Appendix C

Unfounded Allegations of Criminal and Professional Misconduct and Spurious Claims of Privilege

I. Introduction

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This Office faced numerous challenges to its professional integrity and the lawful exercise of its authority, ranging from unsubstantiated allegations of criminal and professional misconduct to unsupported claims that the Office and its duly empaneled grand jury were not legally entitled to evidence in the possession of witnesses, many of whom were White House employees. Responding to all of these claims in court and in public affected the Office's ability to fulfill its mandate in a timely and cost-effective manner. In the end, no attorney or other employee of this Office was ever found to have engaged in any form of criminal or professional misconduct, and the courts determined in every case that privileges asserted by President Clinton, the Office of the President, and others did not form a legal basis to withhold evidence from this Office and the grand jury. This appendix chronicles the claims made in connection with the Lewinsky investigation, as well as additional claims that, although related to other matters, arose during the last months of the Lewinsky investigation.

II. No Person in this Office Was Found to Have Violated Federal Rule of Criminal Procedure 6(e).

On February 6, 1998, two weeks after the public disclosure of this Office's investigation relating to Monica Lewinsky, President Clinton's private counsel, David Kendall, issued a public statement alleging "a deluge of illegal leaks from that office of false and misleading information."[1] Stating that he intended to seek judicial relief from the leaks under Federal Rule of Criminal Procedure 6(e), Kendall continued:

> The leaking of the past few weeks is intolerably unfair. It violates not only the criminal rules, rules of court, rules of ethics and Department of Justice guidelines, it also violates the fundamental rules of fairness in an investigation like this.
>
> We've seen leak after leak, which ultimately and in the fullness of time turns out to be false information. These leaks make a mockery of the traditional rules of grand jury secrecy. They often appear to be a cynical attempt to pressure and intimidate witnesses, to deceive the public and to smear people involved in the investigation.[2]

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On October 30, 1998, slightly more than a month after this Office submitted its Referral to Congress pursuant to 28 U.S.C. § 595(c), Chief Judge Johnson of the United States District Court for the District of Columbia disclosed that she had named a special master to determine whether the Office of the Independent Counsel had illegally leaked secret grand jury information to the media in violation of Rule 6(e).[3]

Notwithstanding the intensity of the charges in February 1998, in March 2001, three years later, and two months after President Clinton left office, the former President, the Office of the President (prior to January 20, 2001), Bruce Lindsey, and Sidney Blumenthal agreed to a joint stipulation with this Office to the dismissal of all sealed proceedings involving alleged violations of Rule 6(e).[4]

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[1] David E. Kendall, Statement (Feb. 7, 1998), *available* at A.P. Political Serv. at 1998 WL 7383986.

[2] *Id.*

[3] Order, *In re: Grand Jury Proceedings*, Misc. Nos. 98–55, 98–177, and 98–228 (consolidated) (D.D.C. Oct. 30, 1998).

[4] Joint Stipulation of Dismissal of Rule 6(e) Proceedings, *In re: Grand Jury Proceedings,* Misc. Nos. 98–55, 98–177, and 98–228 (consolidated) and 99–214 (D.D.C. Mar. 22, 2001).

On March 23, 2001, Chief Judge Johnson filed an order accepting the joint stipulation and dismissing the remaining matters without any finding of a violation of Rule 6(e).[5]

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") also rejected Mr. Kendall's allegations that an article appearing in the January 31, 1999 *New York Times*, while the Senate impeachment trial was pending, included material disclosed by individuals in this Office in violation of Rule 6(e).[6] The D.C. Circuit concluded that the material disclosed in the article was not covered by the rule because it did not constitute matters "occurring before the grand jury."[7] This ruling came more than eight months after Mr. Kendall's charges and only after this Office appealed the district court's decision and obtained a summary reversal to prevent the district court from conducting a proceeding against this Office or any of its personnel on the basis of those charges.[8]

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[5] Order, *In re: Grand Jury Proceedings*, Misc. Nos. 98–55, 98–177, and 98–228 (consolidated) (D.D.C. Mar. 23, 2001); Order, *In re: Grand Jury Proceedings,* Misc. No. 99–214 (D.D.C. Mar. 23, 2001).

[6] *In re: Sealed Case*, 192 F.3d 995 (D.C. Cir. 1999).

[7] *Id*. at 1004.

[8] *In re: Sealed Case*, 151 F.3d 1059 (D.C. Cir. 1998). The district court conducted a criminal contempt proceeding against one former member of this Office, Charles G. Bakaly, not for a violation of Fed. R. Crim. P. 6(e) in connection with the January 31, 1999 *New York Times* article, but for making false and misleading statements to the court following the story. *In re: Grand Jury Proceedings*, 117 F. Supp. 2d 6 (D.D.C. 2000). Following a nonjury trial before Chief Judge Johnson, Mr. Bakaly was acquitted of those charges on October 6, 2000. *Id*. at 33. The court also found "deeply disturbing" the "fraudulent attribution" that "could have had an impact on the Court's determination of . . . whether the OIC should be held to answer under the penalty of contempt of court, for possibly leaking information that may include matters occurring before the grand jury." *Id*. at 25 n.3.

