as a last resort to protect the core constitutional and institutional interests of this and future presidencies. In pursuing his attack on the institution of the Presidency, the OIC took the extreme position that executive privilege was inapplicable and that the governmental attorney-client privilege did not exist in the face of grand jury subpoena. The OIC now seeks to penalize the President for disagreeing with its interpretations of the law, despite the fact that the courts (and the Department of Justice) both also disagreed with the OIC.

A. *The President Followed the Advice of White House Counsel Regarding the Assertion of Official Privileges*

A necessary component of the OIC's abuse of power allegation is that the President initiated the White House's claims of privilege—both executive and attorney-client—with intent to impede the OIC's investigation. The record completely refutes this premise.

The privilege issue initially arose when the OIC served on Bruce Lindsey, Assistant to the President and Deputy Counsel, a subpoena seeking his testimony before the grand jury. Declaration of Charles F.C. Ruff ("Ruff Dec.") ¶31. Prior to Mr. Lindsey's appearance, the White House Counsel met with the OIC to discuss privilege issues and to ask the OIC to describe with particularity possible areas of inquiry to determine whether they would encompass privileged information. *Id.* ¶32. The OIC declined to discuss this

issue, and later stated that it intended to question Mr. Lindsey on areas implicating a wide array of privileges because it believed that executive and attorney-client privileges were inapplicable to information relating to the Lewinsky investigation. *Id.* ¶¶32–34. The White House offered, in good faith, to provide the OIC with any factual testimony regarding the Lewinsky investigation. *Id.* ¶¶45–50. The OIC rejected this offer. *Id.* ¶51.

Instead, the OIC suddenly filed motions to compel the testimony of Mr. Lindsey and other senior staff. *Id.* After careful deliberations, the White House Counsel notified the President of the privilege issue, explained the failed accommodation effort, and recommended that he invoke privilege. As he did in every instance, the President accepted the White House Counsel's recommendation and authorized the Counsel to make the claim of privilege. *Id.* ¶56. Thus, the President's decision to claim privilege was never the result of his own initiative, but of his Counsel's advice.

B. The President's Executive Privilege Assertions Were Upheld by the Court

To put the OIC's apparent abuse of power charges in context, it is important to recognize that the OIC took the extraordinary position that executive privilege was inapplicable in the face of a grand jury subpoena and that it therefore was entitled to immediate and full disclosure of all strategic and political communication among the President's most senior advisors. This position was squarely at odds with the law of the Supreme Court, and of course, the D.C. Circuit. Executive privilege is constitutionally-based and covers communications relating to the President's official duties and the effective functioning of the executive branch. It ensures that the President receives frank and candid advice and recommendations, which ultimately fosters more informed and effective decision-making.

Here, the President asserted executive privilege over communications that relate to matters that affect the performance of his official duties. *In re Grand Jury Proceedings*, 1998 U.S. Dist. Lexis 7736, *7 (D.D.C. 1998); Ruff Dec. ¶¶ 16–30. Indeed, some of these communications related to the President's decision whether to invoke privilege over other communications. *Id.* ¶¶ 26–28.

Rather than acknowledge the presumptively privileged nature of the information, the OIC maintained that the privilege was inapplicable and that it did not have to demonstrate any need for the information. Chief Judge Johnson rejected the OIC's position holding that the communications were presumptively privileged. *In re Grand Jury Proceedings*, 1998 U.S. Dist. Lexis at *3–10. The Court then required the OIC to make a showing that its need for the information was sufficient to overcome the privilege. *Id.* at *13–21. Although the Court concluded that the OIC had met its burden, the Court at no time even suggested that the President's assertion of executive privilege was groundless, improper, or made in bad faith. In those circumstances, it cannot seriously be argued that assertion of the privilege was an abuse of power.

C. The President's Assertion of the Attorney-Client Privilege was Solidly Grounded in the Law of this Circuit

For centuries, the law has recognized the attorney-client privilege as absolute in protecting the confidentiality of communications between lawyers and their clients. The D.C. Circuit has also recognized that the attorney-client privilege protects confidential communications between government lawyers and officials. *E.g. Mead Data Control, Inc. v. Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977). Courts recognize that a government official, like any other citizen, must be able to provide information to and seek advice from government lawyers without fear of public disclosure. Ultimately, the privilege serves an important governmental function by fostering well-advised and fully-informed decision-making. The possibility that those communications may be disclosed will forfeit the benefits the privilege was intended to protect.

Despite the law in the D.C. Circuit recognizing the attorney-client privilege in the governmental context, the Independent Counsel pushed to breach the bonds of the governmental attorney-client privilege. Unlike his predecessors, who have respected the professional obligation of government attorneys to provide confidential legal advice on official matters, the Independent Counsel has insisted that government attorneys and clients do not have the right to discuss legal issues in confidence. In this context, the White House's assertion of the attorney-client privilege was not only appropriate, but it was an ethical and institutional obligation.

Prior to the D.C. Circuit litigation, the OIC was well aware that the White House fundamentally disagreed with the OIC regarding the applicability and scope of the governmental attorney-client privilege. In the Eighth Circuit, the OIC had attempted to obtain a White House lawyer's notes that reflected confidential communications. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). At the time of that litigation, which the White House resisted and the OIC won, there was no authority rejecting the existence of a governmental attorney-client privilege.

Two years later, the OIC, in the Lewinsky investigation, sought to compel the disclosure of confidential communications between the President and his official lawyers in which legal advice was either being sought by or provided to the President regarding official matters. In view of the law of the D.C. Circuit, which recognized an absolute governmental attorney-client privilege, the White House Counsel recommended, and the President asserted, the privilege.

A recent Supreme Court ruling that rejected the OIC's sweeping attack on the attorney-client privilege provided additional support for the President's position. In *Swidler & Berlin v. United States*, _____ U.S. _____ (1998); 1998 U.S. Lexis 4214 (1998), the OIC argued that the personal attorney-client privilege should automatically give way to the needs of a criminal investigation. The Court rejected the OIC's position and stated that "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases," *id.* at *7, supporting the principle that the privilege remains absolute in a grand jury context. Accordingly, the President's position on the applicability of the privilege in this

context had a substantial basis in the decisions of both this Circuit and the Supreme Court.

Undaunted, the OIC argued that, based upon the non-binding Eighth Circuit opinion, the governmental attorney-client privilege is inapplicable in a grand jury context. 112 F.3d 910 (8th Cir. 1997). From an institutional standpoint, the OIC's position stripped the President of any ability to obtain confidential advice from government lawyers about official matters in the event that the OIC made a referral to Congress for possible impeachment hearings. In an impeachment context, the President is entitled to rely on Counsel's Office lawyers to provide critical legal guidance. Without the ability to receive such confidential advice, he is left without any legal guidance regarding the conduct of his official duties.

The District Court rejected the OIC's position and held that the President had a valid, though qualified, governmental attorney-client privilege. *In re Grand Jury Proceedings*, 1998 U.S. Dist. Lexis at *21-52. Performing a need analysis similar to executive privilege, the Court balanced the President's interests against those of the grand jury and ultimately determined that the grand jury was entitled to the information. Once again, the District Court did not suggest that the privilege claim was spurious or made in bad faith.

On appeal, a divided D.C. Circuit Court of Appeals ruled that the President had an attorney-client privilege with White House Counsel in some contexts, but not this one. *In re: Bruce R. Lindsey*, 1998 U.S. App. Lexis 17066, *7-43 (D.C. Cir. 1998). Judge David Tatel, whose dissenting opinion in the Court of Appeals' decision in *Swidler & Berlin* was adopted by the Supreme Court, dissented here as well. Consistent with his analysis in *Swidler & Berlin*, Judge Tatel found that the Court's opinion did not account for "the unique nature of the Presidency, its unique need for confidential legal advice, or the possible consequences of abrogating the attorney-client privilege for a President's ability to obtain such advice." *Id.* at *54. Judge Tatel's recognition of the validity of the absolute nature of the privilege and the President's need to assert this and belies the notion that the assertion was in any way an abuse of power.

The OIC's apparent argument that the assertions of privilege were for purposes of delay lacks any evidentiary support and, more significantly, overlooks the OIC's own dilatory conduct. After Mr. Lindsey was subpoenaed and *before* he was scheduled to testify, the Office of the President attempted to avoid litigating these issues by reaching an accommodation that would provide the OIC with access to the information to which it was entitled while maintaining the legitimate confidentiality interests of the President. *Id.* ¶¶ 31-32. The OIC rejected those efforts and instead filed its motion to compel. *Id.* ¶ 51. The OIC has continued to reject any attempt by the White House to compromise, choosing instead to litigate these issues. The Office of the President has sought to avoid any delay by agreeing to expedited briefing schedules involving privilege litigation, and the courts, appreciating the time-sensitivity of the issues, have ruled swiftly on these matters.

In any event, any delay that might have been caused by the White House had no substantive impact on the OIC's investigation. Privilege claims have been advanced as to only a narrow portion

of the testimony of three witnesses. The OIC originally filed motions to compel the testimony of two senior staff members and one Counsel's Office lawyer. The litigation only temporarily postponed the testimony of the two senior staffers; in March, they both appeared before the grand jury and testified fully. The privilege assertions ultimately involved the testimony of only three Counsel's Office lawyers. Each of these individuals has testified at length regarding any facts they may have possessed about whether the President had a relationship with Ms. Lewinsky. The questions as to which they asserted privilege were narrow in scope and irrelevant to the matters being investigated.

Finally, substantial delay in the investigation has been self-inflicted. The OIC has wandered aimlessly down more alleys and byways than any federal prosecutor would appropriately do. The OIC has called current and former White House staffers before the grand jury, and interviewed many others. The OIC has called presidential advisers before the grand jury four, five and six times; sometimes for only one- or two-hour sessions. Some witnesses appeared to testify only to find themselves waiting for hours and then being told to return on another day. The OIC has also insisted on exploring such irrelevant subjects as White House contacts with the press, and has required testimony from attorneys whose primary function was to deal with the OIC. Such actions are highly unusual, if not unprecedented.

4. White House Lawyers Played an Appropriate Role in the Investigation

Finally, the open and lawful efforts of the White House lawyers to assist White House staff obtain lawyers, to speak with witnesses and their lawyers, and to provide advice on the ramifications of the investigation also cannot be considered an abuse of power.