III. Charges that this Office Intentionally Disclosed the Existence of a Grand Jury Investigating President Clinton Were False.

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Former Vice President Al Gore accepted the Democratic Party's nomination for President on the evening of August 17, 2000. During the afternoon prior to his speech, the Associated Press reported that a new grand jury had been empaneled to hear evidence regarding perjury and obstruction of justice by President Clinton.[9]

Although the article stated that the sources of the story were "outside [Independent Counsel] Ray's office,"[10] and despite affirmative denials that this Office was the source of the story,[11] the media widely reported the leak as a gross political act by this Office.[12] Many made unsubstantiated accusations that this Office intentionally leaked the story to influence the political process.[13] The next day, August 18, 2000, Judge Richard D. Cudahy of the D.C. Circuit's Division for the [v]

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[9] Pete Yost, *Grand Jury to Hear New Clinton Case*, A.P., Aug. 18, 2000.

[10] *Id.*

[11] Press Release from the Office of the Independent Counsel (Aug. 17, 2001), *at* http://www.oicray.com.

[12] *See, e.g.*, *CBS News: Evening News with Dan Rather* (CBS television broadcast, Aug. 17, 2000) ("Timing is everything. Al Gore must stand and deliver here tonight as the Democratic Party's presidential nominee. And now Gore must do so against the backdrop of a potentially-damaging carefully orchestrated story leak about President Clinton. This story is that Republican-backed special prosecutor Robert Ray—Ken Starr's successor—has a new grand jury looking into possible criminal charges against the president, growing out of Mr. Clinton's sex life"); Dan Rather, *Low-Road Politics—Clinton Grand Jury Leak Carefully Orchestrated* (Aug. 17, 2000), *available at* http://cbsnews.cbs.com/now/story/0,1397,225854–412,00.shtml ("You don't have to be a cynic to note that this has all the earmarks of a carefully orchestrated, politically motivated leak. The Republican-backed Robert Ray is sponsored by a three-judge panel that must periodically decide whether Ray's investigation should continue. This panel features two federal judges backed by the Jesse Helms wing of the Republican Party").

[13] *See, e.g.*, Jonathan Weisman, *Angry Democrats Call News Leak Of Clinton Probe A Political Tactic*, Balt. Sun, Aug. 19, 2000, at 20A (noting comments from Julian Epstein, Democratic counsel on the House Judiciary Committee: "The fact that [Ray] does not prevent a story like this from coming out on the day the nominee of a party is going to speak could not be more overtly political"); Michael Hedges, *New Panel Probes Lewinsky: Democrats Accuse Special Counsel Of Timing Leak To Hurt Gore,* Aug. 18, 2000, at A1 (White House spokesman Jake Siewert: "The timing of the leak reeks to high heaven. But given their (the independent counsel's office) track record on this, it is hardly surprising"); *id.* (Gore campaign spokesman Doug Hattaway: "The timing is highly suspect. People are sick and tired of the judicial system being manipulated for political purposes").

Purpose of Appointing Independent Counsels ("Special Division") admitted that he had been the source of the disclosure; he stated that he had inadvertently disclosed the existence of the new grand jury to a reporter.[14] Even after Judge Cudahy's admission, the White House Press Secretary still asserted: "We may never know the full story here."[15]

[14] Statement by Judge Richard D. Cudahy, Aug. 18, 2000 (GJ 00–3 Exh. No. 33). Judge Cudahy expressed his apologies to all concerned, stating that the nature of the controversy generated by his inadvertent disclosure prompted him to make the statement. *Id.*

[15] Susan Schmidt, *Judge Was Source of Clinton Jury Story; Leak 'Inadvertent,' Carter Nominee Says,* Wash. Post, Aug. 19, 2000, at A1.

IV. All Complaints to the Department of Justice of Professional Misconduct Were Rejected.

The Department of Justice also received numerous complaints about the conduct of Independent Counsel Kenneth W. Starr and his staff.[16] These complaints were referred to the Justice Department's Office of Professional Responsibility ("OPR"), which investigates complaints concerning the conduct of Department attorneys in the exercise of their official responsibilities. The Attorney General undertook a review of these allegations pursuant to her authority to remove an independent counsel for cause.[17] None of these complaints resulted in a finding of professional misconduct by any person in the Office of the Independent Counsel.[18] [vi]

On November 15, 1998, shortly before Independent Counsel Starr was scheduled to testify on the referral under 28 U.S.C. 595(c) before the House Judiciary Committee, Attorney General Janet Reno informed him that OPR had recommended further inquiry about complaints of professional misconduct. At the request of the Attorney General, OPR ultimately identified nine allegations that appeared to OPR to require further analysis.[19] In May 1999, the Office of the Independent Counsel provided OPR with a detailed submission addressing these allegations,[20] which OPR reviewed in conjunction with other materials.[21]

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[16] The Department of Justice's Office of Professional Responsibility received 283 complaints regarding the Office of the Independent Counsel, including 27 from Members of Congress. Letter from H. Marshall Jarrett, Counsel, Office of Professional Responsibility, to J. Keith Ausbrook, Deputy Independent Counsel (Feb. 28, 2001). The Justice Department's Criminal Division received 5,308 complaints. *Id*. The Executive Secretariat received 132 complaints, including 16 from Members of Congress. Id.

[17] 28 U.S.C. § 596(a)(1); Letter from H. Marshall Jarrett, Counsel, Office of Professional Responsibility, to Kenneth W. Starr, Independent Counsel (Jan. 19, 1999).

[18] Recently, when former Attorney General Reno was asked her "opinion of how [Independent Counsel] Starr conducted the investigation," she responded: "I have not reviewed it other than to determine whether there was a basis for removing him for cause, and determined that there was not." Hannity and Colmes (Fox News television broadcast, May 2, 2001).

[19] Letter from Gary G. Grindler, Principle Associate Deputy Attorney General, to the Honorable Kenneth W. Starr, Independent Counsel (Mar. 16, 1999) (attaching Memo from H. Marshall Jarrett, Counsel, Office of Professional Responsibility, identifying nine issues to be addressed in OPR inquiry).

[20] *See* Submission of the Office of the Independent Counsel (*In re: Madison Guaranty Sav. & Loan Assoc*.) Relating to the Inquiry of the Department of Justice Office of Professional Responsibility (May 28, 1999) [hereinafter "OIC Submission"].

[21] *See* Mem. for the Attorney General from H. Marshall Jarrett, Counsel, Office of Professional Responsibility, stating recommendations regarding disposition of allegations against Independent Counsel Kenneth W. Starr at 1 (Oct. 15, 1999) [hereinafter "Jarrett Mem."].

[vii] On October 15, 1999, the Attorney General, acting on OPR's recommendation, concluded that no further inquiry was necessary regarding eight of the nine allegations.[22] Four of these allegations were deemed unlikely to develop evidence warranting the removal of the Independent Counsel from office, and three allegations lacked a factual basis.[23] One allegation included a primary and two subsidiary charges. The primary charge was rejected on the ground that the issue had been properly resolved through litigation before a federal district court judge in the course of pretrial motions.[24] The two subsidiary charges were referred back to the Independent Counsel for his consideration and action.[25] In sum, OPR recommended further inquiry into only one of the nine allegations, which related to the Office of the Independent Counsel's first contact with Monica Lewinsky.[26]

A. Four Allegations Were Rejected on the Ground That, Even if Substantiated, They Would Not Have Warranted the Removal of Independent Counsel Starr.

With respect to four allegations, the Attorney General accepted OPR's conclusion that a full investigation would not develop evidence of misconduct warranting the removal of Independent Counsel Starr from office pursuant to the Attorney General's authority under Title 28, United States Code, Section 596(a). Those allegations were: (1) whether communications between Linda Tripp, or
[viii] persons acting on her behalf, and Independent Counsel Starr's law partner, Richard Porter, were consistent with the client representation restrictions governing Independent Counsels, their staffs, and attorneys associated with them, as codified at 28 U.S.C. § 594(j), and with other applicable provisions governing conflicts of interest;[27] (2) whether the Office of the Independent Counsel made material misrepresentations to the Attorney General, and to other Department attorneys, in connection with its request for jurisdiction over the Lewinsky matter;[28] (3) whether Independent Counsel Starr's prior contacts with people working on the *Jones v. Clinton* civil case gave rise to a conflict of interest in the request for and acceptance of jurisdiction to investigate the Lewinsky matter, including whether the Department of Justice was provided appropriate information about those prior contacts at the time of the request for jurisdiction;[29] and (4) whether the Office of the Independent Counsel made improper statements about Presidential advisor Sidney Blumenthal.[30]

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[22] *See* Letter from Janet Reno, Attorney General, to Kenneth W. Starr, Independent Counsel 1 (Oct. 15, 1999) [hereinafter "Reno Letter"].

[23] Reno Letter, *supra* note 22, at 1; Jarrett Mem., *supra* note 21, at 1–3.

[24] Reno Letter, *supra* note 22, at 1; Jarrett Mem., *supra* note 21, at 1–3.

[25] Reno Letter, *supra* note 22, at 1; Jarrett Mem., *supra* note 21, at 1–3.

[26] Reno Letter, *supra* note 22, at 1; Jarrett Mem., *supra* note 21, at 1–3.

[27] Jarrett Mem., *supra* note 21, at 1–2; OIC Submission, *supra* note 20, at 99–106.

[28] Jarrett Mem., *supra* note 21, at 1–2; OIC Submission, *supra* note 20, at 112–33.

[29] Jarrett Mem., *supra* note 21, at 1–2; OIC Submission, *supra* note 20, at 134–45.

[30] Jarrett Mem., *supra* note 21, at 1–2; OIC Submission, *supra* note 20, at 173–83.