As a threshold matter, when there is an official nexus between the duties of the President and an ongoing investigation, which certainly exists here, it is the duty of government attorneys to represent their official client. The specter of impeachment loomed from the day the Lewinsky story broke in the press. Ruff Dec. ¶21. Members of the Congress asserted that the investigation, which drew explosive media, public and congressional attention, burdened the President's ability to perform his constitutional and statutory duties. Accordingly, the White House Counsel's Office lawyers, among others, were responsible for providing the President and White House officials with informed, candid advice on the issues raised by the investigation that affected the President's official duties. *Id.* ¶¶16–30.

When it suited the OIC's interests, the OIC recognized the appropriateness of, and relied on, the White House Counsel's efforts. From the beginning of this investigation, the OIC sought—and received—the cooperation of the White House lawyers in setting up interviews and grand jury appearances of current and former White House employees. The OIC, however, refused to allow the White House lawyers to represent even the most junior, uninvolved witnesses. Thus, all White House officials, from the most senior to the most junior, were required to obtain private counsel. White House lawyers also provided relevant documents to witnesses' at-

torneys to ensure complete and accurate testimony, provided privilege instructions and guidance, and followed-up afterwards to discuss an individual's interview or grand jury appearance and any outstanding issues. All of the Counsel's Office activities were well-known to the OIC, and no objection was ever voiced.

Lastly, it was not uncommon for the White House to be faced with inaccurate and spurious stories that seemed to be coming from the OIC or "sources close to the OIC" shortly after a witness testified or was interviewed by the prosecution. Indeed, Judge Johnson examined media reports, and concluded that they contained grand jury material and that there was evidence that the OIC as the source. *In re Grand Jury Proceedings*, Misc. No. 98-55 (D.D.C. June 19, 1998), Mem. Op. at 6. Accordingly, Judge Johnson held that this evidence established a prima facie case that the OIC had violated Rule 6(e) and ordered the OIC to appear to show cause why it should not be held in contempt for Rule 6(e) violations. These leaks created a deluge of press inquiries to the White House; not surprisingly, White House Counsel lawyers were required to gather information and advise senior staff concerning the appropriate response to these inquiries.

VII. ALLEGATIONS OF PERJURY²¹

The OIC cannot make out even a colorable claim of perjury. If answers are truthful or literally truthful but misleading, *there is no perjury* as a matter of law, no matter how misleading the testimony is or is intended to be. The law simply does not require the witness to aid his interrogator. The Referral seeks to punish the President for being unhelpful to those trying to destroy him politically.

A. *The Law of Perjury*

Perjury requires proof that a defendant, while under oath, knowingly made a false statement as to material facts.²² *See, e.g., United States v. Dunnigan*, 507 U.S. 87, 94 (1993). The "knowingly" requirement is a high burden: the government must prove the defendant had a subjective awareness of the falsity of his statement at the time he provided it. *See, e.g., United States v. Dowdy*, 479 F.2d 213, 230 (4th Cir. 1973); *United States v. Markiewicz*, 978 F.2d 786, 811 (2d Cir. 1992). It is beyond debate that false testimony provided as a result of confusion, mistake, faulty memory, carelessness, misunderstanding, mistaken conclusions, unjustified inferences testified to negligently, or even recklessness does *not* satisfy the "knowingly" element. *See, e.g., Dunnigan*, 507 U.S. at 94; *United States v. Dean*, 55 F.3d 640, 659 (D.C. Cir. 1995); *see also* Department of Justice Manual, 1997 Supplement, at 9-69.214.

Moreover, it is of course clear that a statement must be false in order to constitute perjury. It is equally beyond debate that the following types of answers are not capable of being false and are

²¹"Perjury" was not even in the original grant of jurisdiction to the OIC but reportedly is now the crux of the OIC's case.

²²There are two basic federal perjury statutes: 18 U.S.C. §1621, and 18 U.S.C. §1623. Section 1621 applies to all material statements or information provided under oath "to a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." Section 1623, in contrast, applies only to testimony given before a grand jury and other court proceedings. Although there are differences between the two statutes, the four basic elements of each are substantially the same.

therefore by definition non-perjurious: literally truthful answers that imply facts that are not true, *see, e.g., United States v. Bronston*, 409 U.S. 352, 358 (1973), truthful answers to questions that are not asked, *see, e.g., United States v. Corr*, 543 F.2d 1042, 1049 (2d Cir. 1976), and failures to correct misleading impressions. *See, e.g., United States v. Earp*, 812 F.2d 917, 919 (4th Cir. 1987). The Supreme Court has made abundantly clear that it is not relevant for perjury purposes whether the witness intends his answer to mislead, or indeed intends a “pattern” of answers to mislead, if the answers are truthful or literally truthful.

Thus, in explaining the law of perjury, the Supreme Court and numerous lower federal courts have set forth three clear standards. First, answers to questions under oath that are literally true, but unresponsive to the questions asked, do not, as a matter of law, fall under the scope of the federal perjury statute. That is so even if the witness intends to mislead his questioner by his answer and even if the answer is false by “negative implication.” The second clear rule is that answers to questions that are fundamentally ambiguous cannot, as a matter of law, be perjurious. Finally, a perjury conviction under 18 U.S.C. §1621 cannot rest solely on the testimony of a single witness, and, at the very least as a matter of practice, no reasonable prosecutor would bring any kind of perjury case based on the testimony of one witness without independent corroboration—especially if the witness is immunized, or has any question as to credibility or truthfulness. As the Supreme Court has made clear, a perjury case “ought not to rest entirely upon ‘an oath against an oath.’” *United States v. Weiler*, 323 U.S. 606, 608–09 (1945).

1. *Bronston* and “Literal Truth”

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

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

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

A: No, sir.

Q: Have you ever?

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

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

A: No, sir.

Q: Have you ever?

A: No, sir.

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

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

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

Bronston is just one of scores of cases across the federal circuits that make clear that the definition of perjury must be carefully limited because perjury prosecutions are dangerous to the public interest since they “discourage witnesses from appearing or testifying.” *Id.* at 359.²³ For instance, in *United States v. Earp*, 812 F.2d

²³ While *Bronston* involved a perjury conviction under the general perjury statute, 18 U.S.C. §1621, lower federal courts have uniformly relied on it in reviewing perjury convictions under

917 (4th Cir. 1987), the defendant, a member of the Ku Klux Klan, had stood guard during the attempted burning of a cross on the lawn of an interracial couple, and further evidence demonstrated that he had personally engaged in other attempts to burn crosses. During questioning before a grand jury, however, he denied ever having burned crosses on anyone's lawn. He was convicted of perjury, but the United States Court of Appeals for the Fourth Circuit reversed his conviction, because "like the witness in *Bronston*, [the defendant's] answers were literally true although his second answer was unresponsive." *Id.* at 919. That is, the defendant had not actually succeeded in his cross-burning attempts, so it was literally true that he had never burned crosses on anyone's lawn. The court noted that "while he no doubt knew full well that he had on that occasion tried to burn a cross, he was not specifically asked either about any attempted cross burnings." *Id.* Literally every federal court of appeals in the nation concurs in this reading of *Bronston*.²⁴

2. Fundamentally Ambiguous Questions Cannot Produce Perjurious Answers.

When a question or a line of questioning is "fundamentally ambiguous," the answers to the questions posed are insufficient as a matter of law to support a perjury conviction." *See, e.g., United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986); *United States v. Tonelli*, 577 F.2d 194, 199 (3d Cir. 1978); *United States v. Bell*, 623 F.2d 1132, 1337 (5th Cir. 1980); *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967); *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977). In other words, when there is more than one way of understanding the meaning of a question, and the witness has answered truthfully as to his understanding, he cannot commit perjury. Many courts have emphasized that "defendants may not be assumed into the penitentiary" by "sustain[ing] a perjury charge based on [an] ambiguous line of questioning." *Tonelli*, 577 F.2d at 199.

United States v. Lattimore, 127 F. Supp. 405 (D.D.C. 1955), is the key case dealing with ambiguous questions in the perjury context. In *Lattimore*, a witness was questioned before the Senate Internal Security Subcommittee about his ties to the Communist party. He

²⁴§1623(a), which makes it unlawful to make any false material declaration "in any proceeding before or ancillary to any court or grand jury of the United States." *See, e.g., United States v. Porter*, 994 F.2d 470, 474 n. 7 (8th Cir. 1993); *United States v. Reveron Martinez*, 836 F.2d 684, 689 (1st Cir. 1988); *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986).

²⁴*See also United States v. Finucan*, 708 F.2d 838, 847 (1st Cir. 1983) (intent to mislead is insufficient to support conviction for perjury); *United States v. Lighte*, 782 F.2d 367, 374 (2d Cir. 1986) (literally true answers by definition non-perjurious even if answers were designed to mislead); *United States v. Tonelli*, 577 F.2d 194, 198 (3d Cir. 1978) (perjury statute is not to be invoked because a "wily witness succeeds in derailing the questioner"). *United States v. Abrams*, 947 F.2d 1241, 1245 (5th Cir. 1991) (unambiguous and literally true answer is not perjury, even if there was intent to mislead); *United States v. Eddy*, 737 F.2d 564, 569 (6th Cir. 1984) ("An 'intent to mislead' or 'perjury by implication' is insufficient to support a perjury conviction."); *United States v. Williams*, 536 F.2d 1202, 1205 (7th Cir. 1976) (literally true statement cannot form basis of perjury conviction even if there was intent to mislead); *United States v. Robbins*, 997 F.2d 390, 394 (8th Cir. 1993); *United States v. Boone*, 951 F.2d 1526, 1536 (9th Cir. 1991) (literally true statement is not actionable); *United States v. Larranaga*, 787 F.2d 489, 497 (10th Cir. 1986) (no perjury where answer literally truthful and prosecutor's questioning imprecise); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998) ("An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it is not perjury."); *United States v. Dean*, 55 F.3d 640, 662 (D.C. Cir. 1995) (perjury charge cannot be based upon evasive answers or even misleading answers so long as such answers are literally true).

was asked whether he was a “follower of the Communist line,” and whether he had been a “promoter of Communist interests.” He answered “no” to both questions, and was subsequently indicted for committing perjury. The United States District Court for the District of Columbia found that the witness could not be indicted on “charges so formless and obscure as those before the Court.” *Id.* at 413. The court held that “‘follower of the Communist line’ is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony.” *Id.* at 110. As the court explained further:

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

Id. at 109.