B. Three Allegations Were Rejected as Having No Factual Basis.

With respect to three other allegations, the Attorney General accepted OPR's conclusion that none was supported by any factual basis.[31] Those allegations were whether (1) the Office of the Independent Counsel improperly influenced the conduct of Linda Tripp prior to January 12, 1998 in order to create a basis for obtaining jurisdiction over the Lewinsky matter;[32] (2) the Office of the Independent Counsel misled the D.C. Circuit on June 29, 1998 regarding the likelihood of impeachment proceedings;[33] and (3) the Office of the Independent Counsel conducted investigative activities without any jurisdictional basis, including whether it was proper to offer Linda Tripp immunity from prosecution and surreptitiously record conversations involving Linda Tripp before receiving jurisdiction over the Lewinsky matter.[34]

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C. One Complaint, Which Included Two Subsidiary Complaints, Regarding the Steele Investigation Were Rejected.

With respect to one complaint—that the Office of the Independent Counsel lacked jurisdiction to investigate Julie Hiatt Steele—the Attorney General also accepted OPR's recommendation to reject the allegations.[35] OPR reviewed the record of pretrial motions in the Steele case and concluded that the trial judge had properly disposed of those allegations.[36]

Pursuant to OPR's recommendation, the Attorney General referred to the Independent Counsel two subsidiary allegations that the trial judge had not addressed. These allegations concerned the filing of an ex parte brief in another court and the alleged harassment of Steele's daughter in the grand jury.[37] The Independent Counsel reviewed the matters and, in December 1999, found the relevant attorneys to have acted appropriately in both instances.[38]

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[31] Jarrett Mem., *supra* note 21, at 1.

[32] *Id.*; OIC Submission, *supra* note 20, at 107–11.

[33] Jarrett Mem., *supra* note 21, at 1; OIC Submission, *supra* note 20, at 146–51.

[34] Jarrett Mem., *supra* note 21, at 1; OIC Submission, *supra* note 20, at 152–61.

[35] Reno Letter, *supra* note 22, at 1; Jarrett Mem., *supra* note 21, at 2.

[36] Jarrett Mem., *supra* note 21, at 2.

[37] Reno Letter, *supra* note 22, at 1.

[38] *See* Mem. from J. Keith Ausbrook, Senior Counsel, to Independent Counsel Robert W. Ray (Dec. 22, 1999) (reflecting Independent Counsel's acceptance of recommendation that filing of *ex parte* brief was appropriate conduct); *see also* Mem. from J. Keith Ausbrook, Senior Counsel, to Independent Counsel Robert W. Ray (Dec. 22, 1999) (reflecting Independent Counsel's acceptance of recommendation that conduct in the grand jury was appropriate).

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D. The Independent Counsel Accepted the Conclusion of a Special Counsel Concerning the January 16, 1998 Contact with Monica Lewinsky that No Attorney Committed Professional Misconduct.

OPR decided that additional investigation was needed in order to determine whether this Office complied with Department of Justice regulations then in effect relating to contacts with individuals outside the presence of an attorney in their dealings with Monica Lewinsky on January 16, 1998.[39] In November 1999, in response to a request by Independent Counsel Ray, Attorney General Reno referred that matter to the Independent Counsel for investigation with the agreement that the Attorney General would accept his findings.[40]

On February 16, 2000, Independent Counsel Ray appointed Jo Ann Harris, former Assistant Attorney General for the Justice Department's Criminal Division during the Clinton Administration, as Special Counsel to this Office to conduct an independent review of the allegation.[41] Special Counsel Harris and her co-

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counsel, former Counsel to the Assistant Attorney General, Mary Harkenrider, completed their review and submitted a report to Independent Counsel Ray on December 6, 2000 for his consideration and final determination.[42] The Report of the Special Counsel acknowledged the full cooperation and support of the Office of the Independent Counsel.[43]

The Report of the Special Counsel concluded that no attorney in the Office of the Independent Counsel engaged in professional misconduct in connection with the approach to Monica Lewinsky on January 16, 1998 because the Department's regulations did not unambiguously define Lewinsky as a represented person.[44] The

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[39] Specifically, this Office had been accused of violating then-applicable ethical provisions regulating contact by federal prosecutors with persons represented by lawyers. *See* 28 C.F.R. §§ 77.8, 77.9 (effective Aug. 4, 1994). The regulations have since been superseded by the McDade Amendment, effective October 21, 1998. *See* 28 U.S.C. § 530B (subjecting attorneys for the Government, including independent counsels, to state bar laws and rules).

[40] *See* Letter from Janet Reno, Attorney General, to Robert W. Ray, Independent Counsel 1 (Nov. 12, 1999).

[41] Report of the Special Counsel Concerning Allegations of Professional Misconduct by the Office of the Independent Counsel in Connection with the Encounter with Monica Lewinsky on January 16, 1998 at 1 (Dec. 6, 2000) [hereinafter "Report of the Special Counsel"]. The resolution of this matter is disclosed here because of the substantial interest in assuring the public that these allegations were fully investigated and appropriately resolved.

[42] Report of the Special Counsel, *supra* note 41, at 1–2.

[43] *Id*. at 1, 7.

[44] *Id*. at 2. Subsequent to the Independent Counsel's decision on the report, the United States Supreme Court held that the right to counsel under the Sixth Amendment to the U.S. Constitution does *not* attach to both charged crimes and "any other offense that is very closely related factually to the offense charged." *Texas v. Cobb*, 121 S. Ct. 1335, 1340 (2001) (internal quotation marks and citation omitted). In expressly rejecting the dissenting justices' views, the Court recognized that "vague iterations of the 'closely related to' or 'inextricably intertwined' test . . . would defy simple application." *Id*. at 1343; *cf. id*. at 1350 (Breyer, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg) (invoking the "closely related to" and "inextricably intertwined" test). Thus, a person charged with burglary did not have a right to counsel—and therefore was not represented—with respect to a murder for which he had not been charged that occurred in the course of the burglary. *Id*. at 1344.

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Report of the Special Counsel concluded, however, that one lawyer exercised poor judgment in the planning and execution of the approach to Lewinsky.[45] [xii]

On January 16, 2001, Independent Counsel Ray accepted the Special Counsel's determination that no attorney of this Office engaged in professional misconduct. Upon full consideration of the Report of the Special Counsel, written comments, an oral presentation by the attorney in question, the recommendation of two senior attorneys in the Office who reviewed the report, and consultation with counsel for this Office, the Independent Counsel decided to overrule the Special Counsel's finding of poor judgment.

1. The Independent Counsel Accepted the Determination that No Attorney Had Committed Professional Misconduct.

The Independent Counsel accepted the Special Counsel's determination that no attorney had engaged in professional misconduct. The Special Counsel concluded that whether Monica Lewinsky was a "represented person" within the meaning of the regulations was ambiguous. The Special Counsel specifically found that the regulations, commentary on the regulations, and other materials relevant to the inquiry supported two different ways of analyzing whether a person is represented with respect to a matter.[46] After acknowledging these two modes of analysis, one of which was used in the contact with Monica Lewinsky, the Special Counsel found no professional misconduct occurred because "the regulation does not clearly answer the question of the scope" of the representation of Lewinsky.[47]

2. The Independent Counsel Rejected the Special Counsel's Finding of Poor Judgment. [xiii]

The Independent Counsel rejected the Special Counsel's finding that one attorney exercised poor judgment, on the ground that the Independent Counsel considered it fundamentally unfair to single out one attorney for decisions that were made in consultation with supervisors, other colleagues, and a representative of the Department of Justice, which resulted in a decision that the Special Counsel herself recognized was proper under one mode of analysis supported by relevant authority.[48] The Independent Counsel concluded that the attorney had

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While the issue here arose in the context of the Department's ethical rules rather than the Sixth Amendment, the "closely related to" or "inextricably intertwined" test raises similar difficulties in determining whether Lewinsky's representation for the purpose of filing an affidavit in the *Jones* case constituted representation with respect to the criminal investigation of her filing a false affidavit. *Cf. Shelton v. Hess,* 599 F. Supp. 905, 909 (S.D. Tex. 1984) (case cited and relied upon by OPR during its preliminary inquiry in which court disqualified lawyer from representation because subject of the existing representation was "strikingly similar" to and "inextricably intertwined" with the matter for which the contact was initiated). Summary of the Preliminary Inquiry of the Office of Professional Responsibility into Allegations Against Independent Counsel Kenneth W. Starr Concerning Contact with Monica Lewinsky at 36–39 (transmitted to Independent Counsel Ray, Nov. 23, 1999).

[45] Report of the Special Counsel, *supra* note 41, at 2–4.

[46] *Id.* at 71.

[47] *Id.* at 82.

[48] *See id.* at 3, 70–71.

adopted a mode of analysis used by the Justice Department in analyzing its own regulations, and despite lecturing for the Department numerous times on the subject, had never been informed by the Department of any other mode of analysis.[49] Accordingly, in the Independent Counsel's view, no finding of poor judgment could be fairly sustained that was entirely dependent upon which mode of analysis was correct.[50]

Moreover, the Special Counsel's investigation revealed that there were many others involved in the planning and execution of the encounter, including senior staff of the Office of the Independent Counsel and representatives of the Department of Justice, who did not make clear—with opportunities to do so—their specific concerns, if any, regarding the proposed contact.[51] Under these circumstances, the Independent Counsel concluded that the finding of poor judgment could not be fairly sustained.

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[49] *See id.* at 54, 97.

[50] *See id.* at 32–97. The Independent Counsel further concluded that the judgment exercised under these circumstances was not "in marked contrast" to the judgment of an attorney exercising good judgment—OPR's standard for finding poor judgment. The Independent Counsel determined that an attorney who used a mode of analysis that was recognized by the Department could not be found to have used judgment "in marked contrast" to the judgment of an attorney exercising good judgment.