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

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

It is clear that the defendant interpreted the prosecutor’s questions about “handling” to mean “touching” . . . To sustain a perjury charge based on the ambiguous line of questioning here would require us to assume [defendant] interpreted “handle” to include more than “touching.” The record will not allow us to do so and as the Court of Appeals for the Fifth Circuit has observed “[e]specially in

perjury cases defendants may not be assumed into the penitentiary.”

United States v. Bell, 623 F.2d 1132, 1137 (5th Cir. 1980), is yet another example of this doctrine. In *Bell*, a witness was asked before a grand jury, “Whether personal or business do you have records that are asked for in the subpoena,” and the witness answered, “No, sir, I do not.” It was later established that the witness’s files clearly contained relevant records. Nonetheless, the court held that the question was ambiguous, and therefore incapable of yielding a perjurious answer. The witness interpreted the question to ask whether he had brought the records with him that day, and not whether he had any records anywhere else in the world.²⁵

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

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

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

²⁵ Many other cases as well hold that ambiguous questions cannot produce perjurious answers. *See, e.g., Lighte*, 782 F.2d at 376 (questions fundamentally ambiguous because of imprecise use of “you,” “that,” and “again”); *United States v. Farmer*, 137 F.3d 1265, 1270 (10th Cir. 1998) (question “Have you talked to Mr. McMahon, the defendant about your testimony here today?” ambiguous because phrase “here today” could refer to “talked” or to “testimony;” conviction for perjury could not result from the question); *United States v. Ryan*, 828 F.2d 1010, 1015–17 (3d Cir. 1987) (loan application question asking for “Previous Address (last 5 years)” fundamentally ambiguous because unclear whether “address” refers to residence or mailing address, and “previous” could mean any previous address, the most recent previous address, or all previous addresses; based on ambiguity, perjury cannot result from answer to question); *United States v. Markiewicz*, 978 F.2d 786, 809 (2d Cir. 1992) (question “[D]id you receive any money that had been in bingo hall” ambiguous, and incapable of producing perjurious answer, when it did not differentiate between witness’s personal and business capacities). *See also United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991); *United States v. Eddy*, 737 F.2d 564, 565–71 (6th Cir. 1984); *United States v. Hilliard*, 31 F.3d 1509 (10th Cir. 1994).

639 F.2d 1224, 1226 (5th Cir. 1981). It is therefore clear that a perjury conviction under § 1621 cannot lie where there is no *independent* second witness who corroborates the first, or where there is no *independent* evidence that convincingly contradicts the testimony of the accused.

While 18 U.S.C. § 1623 does not incorporate the “two-witness rule,” it is nonetheless clear from the case law that perjury prosecutions require a high degree of proof, and that prosecutors should not, as a matter of reason and practicality, even try to bring perjury prosecutions based solely on the testimony of a single witness. In *Weiler v. United States*, 323 U.S. 606, 608–09 (1945), the United States Supreme Court observed that “[t]he special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries.” The Court further observed that “equally honest witnesses may well have differing recollections of the same event,” and hence “a conviction for perjury ought not to rest entirely upon ‘an oath against an oath.’” *Id.* at 609 (emphasis added). Indeed, the common law courts in seventeenth-century England *required* the testimony of two witnesses as a precondition to a perjury conviction, when the testimony of a single witness was in almost all other cases sufficient. *See Chaplin*, 25 F.3d at 1377, *citing* Wigmore on Evidence § 2040(a), at 359–60 (Chadbourne rev. 1978). The common law courts actually adopted the two-witness rule from the Court of Star Chamber, which had followed the practice of the ecclesiastical courts of requiring two witnesses in perjury cases. *Id.* The English rationale for the rule is as resonant today as it was in the seventeenth century: “[I]n all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused’s oath was always in effect evidence and thus, if but one witness was offered, there would be merely . . . an oath against an oath.” *Id.* And, as noted above, no perjury case should rest merely upon “an oath against an oath.”

B. The Jones Deposition

Without knowledge of the OIC’s specific allegations it is impossible to address why any particular claim of perjury fails although we are confident that no colorable claim of perjury can be made out. However, illegal leaks and speculation make clear that there are certain misperceptions about this testimony that can immediately be laid to rest. For example,

Allegation: The President falsely testified in his *Jones* deposition that he was never alone with Ms. Lewinsky.

Not so. The President acknowledged in his deposition that he met with Ms. Lewinsky on up to five occasions while she worked at the White House. (p. 50). He then referred back to that testimony when asked if he ever was alone with her in the Oval Office (p. 52), and again when asked whether he was alone with her in any room in the White House. (p. 59). The *Jones* lawyers did not follow up and ask the President to describe the nature of any physical contact that may have occurred on these occasions.

Allegation: The President falsely testified in his *Jones* deposition that he never had any improper physical contact of any kind with Ms. Lewinsky.

Not so. The President was asked whether he had “an extramarital sexual affair” with Ms. Lewinsky (p. 78) and responded that he did not. That term was undefined and ambiguous. The President understood the term “sexual affair” to involve a relationship involving sexual intercourse. He had no such relationship with Ms. Lewinsky.

The President also was asked whether he had “sexual relations” with Ms. Lewinsky, “as that term is defined in Deposition Exhibit 1, as modified by the Court.” (p. 59). The Court explicitly directed the President’s attention to Definition Number 1 on Exhibit 1, which the President had circled.

The President denied he had “sexual relations” with Ms. Lewinsky under this definition. Although the President’s counsel, Mr. Bennett, had invited the Jones lawyers to ask specific questions about the President’s conduct—“Why don’t they ask the President what he did, what he didn’t do, and then we can argue in Court later about what it means?” (p. 21)—the Jones lawyers declined to do so, relying instead on the definition. The President was not asked any specific questions at all about his physical contact with Ms. Lewinsky, and in particular he was not pointedly asked whether he had engaged in any of the conduct *outside* the definition provided. The President’s testimony in response to these questions was accurate. He did not have sexual intercourse with Ms. Lewinsky or otherwise engage in sexual conduct covered by the definition, as provided by plaintiff and narrowed by the Court.

The President also testified in the *Jones* deposition that Ms. Lewinsky’s affidavit, in which she stated she had never had a “sexual relationship” with the President, was accurate (p. 204). He believed this testimony to be truthful. The term “sexual relationship” was not defined in the affidavit or in the deposition. The definition of the different term “sexual relations” utilized by the Jones lawyers did not apply to that question. The term “sexual relationship,” like sexual affair, has no definitive meaning. To the President, that term reasonably requires sexual intercourse as a necessary component of the relationship. Since his relationship with Ms. Lewinsky did not involve intercourse, he truthfully answered that the affidavit was accurate.

Allegation: The President falsely testified in his *Jones* deposition that his relationship with Ms. Lewinsky was the same as that with any other White House intern.

Not so. The President’s answers left no doubt that he had a special relationship with Ms. Lewinsky. He acknowledged knowing how she had gotten her internship at the White House. He acknowledged meeting with her and knowing where she worked after leaving the White House. He acknowledged exchanging small gifts with her. He acknowledged that he knew she was moving to New York and that her mother had moved there. He acknowledged knowing about her job search in New York, and that she had had an interview with (then) U.N. Ambassador Bill Richardson. He acknowledged that Mr. Jordan reported on his meeting with Ms. Lewinsky

about her New York job search. He acknowledged receiving cards and notes from her through Ms. Betty Currie. The *Jones* lawyers received affirmative responses to particular questions. Had they opted to ask precise questions on other matters, they would have received truthful responses. They did not do so.

VIII. THE LEWINSKY EXPANSION OF THE WHITEWATER INVESTIGATION

The expansion of the Independent Counsel's jurisdiction to encompass the *Jones* case and Ms. Lewinsky did not occur by accident or easily. The OIC deliberately and purposefully sought this expansion on an emergency basis. Media accounts that the Attorney General herself requested this expansion are highly misleading.

On January 16, 1998, upon the OIC's request, the Special Division of the Court of Appeals for the Purpose of Appointing Independent Counsels expanded the OIC's jurisdiction to allow it to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*." Order, Div. No. 94-1 (Jan. 16, 1998) (Div. for Purpose of Appointing Independent Counsel) (D.C. Cir.). The series of events that led to this expansion of authority raise serious questions as to the motivations and manipulations of the OIC in securing this expanded jurisdiction.

Under the Independent Counsel statute, if the "independent counsel discovers or receives information about possible violations of criminal law by [covered persons], which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General." 28 U.S.C. § 593 (c)(2)(A). The Attorney General is then to conduct a preliminary investigation. 28 U.S.C. § 592. The statute did not give the OIC authority to conduct its own preliminary investigation in order to gather or create evidence to present to the Attorney General to support a request for an expansion of jurisdiction.

According to media reports, Ms. Linda Tripp contacted the OIC on Monday, January 12, 1998. There was no particular logic to this contact, and she could easily have taken her concerns to state or federal authorities. In any event, the OIC arranged for Ms. Tripp to wear an F.B.I. recording device and tape surreptitiously a conversation that she had with Ms. Lewinsky the next day, Tuesday, January 13, 1998 (Ms. Lewinsky had not yet filed an affidavit in the *Jones* case). On Friday, January 16, 1998, at the OIC's request, Ms. Tripp lured Ms. Lewinsky to a meeting, where she was apprehended by OIC agents, who confronted her and attempted to pressure her into doing surreptitious taping herself. She was informed that an immunity agreement was contingent on her not contacting her lawyer.²⁶

That same day, the Special Division agreed to expand the OIC's authority, based upon the Independent Counsel's earlier application to the Attorney General and on the tapes that the OIC had

²⁶ *Time*, Feb. 16, 1998, at 49.

already created: "In a taped conversation with a cooperating witness, Ms. Lewinsky states that she intends to lie when deposed. In the same conversation, she urges the cooperating witness to lie in her own upcoming deposition. . . . Independent Counsel Starr has requested that this matter be referred to him." (Text of Attorney General's Petition to Special Division, *The Associated Press*, January 29, 1998.)

The Independent Counsel later suggested that the expansion of authority prior to the taping was unnecessary, as it was already within his jurisdiction. However, the Lewinsky matter had no connection whatsoever to the Whitewater activities, or any other activities, then being investigated by the OIC. In addition, the Attorney General specifically stated in her referral to the Special Division that she was seeking an *expansion* of the Independent Counsel's jurisdiction. Or, as former independent counsel Michael Zeldin pointed out, "If he had jurisdiction to investigate it when he wired her, why did he have to go to court to get it afterward? In some ways, he is talking out of both sides of his mouth. . . . It seems to me arguable that he obtained evidence unlawfully. . . ." *Chicago Tribune*, January 25, 1998. And former independent counsel Lawrence Walsh declared, "A prosecutor has no business getting into that case [Paula Jones] unless there's something terrible happening. I question Starr's judgment in going into it so hard." *Chicago Tribune*, January 25, 1998.