[51] *See id.* at 18–23, 27–33.

V. Allegations Concerning the United States District Court for the Eastern District of Arkansas Were All Dismissed.

Over the course of the investigations conducted by this Office, various complaints were lodged before the United States District Court for the Eastern District of Arkansas seeking the appointment of special counsel to investigate alleged prosecutorial misconduct against this Office. The complainants were Francis T. Mandanici (a public defender from Connecticut with no known connection to the investigation), Julie Hiatt Steele (a defendant in a criminal trial conducted by this Office), Stephen A. Smith (former Chief of Staff to Governor Clinton who pled guilty to a misdemeanor and testified for the government at the trial of Susan McDougal, Jim McDougal, and Jim Guy Tucker), and the United States district judges (except for Judge George Howard Jr. who recused himself) of the Eastern District of Arkansas. No counsel was ever appointed, and the complaints were all dismissed as without merit by another judge designated by the Chief Judge of the United States Court of Appeals for the Eighth Circuit to consider these matters.

A. The Complaints of Mandanici, Smith, and Steele Were Rejected.

On September 11, 1996, March 11, 1997, June 19, 1997, and June 4, 1999, Francis T. Mandanici filed "grievances" with the United States District Court for the Eastern District of Arkansas seeking the appointment of counsel to investigate whether (1) Independent Counsel Kenneth W. Starr was subject to conflicts of interest in connection with his investigation involving the Resolution Trust Corporation ("RTC") because his law firm had been sued by the RTC, (2) his planned acceptance of the deanship at the School of Public Policy at Pepperdine University reflected a conflict of interest, (3) the Office had improperly leaked grand jury material about Susan McDougal and Hillary Clinton, (4) Independent Counsel Starr had solicited false testimony from Susan McDougal and Julie Hiatt Steele, (5) Independent Counsel Starr violated the independent counsel law in his testimony before the House Judiciary Committee regarding the Referral under 28 [xv]

U.S.C. 595(c), and (6) Independent Counsel Starr had a conflict of interest because of his representation of the tobacco industry.[52]

On October 2, 1997, the district court dismissed the complaints raised in Mandanici's first three letters, finding that it was "unaware that Mr. Starr has ever acted in an improper or unethical manner in the matters over which this Court has presided [and] [i]n the absence of specific evidence of misconduct. . . , this Court declines to provide Mr. Mandanici a forum for the pursuit of his 'vendetta.'"[53] The Eighth Circuit dismissed Mandanici's "appeal" finding that a complainant in a disciplinary matter has no standing to pursue an appeal.[54]

On September 17 and October 12, 1999, Stephen A. Smith and Julie Hiatt Steele, respectively, filed grievances expressly adopting the June 4, 1999 Mandanici grievance alleging that Independent Counsel Starr had solicited false testimony.[55] They both claimed that Independent Counsel Starr or his staff had
[xvi] solicited false testimony from them.[56] Ms. Steele also claimed that Independent Counsel Starr suffered from a conflict of interest because of his prior contact with the lawyers for Paula Jones.[57]

With respect to Mandanici's June 4, 1999 complaint, and the subsequent complaints by Steele and Smith adopting Mandanici's complaint, all of the judges of the Eastern District of Arkansas recused themselves on December 21, 1999 and asked that the Chief Judge of the Eighth Circuit appoint another judge to sit by designation to consider these claims.[58] The Chief Judge of the Eighth Circuit first appointed the Honorable Warren K. Urbom,[59] who was already sitting by designation on a petition for disclosure of grand jury material related to the Office of the Independent Counsel filed in the Western District of Arkansas by the judges (except for Judge Howard) of the Eastern District.[60]

On January 26, 2000, Judge Urbom recused himself from further consideration of the "grievances" (as well as the petition for disclosure of grand jury materials), stating in both cases: "After being apprised of the nature of the matters involved in these assignments and reflecting upon my relationships with the
[xvii] identifiable persons whose legitimate interests are at stake, I am confident that I must disqualify myself. . . . My impartiality might reasonably be questioned."[61]

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[52] *In re: Mandanici v. Starr*, 99 F. Supp. 2d. 1019, 1021–25 (E.D. Ark. 2000).

[53] I*n re: Starr*, 986 F. Supp. 1159, 1160 (E.D. Ark. 1997).

[54] *Starr v. Mandanici,* 152 F.3d. 741, 751 (8th Cir. 1998).

[55] I*n re: Smith v. Starr,* 99 F. Supp. 2d. 1037, 1038 (E.D. Ark. 2000); *see also In re: Steele v. Starr,* 99 F. Supp. 2d. 1042, 1046 (E.D. Ark. 2000).

[56] *Smith,* 99 F. Supp. 2d. at 1038–39; *Steele,* 99 F. Supp. 2d at 1046.

[57] *Steele*, 99 F. Supp. 2d. at 1046.

[58] *See Steele*, 99 F. Supp. 2d. at 1042; *Smith,* 99 F. Supp. 2d. at 1037.

[59] Designation of District Judge for Service in Another District within His Circuit, *In re: Mandanici v. Starr,* 4:99–MC–160 (E.D. Ark. Dec. 29, 1999) (under seal); Designation of District Judge for Service in Another District within His Circuit, *In re: Smith v. Starr,* 4:99–MC–161 (E.D. Ark. Dec. 29, 1999) (under seal); Designation of District Judge for Service in Another District within His Circuit, *In re: Steele v. Starr,* 4:99–MC–162 (E.D. Ark. Dec. 29, 1999) (under seal).

[60] Designation of Judge for Service in Another District within His Circuit, *In re: Petition for Disclosure Grand Jury Testimony,* No. GJ–99–24 (W.D. Ark. Dec. 9, 1999) (under seal).

[61] Order, *In re: Mandanici v. Starr,* 4:99–MC–160 (E.D. Ark. Jan. 26, 2000); Order, *In re: Smith v. Starr*, 4:99–MC–161 (E.D. Ark. Jan. 26, 2000); Order, *In re: Steele v. Starr,* 4:99–MC–162 (E.D. Ark. Jan. 26, 2000); *see also* Order of Disqualification, *In re: Petition for Disclosure of Grand Jury Testimony,* No. GJ–99–24 (W.D. Ark. Jan. 31, 2000) (under seal). All of the judges of the Eastern District of Arkansas, except for Judge Howard, had initiated a separate ethical inquiry and in connection with it, sought materials from a grand jury investigation related to this Office in the Western District of Arkansas

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The Chief Judge of the Eighth Circuit then appointed the Honorable John F. Nangle of the United States District Court for the Eastern District of Missouri to consider all of the matters that Judge Urbom had been considering.[62]

Judge Nangle dismissed the complaints of Mandanici, Smith, and Steele. Rejecting Mandanici's allegation that Independent Counsel Starr solicited false testimony from Susan McDougal or Julie Hiatt Steele, the court said: "[T]here is not one shred of support in the hundreds of pages of documents submitted by Mandanici to support the[ ] subjective opinions" that "McDougal and Steele thought that they could avoid further legal problems if they testified falsely."[63]

With respect to Mandanici's other substantive allegations, the district court described them variously as "ridiculous,"[64] "the stuff that dreams are made of,"[65] indicating "no suggestion of bias or conflict,"[66] and finally "nonsense."[67] In short, Mandanici's allegations, both independently and as adopted by Smith and Steele, were emphatically rejected by the court. Judge Nangle also rejected Smith's and Steele's individual claims, finding no evidence that Independent Counsel Starr or the Office of the Independent Counsel attempted to suborn perjury from Smith or Steele.[68] The court also found Steele's claim of a conflict of interest was "without merit."[69]

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B. Judge Nangle Rejected the Claims of the Judges of the Eastern District of Arkansas.

Judge Nangle, sitting by designation also in the Western District of Arkansas, rejected the request of all of the judges of the Eastern District of Arkansas (except for Judge George Howard Jr. who had recused himself) to appoint counsel to investigate whether any person improperly sought to have Judge Henry Woods removed from the trial of the then sitting Governor of Arkansas Jim Guy Tucker.[70]

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conducted by Michael E. Shaheen Jr. *See* Petition, *In re: Petition for Disclosure of Grand Jury Testimony,* No. GJ–99–24 (W.D. Ark. Nov. 12, 1999) (under seal). All of the judges of the Western District of Arkansas had recused themselves from consideration of that petition, resulting in the appointment of Judge Urbom to consider that petition. Order, *In re: Petition for Disclosure of Grand Jury Testimony,* No. GJ–99–24 (W.D. Ark. Dec. 2, 1999) (recusal of all judges) (under seal); Designation of Judge for Service in Another District within His Circuit, *In re: Petition for Disclosure of Grand Jury Testimony,* No. GJ–99–24 (W.D. Ark. Dec. 9, 1999) (under seal).

[62] Designation of Judge for Service in Another District within His Circuit, *In re: Mandanici v. Starr,* 4:99–MC–160 (E.D. Ark. Feb. 3, 2000) (under seal); Designation of Judge for Service in Another District within His Circuit, *In re: Smith v. Starr,* 4:99–MC–161 (E.D. Ark. Feb. 3, 2000) (under seal); Designation of Judge for Service in Another District within His Circuit, *In re: Steele v. Starr,* 4:99–MC–162 (E.D. Ark. Feb. 3, 2000) (under seal); Designation of Judge for Service in Another District within His Circuit, *In re: Petition for Disclosure Grand Jury Testimony,* No. GJ–99–24 (W.D. Ark. Feb 3, 1999) (under seal).

[63] *Mandanici,* 99 F. Supp. 2d. at 1029.

[64] *Id.* at 1031.

[65] *Id.* at 1033.

[66] *Id.* at 1035.

[67] *Id.*

[68] *Steele,* 99 F. Supp. 2d. at 1046–47; *Smith,* 99 F. Supp. 2d. at 1041.