Furthermore, the sequence of events suggests that Independent Counsel Starr deliberately delayed requesting the expansion of jurisdiction. Neither Monica Lewinsky nor President Clinton had made any statements under oath in the *Jones* case (at least that had been filed with any court) when Linda Tripp approached the OIC on January 12. The only evidence the OIC possessed at that time were tapes illegally created by Tripp. The OIC itself proceeded to tape the Tuesday, January 13 conversation between Tripp and Lewinsky. Ms. Lewinsky's affidavit was not filed in the *Jones* case until January 16, and the OIC had petitioned the Attorney General the day *before* for an expansion of authority based on the evidence (the Tripp tapes and the OIC's tape) that he had acquired without any authority to do so.

Ms. Tripp remained through the day at the hotel where Ms. Lewinsky was apprehended by the OIC on Friday, January 16, 1998.²⁷ During that day, Ms. Jones' lawyers repeatedly tried to contact Ms. Tripp for a meeting, but she was unavailable. *Ibid.* Late in the afternoon, when it became clear that Ms. Lewinsky would not cooperate in the surreptitious taping of others, the Jones lawyers received a call arranging a meeting with Ms. Tripp for that night, so she could help them prepare for the President's deposition next day. *Ibid.*²⁸ It seems probable that Ms. Tripp, who was acting

²⁷"Linda Tripp Briefed Jones Team on Tapes," *The Washington Post*, Feb. 14, 1998, at A1.
²⁸*The Washington Times*, Feb. 15, 1998, at A1, reported:

"Yesterday, a source close to Mrs. Jones' legal team confirmed that on Jan. 16, the day before Mrs. Jones' lawyers took a deposition from Mr. Clinton, Mrs. Tripp met for two hours with those lawyers at her suburban Maryland home and discussed at length what Miss Lewinsky had said in some 20 hours of secretly recorded conversations. Mrs. Tripp had already given those tapes to Mr. Starr's investigators.

as the OIC's agent under an immunity agreement, must have gotten approval for this briefing from the OIC. Ms. Tripp met with the Jones lawyers at her home in Maryland that night and briefed them on the illegal tapes she had made of Ms. Lewinsky,²⁹ so they could use the contents of those tapes in their questioning of the President.³⁰ Ms. Tripp is under investigation in the state of Maryland because she secretly recorded Ms. Lewinsky and then shared the existence and contents of those tapes with the Jones lawyers. It is a crime in that state, punishable by imprisonment up to five years and a fine of up to \$10,000, for a person to "wilfully" record a conversation without the consent of both parties or to "wilfully" disclose the contents of such an illegally recorded conversation. Md. Code Ann. §10-402 (1997).³¹

On January 17, armed with the information obtained from Ms. Tripp, Ms. Jones' attorneys deposed President Clinton in great detail regarding Ms. Lewinsky. At about this time, the OIC sought to prevent press coverage of its attempt to have Ms. Lewinsky cooperate in secret taping.³²

This entire sequence of events—the OIC's delay in requesting jurisdiction, the OIC's pressure on reporters to withhold public disclosure of the matter,³³ the OIC's unwillingness to permit Ms. Lewinsky to contact her lawyer, and the OIC's dispatch of Ms. Tripp to brief the Jones lawyers about the fruits of her illegal taping the day before they were to depose the President—suggests an intention by the OIC to ensure that the expansion of jurisdiction was kept a secret until the President and Ms. Lewinsky had given testimony under oath and (if Ms. Lewinsky could be so persuaded) she had been enlisted to do surreptitious taping. In other words, rather than taking steps to defer or avoid any possible interference with the *Jones* case, the OIC did everything in its power—and some things outside its authority—to set up a case against the President.

With the information from Mrs. Tripp, the Jones lawyers were able to ask Mr. Clinton in his deposition specific questions about his relationship with and gifts to Miss Lewinsky, according to a person informed about the President's testimony."

²⁹ Under the Maryland electronic surveillance statute, which criminalizes taping without the consent of both parties, it is a violation of the statute simply to disclose that an illegal tape has been made, since the term "Contents", as used in the statute to define what may not be disclosed, is defined to include "any information concerning the identity of the parties to the communication or the *existence*, substance, purport, or meaning of that communication." Md. Code Ann. §10-401(7) (1997) (emphasis added).

³⁰ There is no doubt that the Jones lawyers believed they had a significant tactical advantage due to their knowledge of the Tripp tapes. They may also have known that Ms. Tripp was an OIC agent. After being asked a highly specific series of questions about Ms. Lewinsky, the President replied, "I don't even know what you're talking about, I don't think," and one of the Jones lawyers, James Fisher, responded, "Sir, I think this will come to light shortly, and you'll understand" (p. 85).

³¹ Recent news reports indicate that Ms. Tripp was specifically warned at the Radio Shack store where she brought her tape recorder that it was illegal to tape in Maryland without the consent of the other party. See, e.g., "Tripp Was Told of Law at Store," *The Baltimore Sun*, Aug. 28, 1998, at A1.

³² "Pressgate", *Brill's Content*, August 1998, at 128.

³³ See, e.g., Stephen Brill, "Pressgate" in *Brill's Content* (August 1998) at 127 ("Isikoff says that when he talked to Starr deputy Jackie Bennett, Jr., on Thursday [January 15], Bennett begged him to wait until Friday before trying to call Jordan, the White House, or Lewinsky about his story. . . . Isikoff says he agreed to hold off in exchange for getting a full report on how the stings had gone.").

INITIAL RESPONSE
TO REFERRAL OF

OFFICE OF INDEPENDENT COUNSEL

David E. Kendall
Nicole K. Seligman
Emmet T. Flood
Max Stier
Glen Donath
Alicia L. Marti
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, DC 20005

Charles F.C. Ruff
Cheryl Mills
Lanny A. Breuer
OFFICE OF THE WHITE
HOUSE COUNSEL
The White House
Washington, DC 20005

September 12, 1998

On May 31, 1998, the spokesman for Independent Counsel Kenneth W. Starr declared that the Office's Monica Lewinsky investigation "is not about sex. This case is about perjury, subornation of perjury, witness tampering, obstruction of justice. That is what this case is about."¹ Now that the 450-page Referral to the United States House of Representatives Pursuant to Title 28, United States Code § 595(c) (the "Referral") is public, it is plain that "sex" is precisely what this four-and-a-half year investigation has boiled down to. The Referral is so loaded with irrelevant and unnecessary graphic and salacious allegations that only one conclusion is possible: its principal purpose is to damage the President.

The President has acknowledged and apologized for an inappropriate sexual relationship with Ms. Lewinsky, so there is no need to describe that relationship in ugly detail. No one denies that the relationship was wrong or that the President was responsible. The Referral's pious defense of its pornographic specificity is that, in the Independent Counsel's view:

"the details are crucial to an informed evaluation of the testimony, the credibility of witnesses, and the reliability of other evidence. Many of the details reveal highly personal information; many are sexually explicit. This is unfortunate, but it is essential."

Narrative at 20. This statement is patently false. Any fair reader of the Referral will easily discern that many of the lurid allegations, which need not be recounted here, have no justification at all, even in terms of any OIC legal theory. They plainly do not relate, even arguably, to activities which may be within the definition of "sexual relations" in the President's *Jones* deposition, which is the excuse advanced by the OIC. They are simply part of a hit-and-run smear campaign, and their inclusion says volumes about the OIC's tactics and objectives.

Review of a prosecutor's case necessarily starts with an analysis of the charges, and that is what we offer here. This is necessarily a very preliminary response, offered on the basis of less than a day's analysis and without any access to the factual materials cited in the Referral.

Spectacularly absent from the Referral is any discussion of contradictory or exculpatory evidence or any evidence that would cast doubt on the credibility of the testimony the OIC cites (but does not explicitly quote). This is a failure of fundamental fairness which is highly prejudicial to the President and it is reason alone to withhold judgment on the Referral's allegations until all the prosecutors' evidence can be scrutinized—and then challenged, as necessary, by evidence from the President.

¹ CNN Late Edition with Wolf Blitzer (May 31, 1998). Other commentators and journalists have made similar assertions. See, e.g., *The Washington Times* (March 19, 1998); *The New York Times* (March 29, 1998); ABC Nightline (April 15, 1998); *The Washington Times* (July 29, 1998).

The real critique can occur only with access to the materials on which the prosecutors have ostensibly relied. Only at that time can contradictory evidence be identified and the context and consistency (or lack thereof) of the cited evidence be ascertained. Since we have not been given access to the transcripts and other materials compiled by the OIC, our inquiry is therefore necessarily limited. But even with this limited access, our preliminary review reaffirms how little this highly intrusive and disruptive investigation has in fact yielded. In instance after instance, the OIC's allegations fail to withstand scrutiny either as a factual matter, or a legal matter, or both. The Referral quickly emerges as a portrait of biased recounting, skewed analysis, and unconscionable overreaching.

In our Preliminary Memorandum, filed yesterday, at pages 3–12, we set forth at some length the various ways in which impeachable “high Crimes and Misdemeanors” have been defined. Nothing in the Referral even approximates such conduct. In the English practice from which the Framers borrowed the phrase, “High Crimes and Misdemeanors” denoted political offenses, the critical element of which was *injury to the state*. Impeachment was intended to redress public offenses committed by public officials in violation of the public trust and duties. Because presidential impeachment invalidates the will of the American people, it was designed to be justified for the gravest wrongs—offenses against the Constitution itself. In short, only “serious assaults on the integrity of the processes of government,”² and “such crimes as would so stain a president as to make his continuance in office dangerous to the public order,”³ constitute impeachable offenses. The eleven supposed “grounds for impeachment” set forth in the section of the Referral called “Acts That May Constitute Grounds for an Impeachment” (“Acts”) fall far short of that high standard, and their very allegation demeans the constitutional process. The document is at bottom overreaching in an extravagant effort to find a case where there is none.

ALLEGATION I—PERJURY IN JANUARY 17, 1998, DEPOSITION

We begin our response to the OIC's charge that the President committed perjury in his January 17 deposition in the *Jones* case with these simple facts: the President's relationship with Ms. Lewinsky was wrong; he admitted it was wrong; and he has asked for the forgiveness of his family and the American people. The perjury charges in the Referral in reality serve one principal purpose for the OIC—to provide an opportunity to lay out in a public forum as much salacious, gratuitous detail as possible with the goal of damaging the President and the presidency.

The OIC begins its catalogue of “acts that may constitute grounds for impeachment” with the allegation that “[t]here is substantial and credible information that President Clinton lied under oath as a defendant in *Jones v. Clinton* regarding his sexual relationship with Monica Lewinsky.” Acts at 5. The OIC contends that, for legal reasons, it must discuss its allegations of sexual activity in detail and then goes out of its way to supply lurid detail after

² Charles L. Black, Jr. *Impeachment: A Handbook*—38–39 (1974)

³ *Ibid.*

lurid detail that are completely irrelevant to any legal claim, obviously hoping that the shock value of its footnotes will overcome the absence of legal foundation for the perjury allegation.

In reaching any fair judgment as to the merits of the OIC's claim that the President's testimony establishes a basis for impeachment, it is important to understand a few additional points. First, the OIC barely acknowledges the elements of perjury, including, in particular, the substantial burden that must be met to show that the alleged false statements were made "knowingly," Preliminary Memorandum at 52, or that they were material to the *Jones* proceeding.

Second, the OIC ignores the careful standards that the courts have mandated to prevent the misuse of perjury allegations. As was set out in detail in our Preliminary Memorandum, pages 51–64, literally true statements cannot be the basis for a perjury prosecution, even if a witness intends to mislead the questioner. Likewise, answers to inherently ambiguous questions cannot constitute perjury. And, normally, a perjury prosecution may not rest on the testimony of a single witness.

Third, by selectively presenting the facts and failing to set out the full context of the answers that it claims may have been perjurious, the OIC has presented a wholly misleading picture. This tactic is most pronounced in the OIC's astonishing failure to set out the initial definition of "sexual relations" presented by the *Jones* lawyers at President Clinton's deposition, two parts of which were eliminated by Judge Wright as being "too broad."⁴ The OIC also fails to mention that the *Jones* lawyers were fully able, and indeed were invited by President Clinton's counsel, to ask the President specific questions about his sexual encounters, but they chose not to do so. See Preliminary Memorandum at 65.

These surprising and substantial gaps in the Referral, and the OIC's purposefully incomplete presentation reflect the extreme weakness of the OIC's contention that the President's deposition testimony about "sexual relations" may constitute perjury.

As any fair prosecutor would acknowledge, what the OIC dismisses as a mere "semantical defense" is, in fact, reflective of the great care the courts have taken to ensure that a witness is not charged with perjury except when the government can demonstrate a clear intent to provide false testimony. Thus, in any ordinary prosecutor's office, and surely in the chambers of the House Judiciary Committee, the definitions of such terms as "sexual affair," "sexual relations," and "sexual relationship" would be seen as vital

⁴The President was presented with the following definition, as he understood the court to have amended:

Definition of Sexual Relations

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

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

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

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

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

to a determination whether some violation of law had occurred.⁵ The burden that must be met by the OIC extends beyond showing that the President was wrong on the semantics, it must also show that, because perjury is a specific intent crime, he *knew* he was wrong and *intended* to lie—something that the OIC could not begin to demonstrate. In fact, all the OIC has is a witness who gave narrow answers to ambiguous questions.

Lawyers' arguments, however well taken, should not obscure the President's admission that his relationship with Ms. Lewinsky was wrong and his acceptance of responsibility for his conduct. But one example will suffice to demonstrate the inherent weakness of the OIC's claim. The OIC argues that oral sex falls within the definition of sexual relations and that the President therefore lied when he said he denied having sexual relations. It is, however, the President's good faith and reasonable interpretation that oral sex was outside the special definition of sexual relations provided to him. The OIC simply asserts that it disagrees with the President's "linguistic parsing," and that reasonable people would not have agreed with him. Acts at 30. This simply is not the stuff of which criminal prosecutions—and surely impeachment proceedings—are made.

What is left, then, is a disagreement about the very specific details of certain encounters that the President has acknowledged were improper—the very "oath against oath" that the law and experience reject as a basis for a prosecution, because a perjury conviction cannot rest on simple inconsistencies and memory disparities between only two witnesses.

Instead of acknowledging the well-settled legal limits on perjury cases, or grappling with the important limitations on perjury prosecutions, the OIC has chosen to fill its report with unnecessary and salacious sex—details that cause pain and damage for absolutely no legitimate reason.

ALLEGATION II—PERJURY IN AUGUST 17, 1998, GRAND JURY TESTIMONY

In its second allegation, the OIC contends that "[t]here is substantial and credible information that President Clinton lied under oath to the grand jury about his sexual relationship with Monica Lewinsky." Acts at 40. In particular, the OIC alleges that the President committed perjury three times: (1) when he testified that he believed oral sex was not covered by any of the terms and definitions for sexual activity used at the Jones deposition; (2) when he contradicted Ms. Lewinsky's grand jury testimony on the question whether the President touched Ms. Lewinsky's breasts or genitalia during their sexual activity, since "[t]here can be no contention that one of them has a lack of memory or is mistaken," *id.*; and (3) when he testified to a purportedly false date on which his relationship with Ms. Lewinsky commenced. None of these "allegations" makes out a prima facie case of perjury, and none can possibly constitute a "ground" for impeachment.

⁵For example, dictionary definitions of "sexual relations" expressly support the President's interpretation. See, e.g., Webster's Third International Dictionary (defining "sexual relations" as "coitus"). Yet, apparently, the OIC did not bother to check a dictionary before leveling its accusations.

1. The OIC first claims that the President testified falsely that he did not believe oral sex to be covered by any of the terms and definitions for sexual activity used at the *Jones* deposition. As noted in response to the first allegation, *supra*, the terms “sexual affair” and “sexual relationship” are inherently ambiguous and, when used without definition, cannot possibly amount to perjury. The President testified to the grand jury about what he believed those terms mean. Not content to accept his explanation, the OIC makes the extraordinary (and factually unsupported) claim that the President committed perjury before the grand jury by lying not about some fact but about his belief about the meaning of certain words. The OIC then compounds this error by claiming as perjury the President’s explanation of his understanding of the contorted definition of “sexual relations” in the *Jones* suit, as modified by the court.

This claim is quite stunning. The OIC charges the President with perjury, saying it is “not credible” that the President believed oral sex fell *outside* the definition he was given, even though it plainly did, and even though many commentators and journalists have stated that they believe that the definition of sexual relations in the *Jones* deposition did not include oral sex (performed on the President). *See, e.g., Internight*, August 12, 1998 (Cynthia Alksne) (“when the definition finally was put before the president, it did not include the receipt of oral sex.”); “DeLay Urges a Wait For Starr’s Report,” *The Washington Times*, August 31, 1998 (“The definition of sexual relations, used by lawyers for Paula Jones when they questioned the president, was loosely worded and may not have included oral sex.”); “Legally Accurate,” *The National Law Journal*, August 31, 1998 (“Given the narrowness of the court-approved definition in [the *Jones*] case, Mr. Clinton indeed may not have perjured himself back then if, say, he received oral sex but did not reciprocate sexually.”). Despite the fact that several reasonable commentators agree with the President’s interpretation, the OIC acts as though the President’s interpretation of the definition in the *Jones* case is both unique and untenable. It is in fact the OIC’s theory that is untenable.

It is beyond debate that false testimony provided as a result of confusion or mistake cannot as a matter of law constitute perjury. *See United States v. Dunnigan*, 507 U.S. 87, 94 (1993); Department of Justice Manual, 1997 Supplement, at 9–69.214. Moreover, if there is any doubt as to the falsity of testimony, the issue must be resolved in favor of the accused. *See United States v. Chaplin*, 25 F.3d 1373, 1380 (7th Cir. 1994) (the government must prove falsity by direct evidence, and not inferences). The definitions on which the President relied are shared both by dictionaries, *see* discussion of Allegation I, *supra*, and by commentators. The OIC’s very allegation that the President committed perjury by re-explaining his belief and interpretation to the grand jury is yet another indication of the extent of the OIC’s overreaching in this Referral.⁶

⁶This overreaching is compounded by the complete lack of legal citation and analysis in the Referral. Perjury is a specific intent crime, and is an area of the law in which stringent safeguards have been erected to make perjury prosecutions exceedingly difficult. Rather than explain how, notwithstanding these safeguards, it has made out a valid perjury charge, the OIC has elected simply to forego discussing the law entirely.

2. The OIC's next charge—that the President testified falsely when he contradicted Ms. Lewinsky's grand jury testimony on the question whether he touched Ms. Lewinsky's breasts or genitalia during their sexual activity—is substantially identical to the allegation contained in Allegation I, *supra*, and cannot constitute perjury for the same reason. The critical issue here is not whether the testimony of the President and Ms. Lewinsky differ but whether there is any evidence that the President knowingly and intentionally gave false testimony. It is worthwhile to note, however, the inaccuracy of the OIC's assertion that “[t]here can be no contention that one of them has a lack of memory or is mistaken” about the details of their physical relationship. Acts at 40.

3. The OIC's final allegation here is that the President made a false statement to the grand jury regarding the timing of the beginning of his relationship with Ms. Lewinsky. Whereas the Referral indicates that the President remembers the improper relationship beginning early in 1996, Ms. Lewinsky has apparently testified that it began November 15, 1995. As a legal allegation this claim is frivolous, because the statement by the President regarding the timing of the relationship (mid-November 1995 as opposed to January 1996) was utterly immaterial to the grand jury's investigation. The Supreme Court has held that “there is no doubt that materiality is an element of perjury.” *Johnson v. United States*, _____ U.S. _____, 117 S. Ct. 1544, 1548 (1997). The test for materiality is whether the statement in question had “a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed.” *United States v. Gaudin*, 515 U.S. 506, 509 (1995). There is no conceivable way in which any statement by the President with regard to the date (within a few weeks) of the commencement of his relationship with Ms. Lewinsky could possibly have influenced the grand jury, and the OIC has of course not identified how the grand jury was “influenced” by this testimony. The President acknowledged to the grand jury his improper relationship, beginning early in 1996, with Ms. Lewinsky, and his testimony regarding the date that the relationship began cannot possibly have influenced the grand jury in any decision-making function. The mere fact that the OIC would allege perjury as a result of an utterly immaterial statement speaks volumes about the overreaching in the Referral.

ALLEGATION III—MEETINGS AND EXCHANGING GIFTS WITH MS. LEWINSKY

In its third allegation, the OIC makes various claims of perjury based on President Clinton's statements in the *Jones* deposition regarding whether he had been alone with Ms. Lewinsky in the Oval Office and in an adjacent hallway and whether he and Ms. Lewinsky had exchanged gifts. Like the other perjury allegations, the OIC fails to offer a credible case.

First and foremost, President Clinton did not deny meeting alone with Ms. Lewinsky at the White House nor deny that they exchanged gifts. In essence, the OIC's complaint is that President Clinton was not more forthcoming, which is plainly not a ground for perjury, rather than that he knowingly lied under oath. This is

perhaps most clearly seen in the OIC's heading for this allegation, which sets forth the accusation that President Clinton "minimized the number of gifts they had exchanged," Acts at 45, which of course concedes that he acknowledged that gifts were exchanged. There is not much that is safe from a perjury prosecution if mere "minimization" qualifies for the offense. The transcript makes it clear that, when asked about particular gifts, the President honestly stated his recollection of the particular item.

Nor can President Clinton's testimony regarding whether he was alone with Ms. Lewinsky at various times and places constitute perjury. The *Jones* lawyers often failed to follow up on incomplete or unresponsive answers. Read as a whole, the deposition makes clear that the President acknowledged being alone with Ms. Lewinsky on some occasions. The Referral unfortunately mischaracterizes the testimony to suggest an absolute denial, for example, transforming a question about being alone with Ms. Lewinsky *in the Oval Office* (where the President did not recall engaging in improper contact) into being alone at all ("The President lied when he said "I don't recall" in response to the question whether he had ever been alone with Ms. Lewinsky." Acts at 51.). And, surprisingly since the *Jones* lawyers had been briefed by Ms. Tripp, the *Jones* lawyers never asked the President whether he was alone with Ms. Lewinsky in the study, where some of the alleged activity took place. They were free to ask specific follow-up questions about the nature and locale of any physical contact, and they did not do so. The OIC cannot now hold the President to blame for their failure.

ALLEGATION IV—DISCUSSIONS WITH MS. LEWINSKY ABOUT POTENTIAL TESTIMONY

The Referral claims that in the following exchange in President Clinton's January 17 deposition in the *Jones* case he committed perjury:

Q: Have you ever talked to Ms. Lewinsky about the possibility that she might be asked to testify in this lawsuit?

A: I'm not sure and let me tell you why I'm not sure. It seems to me the . . . I want to be as accurate as I can here. Seems to me the last time she was there to see Betty before Christmas we were joking about how you-all, with the help of the Rutherford Institute, were going to call every woman I'd ever talked to and . . . ask them that, and so I said you would qualify, or something like that. I don't, I don't think we ever had more of a conversation than that about it, because when I saw how long the witness list was, or I heard about it, before I saw, but actually by the time I saw her name was on it, but I think that was after all this happened. I might have said something like that, so I don't want to say for sure I didn't because I might have said something like that.

Q: What, if anything, did Monica Lewinsky say in response?

A: Nothing, that I remember. Whatever she said, I don't remember. Probably just some predictable thing.

This answer was literally accurate. The President described a joking conversation that he had with many women about the *possibility* that they might be subpoenaed by the *Jones* lawyers. He made clear that the recollection of the conversation with Ms. Lewinsky *preceded* the appearance of Ms. Lewinsky's name on the witness list (on December 5), saying: "by the time I saw [the witness list on December 6] her name was on it, but I think that was after all this had happened." The President also stated three different times in that one answer that he was not certain as to his recollection, saying, "I'm not sure," "I don't think," and "I might have said something like that." In his grand jury testimony, additional details of a December 28 conversation with Ms. Lewinsky were provided by the President. The testimony that the Referral cites is not inconsistent—his first answer indicating he was referring to a conversation that occurred *before* she had been named a witness, and his August 17 testimony describing a conversation after she had been subpoenaed in mid-December. The fact that Ms. Lewinsky recalls additional conversations on the subject, all occurring after she had been named on the witness list, does not establish that the President's answer was inaccurate. This answer cannot possibly support a perjury charge.

ALLEGATION V—CONCEALING GIFTS AND AN INTIMATE NOTE

In its fifth allegation, the OIC contends that President Clinton obstructed justice by concealing gifts he had given to Ms. Lewinsky. This claim is wholly unfounded and simply absurd. On her December 28, 1997 visit, the President gave Ms. Lewinsky several holiday and going-away gifts. Ms. Lewinsky apparently testified that, during the visit, she raised a question about the *Jones* subpoena and suggested "put[ting] the gifts away outside of my house or somewhere or giv[ing] them to someone, maybe Betty." Acts at 74–75. To this suggestion, the President, according to Ms. Lewinsky's reported testimony, responded with something like, "I don't know" or "Hmmm" or "there really was no response."⁷ President Clinton contradicts this testimony. But even if one accepts Ms. Lewinsky's testimony, "I don't know," "Hmmm" and silence do not constitute obstruction of justice.

Moreover, Ms. Lewinsky's testimony is contradicted by Ms. Currie who testified that it was Ms. Lewinsky, not the President, who asked her to come get the gifts and keep them. The OIC tries to impugn Ms. Currie's memory in the quoted passage, yet her recollection is consistent with the testimony of one of the two other parties to the events. Indeed, the OIC's effort to shore up its case by trying to discount Ms. Currie's testimony on this point is a prime example of the dangers of relying on the OIC's development and presentation of the evidence. When confronted with testimony not to its liking from Ms. Currie, the OIC responded by questioning

⁷The ambiguity and indeterminacy of Ms. Lewinsky's testimony here, as quoted by the OIC, dramatically illustrates the need to review carefully *all* the materials which the OIC cryptically cites in the Referral.

her in a manner clearly designed to encourage Ms. Currie to restate her recollection in a manner consistent with the OIC's theory of the case. Acts at 77.⁸

The OIC's theory of concealment also is belied by Ms. Lewinsky's decision to turn over some, but not all, of the gifts she had received from the President to Ms. Currie; if the purpose of the exercise was to avoid having gifts in her possession at the time of the deposition (which of course would not have been proper), retaining some gifts made no sense. But the OIC is forced to acknowledge that only one of the several gifts the President gave to Ms. Lewinsky on December 28, 1997 was included in the box she gave to Ms. Currie for safekeeping. The theory makes no sense.

Ultimately, the only theory that does make sense is the truth, as testified to by the President and Ms. Currie and as supported by the fact that the President acknowledged giving Ms. Lewinsky gifts as early as his January 17, 1998 deposition. The President was unconcerned about the gifts he had given to Ms. Lewinsky because he frequently exchanges gifts with friends. That is why he gave her additional gifts on December 28 even though, according to her testimony, he knew the *Jones* lawyers were interested in them. Thus, when she raised a question, he told Ms. Lewinsky she had to turn over what she had; they were of no concern to him. Nonetheless, in response to Ms. Lewinsky's subsequent request, Ms. Currie drove to Ms. Lewinsky's apartment and picked up a box of gifts from Ms. Lewinsky and held them for safekeeping. The President did not direct or encourage Ms. Currie's activities regarding the gifts. He likewise did not obstruct justice by concealing their existence.

The OIC also argues that the President obstructed justice in the *Jones* case by destroying an intimate note that Ms. Lewinsky included in a book she left for him on January 4, 1998.⁹ The OIC states in its Referral that the President was served with a document request from the *Jones* lawyers on December 16, 1997, that required him to produce this note to the *Jones* lawyers. The disingenuousness of this allegation is apparent on several levels.

As a preliminary matter, the President testified that he recalled receiving a book from Ms. Lewinsky, that he believed he had received it in December, and that he did not recall receiving an accompanying note. Deposition of the President, August 17, 1998. Contrary to the one-sided presentation of the purported facts in the OIC's referral, the President may not even have received that note.

Second, the OIC asserts, without basis, that the President purposefully destroyed Ms. Lewinsky's note because he did not want to have to turn it over to the *Jones* lawyers. The OIC has absolutely no basis for assuming that the President was aware of the document request at the time he received the book. Thus, even as-

⁸The lengths to which the OIC is willing to go to force evidence into the picture it wants to draw is further revealed by its citation to the fact that Ms. Currie drove to Ms. Lewinsky's apartment to pick up the gifts as evidence that Ms. Lewinsky's story, rather than Ms. Currie's, is the correct one. According to the OIC, "the person making the extra effort (in this case, Ms. Currie) is ordinarily the person requesting the favor." Acts at 83. There is no basis in logic or experience for this position.

⁹The United States Secret Service WAVES records do not reflect a clearance request or an entry into the White House complex by Ms. Lewinsky on this date (or any other date in 1998).

suming the President had received and discarded the note, his acts would not constitute obstruction of justice.

Finally, setting aside whether the President actually received Ms. Lewinsky's note, or knew whether it was subject to a document request, at bottom the OIC is transforming a civil discovery issue into yet another flimsy criminal charge, accusing the President with obstruction of justice on the basis of his alleged failure to produce this note to the *Jones* lawyers. As the OIC clearly knows, the obstruction of justice statute does not apply to a party's concealing or withholding of discoverable documents in *civil* litigation. See, e.g., *Richmark v. Timber Falling Consultants*, 730 F. Supp. 1525, 1532 (D. Or. 1990) (“[t]he parties have not cited and the court has not found any case in which a person was charged with obstruction of justice for concealing or withholding discovery in a civil case”). Demonstrable non-compliance with the rules is sanctioned civilly as an abuse of the discovery process. See Rule 37, Fed. R. Civ. P. (“Failure to Make Disclosure or Cooperate in Discovery: Sanctions”). Therefore, even if, as the OIC alleges, the President received and discarded the note in the wake of an outstanding request—which the President testified he did not—those actions would not constitute obstruction of justice. The OIC's allegation is missing both the facts and the law.

ALLEGATION VI—CONCEALMENT OF THE RELATIONSHIP

In the sixth allegation, the OIC contends that there is substantial and credible information that:

- (i) President Clinton and Ms. Lewinsky had an understanding that they would lie under oath in the *Jones* case about their relationship; and
- (ii) President Clinton endeavored to obstruct justice by suggesting that Ms. Lewinsky file an affidavit so that she would not be deposed, she would not contradict his testimony, and he could attempt to avoid questions about Ms. Lewinsky at his deposition.

The essence of the OIC's argument is that, because the President and Ms. Lewinsky attempted to conceal the improper nature of their relationship while it was going on and because the President failed affirmatively to assure that each statement contained in the affidavit filed by Ms. Lewinsky was true, he therefore obstructed justice. The Referral fails even to allege facts that, if true, would constitute obstruction of justice under the law as set out in our Preliminary Memorandum at pp. 21–25.

First, the Referral alleges that during the course of their admittedly improper relationship, the President and Ms. Lewinsky concealed the nature of their relationship from others. This is hardly a remarkable proposition. The use of “cover stories” to conceal such a relationship, apart from any proceeding, is not unusual and not an obstruction of justice.

The Referral alleges only one specific statement that Ms. Lewinsky claims the President made to her regarding the substance of her testimony. Ms. Lewinsky testified that the President told her, “You know, you can always say you were coming to see

Betty or that you were bringing me letters.” Act at 98. As an initial matter, the President testified that he did not recall saying anything like that in connection with Ms. Lewinsky’s testimony in the *Jones* case. But even if he did, neither of those two ambiguous statements would be false. And most importantly, as even the OIC concedes, Narrative at 29, the President never instructed her to lie.

The Referral also alleges that the President somehow obstructed justice by suggesting to Ms. Lewinsky that she could sign an affidavit in the *Jones* case. But the Referral again fails to establish how this might constitute obstruction. The OIC makes no contention that the President ever told Ms. Lewinsky to file a false affidavit. A suggestion to submit written testimony under oath in a judicial proceeding, *if* he made it, is hardly improper—let alone an obstruction of justice. The President was aware that other potential deponents in the *Jones* case had filed affidavits in an attempt to avoid the expense, burden, and humiliation of testifying in the *Jones* case, and that there was a chance that doing so might enable Ms. Lewinsky to avoid testifying. Even if the affidavit did not “disclose the true nature of their relationship,” as the OIC asserts, since the *Jones* case concerned allegations of nonconsensual sexual solicitation, a truthful albeit limited affidavit *might* have allowed her to have avoided giving a *Jones* deposition. But the President never told Ms. Lewinsky what to say in the affidavit, knew that Ms. Lewinsky had her own lawyer to protect her interests, and expressly declined the opportunity to review the content of the affidavit, according to Ms. Lewinsky. Narrative at 203. The OIC’s position appears to be that this is somehow obstruction of justice—that the President had an affirmative duty to ensure that Ms. Lewinsky volunteered in her affidavit all information in which the *Jones* lawyers might possibly have an interest. There simply is no such duty under the law, nor does the OIC cite any basis for such a duty. Civil litigation is based upon an *adversarial* process of determining truth, and a party is under no affirmative obligation to assist an opponent in every way it can.

Finally, the OIC suggests that the President was “knowingly responsible” for a misstatement of fact to a federal judge because he failed to correct a statement made by his lawyer to the court in the *Jones* deposition. The President testified to the grand jury that the lawyers’ argument at the start of the deposition “passed [him] by;” he also remarked that the statement of his lawyer might be literally true. The OIC distorts this response to suggest the President testified that he did not correct the statement at the January deposition because it might have been true. We do not believe the testimony would support that claim.

There is of course no legal obligation imposed on a client to listen to every word his attorney says, and the OIC has no evidence that the President even focused on or absorbed his attorney’s remark. Without any evidence whatsoever, the OIC asserts that the President knew what was said, knew he was somehow responsible for it, knew it was incorrect and ignored a duty to correct it. Yet, again, the OIC has made a wholly unsupportable allegation of obstruction of justice.

ALLEGATION VII—JOB SEARCH FOR MS. LEWINSKY

In its seventh allegation, the Referral contends that certain actions taken on behalf of Ms. Lewinsky in her job efforts amounted to obstruction of justice. The Referral acknowledges that the case for obstruction based on the job search is wholly circumstantial and that there is absolutely “no evidence” of any “arrangement . . . explicitly spelled out.” Acts at 113 n.361. Noting that the critical issue centers on the intent of the party providing the assistance, the Referral asks that “inferences be drawn” from the circumstantial evidence set forth in the Referral chronology. *Id.* at 113.

But that chronology presents precious little in the way of Presidential involvement and nothing that supports an inference of any intent to obstruct justice by helping Ms. Lewinsky (to the limited extent he did) in her job efforts. It may be the OIC’s view that the President should have cast Ms. Lewinsky off and refused to assist her in any way, simply because the *Jones* case was filed. Fortunately the law requires no such callous absurdity.

The Referral states that the President agreed to help Ms. Lewinsky look for a job, Acts at 105; that he said he would take care of finding her a reference from someone in the White House, *Id.* at 105; and that after Ms. Lewinsky obtained a job, the President asked Erskine Bowles “could we see if [John Hilley] could recommend her, if asked,” *Id.* at 111–12. There is no suggestion that he ever ordered or directed anyone to assist Ms. Lewinsky or asked anyone to give her special advantages or disadvantages because of their relationship or that he ever *linked* his relatively insubstantial assistance to a requirement that she act—or testify—in a certain way. The kinds of actions that are alleged simply do not constitute obstruction of justice.

Indeed, upon close reading, the Referral itself acknowledges the following facts, which, if taken as true, are all at odds with the notion that the President acted with corrupt intent:

- that it *was Ms. Lewinsky* who initiated discussions about a job in New York; Acts at 104, Narrative at 117;
- that the subject of a job in New York was raised on July 3, 1997—more than three months before the President was served with interrogatories in the *Jones* case, and more than five months before Ms. Lewinsky’s name appeared on a witness list; Acts at 104;
- that *it was Ms. Lewinsky* who broached the subject of receiving the President’s help in obtaining a job in New York; Acts at 104–05;
- that Ms. Lewinsky presented the President with a list of jobs in which she was interested; Acts at 105;
- that Ms. Lewinsky suggested that a White House job reference would be useful; Acts at 105;
- that Ms. Lewinsky suggested that Vernon Jordan might be able to help her; Acts at 105; and
- that, notwithstanding the Referral’s insinuations to the contrary, the President and Ambassador Bill Richardson testified that they never discussed Ms. Lewinsky with each other; Narrative at 145.

This account fails to allege facts supporting a case of obstruction of justice under the only statute that could conceivably apply here, 18 U.S.C. § 1503. Under that provision, the government must prove obstruction of justice by establishing that there was a pending judicial proceeding, that the defendant knew of the proceeding, and that the defendant acted “corruptly” with the specific intent to obstruct or interfere with the proceeding or due administration of justice. *See, e.g., United States v. Buicey*, 876 F.2d 1297, 1314 (7th Cir. 1989); *United States v. Smith*, 729 F. Supp. 1380 (D.C.C. 1990). Four federal courts of appeals have held that the “act corruptly” element of the crime requires that the defendant have acted with the specific intent to obstruct justice. *See, e.g., United States v. Moon*, 718 F.2d 1219, 1236 (2d Cir. 1983); *United States v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992); *United States v. Rasheed*, 663 F.2d 843, 847 (9th Cir. 1981). It is simply not enough that the effects of a person’s actions may have had the effect of somehow impeding justice if that was not the intent of the person accused. And here it is not even clear how the President’s limited assistance was meant to or did obstruct *anything*.

ALLEGATION VIII—CONVERSATIONS WITH MR. JORDAN

The OIC asserts in its eighth allegation that the President was “asked during his civil deposition whether he had talked to Mr. Jordan about Ms. Lewinsky’s involvement in the *Jones* case” and that he “stated that he did not recall whether Mr. Jordan had talked to Ms. Lewinsky about her involvement in the *Jones* case.” Acts at 115. This account of the question and answer is simply false. The President was not asked that question, and he did not give that answer.

To bolster this extraordinary claim, the OIC misrepresents certain of the President’s deposition responses. First, the OIC quotes one question and answer—

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

A. *I don’t think so.* (emphasis added in Referral)

but omits the next question and answer, even though it is apparent from the text, and the OIC was told by the President, that the next question and answer were a continuation:

Q. Did you ever talk with Monica Lewinsky about the possibility that she might be asked to testify in this case?

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

This unresponsive answer reflects the President’s effort to recall, in response to the *prior* question, where he had first learned about the subpoena, but the word “first” implies there were other people (perhaps Mr. Jordan) who told him. The *Jones* lawyers simply did not pursue this by asking the logical follow-up questions.

Nor do the remaining two passages state what the OIC claims. The next passage asked whether, in the past two weeks (before

January 17) anyone had reported to the President that they had had a conversation with Ms. Lewinsky about the lawsuit, to which the President replied he did not believe so. This response of course does not rule out all conversations with Mr. Jordan about Ms. Lewinsky's involvement in the case, as the OIC would suggest, but only in the two-week period and only accounts of conversations *with* Ms. Lewinsky, not conversations simply about her involvement in the case. Moreover, the OIC's 252-page Narrative does not identify reports to the President about conversations that Mr. Jordan had with Ms. Lewinsky in that time period—instead, it recounts only that, 10 days before the deposition, Mr. Jordan left word for the President that the affidavit was signed. The last passage on which the OIC relies simply asked whether the President had heard that Mr. Jordan and Ms. Lewinsky *met* to discuss the case; the President recounted his belief that the two had *met* to discuss the job search—about which the President readily acknowledged an awareness. The OIC's assertion that the President “did not recall whether Mr. Jordan had talked to Ms. Lewinsky about her involvement in the *Jones* case,” is simply not supported by the testimony. This allegation is a fabrication by the OIC.

ALLEGATION IX—“WITNESS TAMPERING”

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

The President's actions could not as a matter of law give rise to either charge because Ms. Currie was not a witness in any proceeding at the time he spoke with her: her name had not appeared on any of the *Jones* witness lists; she had not been named as a witness in the *Jones* case; there were just two weeks of discovery left in the case; and there was no reason to suspect she would play any role in that case. The President had no reason to suspect that the OIC had embarked on a wholly new phase of its four-year investigation, one in which Ms. Currie would later be called by the OIC as a witness. To obstruct a proceeding or tamper with a witness, there must be both a witness and a proceeding. Here, there was neither. Despite the OIC's far-fetched suggestion to the contrary, there was no reason the President should not have spoken with Ms. Currie about Ms. Lewinsky.

Indeed, it is hardly surprising that the President would have reached out to Ms. Currie after the deposition. Ms. Currie was Ms. Lewinsky's friend. The President had just faced unexpected and hostile questioning by his fierce political opponents in the *Jones* case about Ms. Lewinsky. He was obviously puzzled at being asked such detailed (and in some cases such bizarrely inaccurate) questions about a past secret relationship. He had no one to whom he could talk freely about the relationship, but he nonetheless had a desire to find out what might have transpired with Ms. Lewinsky and to test his recall, since he had not anticipated such detailed

questions or prepared for them. It was his belief that Ms. Currie was unaware that he had engaged in improper activity with Ms. Lewinsky. He wanted to reassure himself that that was so. He also recalled that in 1997, after the improper relationship ended, he had asked Ms. Currie to try always to be present when Ms. Lewinsky visited. He wanted to inquire whether that was also Ms. Currie's recollection. The President's actions were hardly surprising since he had just undergone hostile and unexpected questioning in a bitterly contested civil suit.

Whatever his reasons, however, one simple fact remains. At the time he discussed Ms. Lewinsky with Ms. Currie, Ms. Currie was not expected to be, nor was she, a witness. Again, the OIC has wholly overreached to make baseless allegations of criminal conduct.

ALLEGATION X—REFUSAL TO TESTIFY

The tenth allegation is premised on the OIC's misrepresentation of the facts. The assertion that "[the President] simultaneously lied to potential grand jury witnesses," "[w]hile refusing to testify for seven months" is a gross distortion of the Referral's own citations.

The statements to Presidential aides cited by the Referral were made either on the day the Lewinsky story broke (January 21, 1998) or within a few days of that date. Those statements were concurrent in time with the President's repeated public statements to the country denying sexual relations with Ms. Lewinsky. And they were virtually identical in substance. Having announced to the whole country on live television that he was not having sexual relations with Ms. Lewinsky, it is simply absurd to believe that he was somehow attempting to corruptly influence the testimony of aides when he told them virtually the same thing at the same time.

And in any event, the mere repetition of a public denial to these aides could not have affected the grand jury process. The elicited testimony was hearsay. The aides were not witnesses to any sexual activity, and they had no first-hand knowledge pertinent to the denials. Their testimony as to what they heard from the President was truthful—the President in no conceivable way sought to alter any other perceptions or information they might have had. Their testimony thus was merely cumulative of the President's own nationally broadcast statements. The suggestion that the President violated section 1503's prohibition on "influenc[ing], obstruct[ing], or imped[ing] the due administration of justice" is groundless. There is and could be no evidence that the President had a specific intent to obstruct justice by his aides' repetition of his own denials.

Nor is there evidence that the President's statements constituted "witness tampering" in violation of section 1512. To make out such a violation, the government must show that the behavior knowingly occurred through one of the specific means set forth in the statute: intimidation, physical force, threats, misleading conduct or corrupt persuasion—with intent to influence testimony in a legal proceeding. A defendant must be aware of the legal proceeding's existence, and his efforts must be aimed specifically at obstructing that proceeding. See *United States v. Wilson*, 565 F. Supp. 1416, 1431 (S.D.N.Y. 1983). In fact, the President simply repeated to

aides substantially the same statement he made to the whole country. There was no action here intended specifically to influence the grand jury through the testimony of Presidential aides. Under the OIC's theory, it could have subpoenaed to the grand jury any citizen who heard the President's denial and thus have created a new violation of law.

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

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

ALLEGATION XI—ABUSE OF POWER

As the Office of Independent Counsel itself acknowledges, Acts at 148, from the very beginning, its investigation was focused on the prospect that the information it was gathering would be transmitted to the Congress. It is in this context, with the threat of impeachment on the horizon, that the OIC's last allegation of an abuse of power must be judged.

The OIC begins with the charge that the President's false denial that he had an improper relationship with Ms. Lewinsky—something that he has now admitted and apologized for—was itself an abuse of power because it served to deceive the American people. Implicit in this charge is the notion that any official, in any branch of the government, who makes a public statement about his own conduct, or indeed any other matter, that is not true may be removed from office. It would follow, therefore, that no official could mount a defense to impeachment, or to ethics charges, or to a criminal investigation while remaining in office, for anything other than an immediate admission of guilt will necessarily be misleading.

In the *Federalist Papers*, Alexander Hamilton described abuse of power as the "corrupt use of the office for personal gain or some other improper purpose." Twenty-four years ago, President Nixon's false statements to the public and to the courts, which were part of a scheme to obstruct justice through the perjury of his senior staff, through payoffs to criminal defendants, and through use of the Central Intelligence Agency (CIA) to thwart an FBI investigation into crimes in which he was involved, fit squarely within that definition. Merely to describe *that* conduct makes clear how different it is from that of President Clinton and how far the OIC has been willing to go to synthesize its charges of impeachable conduct.

The manifest desire to create improprieties where none exist and to transform personal misconduct into impeachable official malfeasance is evident also in the OIC's claim that the President's asser-

tion of executive privilege was somehow unlawful. Oddly enough, the OIC finds abuse of power both in the assertion of the privilege and its withdrawal—surely evidence of an overwrought imagination or of a conceit that any legal position other than the OIC’s is presumptively obstructive. In truth, the OIC’s decision to invade the confidential relationship between the President and his most senior advisors and lawyers was unprecedented. It reflects a patent abuse of authority by the OIC and a wholesale abandonment of any prosecutorial judgment in a campaign to prevent the President from consulting meaningfully with his advisors. At bottom, the Independent Counsel seems to believe that, merely because he chooses to seek confidential information from the Office of the President, the President may not contest that demand without risking a charge that he is abusing his power.

Reading the OIC’s Referral, one would never know which party to the executive privilege litigation was right and which was wrong on the basic question whether the privilege applied to the communications the OIC was seeking to obtain. In the District Court, the OIC took the position that executive privilege was simply inapplicable in the face of its grand jury subpoena because the communications at issue related to the President’s private conduct, but Chief Judge Johnson rejected that claim out of hand. *In re Grand Jury Proceedings*, 1998 U.S. Dist. Lexis 7736 (D.D.C. 1998). Astonishingly, however, the OIC simply repeats that claim in the Referral, Acts at 155, with no acknowledgement that the court agreed with the White House that the privilege had been *properly* asserted.¹⁰

More importantly, the OIC’s abuse-of-power allegation must necessarily rest on the assumption that the President initiated the executive privilege claim with intent to impede the OIC’s investigation. Yet, the record is clear that it was only after extensive negotiations in which the White House offered to make available to the OIC factual information concerning the President’s conduct and had its offer rejected out of hand, that the White House Counsel notified the President of the OIC’s demands, explained the failed accommodation effort, and recommended that he invoke the privilege. Counsel gave that advice because he believed it important to protect the constitutional interests of the presidency. Thus, the President’s decision to claim privilege was not the result of his own initiative, much less of any intent to obstruct the grand jury investigation, but rather was the result of his Counsel’s advice.¹¹

Even more egregiously misleading is the claim that the President abused his power by “acquiescing” in the efforts of the Secret Service to assert a protective function privilege. First, the OIC characterizes that assertion as frivolous even though it reflected the judgment of the law enforcement professionals charged with protecting

¹⁰ Judge Johnson then asked the OIC to make a showing of its need for the information and found that that showing was sufficient to overcome the privilege. At that point, the White House elected not to pursue the issue as to the non-lawyer advisors, and they testified at length before the grand jury.

¹¹ Similarly, the OIC misleads the Congress and the public by blaming the President for pursuing an appeal from rulings of the District Court involving executive privilege claims by lawyers in the White House Counsel’s Office. It does so without acknowledging the fact that White House Counsel had informed Independent Counsel Starr, in a letter dated September 4, that those appeals had been taken only to preserve an issue raised for the first time by the Court of Appeals in a recent opinion dealing with the attorney-client privilege.

this and future presidents and was supported by President Bush.¹² Further, the OIC charges the President with abusing his power despite the fact that the OIC knew that he had nothing to do with the decision to assert the privilege or to pursue the appeal from Judge Johnson's decision. Indeed, the OIC itself had argued (in contesting the claim of the Secret Service in the district court) that the *failure* of the President to involve himself in the matter was itself a reason for the court to reject the Service's claim. The OIC cannot have it both ways.

Last, the OIC charges that it was an abuse of power for the President, at a time when both his personal and official interests were in the balance, not to testify before the grand jury until August—surely a claim that must astound lawyers and laymen alike. Could the OIC truly be taking the position that any government official who is the subject of a criminal investigation must immediately come forward and testify at a prosecutor's whim or risk impeachment? To state the question is to answer it.

CONCLUSION

It has come down to this.

After four years, scores of FBI agents, hundreds of subpoenas, thousands of documents, and tens of millions of dollars. After hiring lawyers, accountants, IRS agents, outside consultants, law professors, personal counsel, ethics advisers, and a professional public relations expert. After impaneling grand juries and leasing office space in three jurisdictions, and investigating virtually every aspect of the President's business, financial, political, official and, ultimately, personal life, the Office of Independent Counsel has presented to the House a Referral that no prosecutor would present to any jury.

The President has admitted he had an improper relationship with Ms. Lewinsky. He has apologized. The wrongfulness of that relationship is not in dispute. And yet that relationship is the relentless focus of virtually every page of the OIC's Referral.

In 445 pages, the Referral mentions Whitewater, the failed land deal which originated its investigation, twice. It never once mentions other issues it has been investigating for years—matters concerning the firing of employees of the White House travel office and the controversy surrounding the FBI files. By contrast, the issue of sex is mentioned more than 500 times, in the most graphic, salacious and gratuitous manner.

The Office of Independent Counsel is asking the House of Representatives to undertake its most solemn and consequential process short of declaring war; to remove a duly, freely and fairly elected President of the United States because he had—as he has admitted—an improper, illicit relationship outside of his marriage. Having such a relationship is wrong. Trying to keep such a relationship private, while understandable, is wrong. But such acts do not even approach the Constitutional test of impeachment—“Treason, Bribery, or other high Crimes and Misdemeanors.”

¹²The OIC also argues that Chief Justice Rehnquist's decision to deny a stay reflects a judgment that the Service's claim was frivolous, but fails to disclose that the Chief Justice specifically left open the prospect that the Court would decide to hear an appeal on the merits.

The founders were wise to set such a high standard, and were wise to vest this awesome authority in the hands of the most democratic and accountable branch of our Government, and not in the hands of unaccountable prosecutors.

We have sought in this Initial Response to *begin* the process of rebutting the OIC's charges against the President—charges legal experts have said would not even be brought against a private citizen. The President did not commit perjury. He did not obstruct justice. He did not tamper with witnesses. And he did not abuse the power of the office of the Presidency.