[69] *Steele,* 99 F. Supp. 2d. at 1047.

[70] Order, *In re: Petition for Disclosure of Grand Jury Testimony,* Civ. No. GJ–99–24 (W.D. Ark. May 22, 2000) (under seal).

The court found that "there is absolutely no basis for the motion of the Eastern District judges and accordingly said motion is denied."[71]

This ruling was the culmination of nearly a year of efforts by the judges of the Eastern District to investigate these allegations. These efforts began in June 1999, apparently after some members of the court received copies of handwritten and typewritten documents that allegedly supported these allegations.[72] To pursue these allegations, the judges (1) sought copies of the report that Michael E. Shaheen Jr. prepared in connection with unrelated allegations that witnesses in the investigation received payments or other things of value in exchange for their testimony;[73] (2) petitioned for disclosure of the grand jury transcripts and exhibits from Mr. Shaheen's investigation conducted in the Western District of Arkansas;[74] and (3) ultimately, having obtained the report (but not the grand jury materials)—over the Independent Counsel's objection—from former independent counsel and federal judge Arlin Adams,[75] withdrew the petition and asked Judge Nangle to determine whether an ethics investigation was warranted based on the available materials.[76]

Chief Judge Wright and Judge Reasoner, while concurring in the filing of a petition for grand jury materials, declined to "sign Judge Wilson's brief."[77] When the judges withdrew their petition for grand jury materials and instead moved for an ethics investigation based on already available materials, only Judges Wilson, Woods, and Moody filed the motion;[78] Judges Wright and Reasoner, while concurring in the request, filed a separate concurring petition expressing their reluctance to join in the majority's specific allegations of misconduct.[79] Judge Howard recused himself, and Judge Eisele did not participate in the motion.[80]

Judge Nangle's ruling reflected that he "read and studied and re-read and restudied" the motion of Judges Wilson, Woods, and Moody, and its exhibits; the concurring motion of Chief Judge Wright and Judge Reasoner; the Independent Counsel's response and all exhibits; Mr. Shaheen's report; the withdrawn petition for disclosure of grand jury materials; the Independent Counsel's response; and
[xxi] "all Eastern District of Arkansas and Eighth Circuit Court of Appeals rulings related to this question and all applicable case law."[81] On the basis of that consideration, he denied the motion as having "no basis."[82]

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[71] *Id*. at 2.

[72] Brief in Support of Petition for Disclosure of Grand Jury Testimony at 1–2, *In re: Petition for Disclosure of Grand Jury Testimony,* Civ. No. GJ–99–24 (W.D. Ark. Nov. 12, 1999) (under seal).

[73] Petition for Disclosure of Grand Jury Testimony at 1–3, *In re: Petition for Disclosure of Grand Jury Testimony,* Civ. No. GJ–99–24 (W.D. Ark. Nov. 12, 1999) (under seal).

[74] *Id*.

[75] Judge Adams had been appointed with former federal judge Charles Renfrew to oversee Mr. Shaheen's investigation.

[76] *See* Motion at 9–10, *In re: Petition for Disclosure of Grand Jury Testimony,* Civil. No. GJ–99–24 (W.D. Ark. Feb. 4, 2000) (under seal) [hereinafter "Motion"].

[77] Mem. from Susan Webber Wright, Chief Judge of the United States District Court, to William R. Wilson Jr., United States District Judge (Nov. 8, 1999).

[78] Motion, *supra* note 76, at 10.

[79] *See* Concurring Petition, *In re: Petition for Disclosure of Grand Jury Testimony,* Civ. No. GJ–99–24 (W.D. Ark. Feb. 4, 2000) (under seal).

[80] Motion, *supra* note 76, at 10.

[81] Order at 1–2, *In re: Petition for Disclosure of Grand Jury Testimony,* Civ. No. GJ–99–24 (W.D. Ark. May 22, 2000) (under seal).

[82] *Id*. at 2.

VI. The Courts Ruled in Every Case that the Independent Counsel and the Grand Jury Were Entitled to Evidence from White House Employees.

The Independent Counsel repeatedly faced invalid assertions of legal privileges that were either well recognized but unavailable under the circumstances or previously unrecognized. In the Iran-Contra investigation, President Ronald Reagan waived all claims to executive privilege and attorney-client privilege.[83] In the investigation of President Jimmy Carter, he too waived all privileges.[84] The assertion of privileges in this investigation required substantial litigation, including appellate litigation in the Supreme Court, and caused substantial delays in obtaining the testimony of government employees, including law enforcement officers, significantly increasing the costs of the investigation. In every case, the courts found that the grand jury was entitled to the evidence claimed to be shielded by privilege.

A. Privilege Litigation.

During the initial stages of the Lewinsky investigation, Bruce Lindsey (then Assistant to the President and Deputy Counsel),[85] Sidney Blumenthal (then Assistant to the President),[86] and Nancy Hernreich (then Deputy Assistant to the

[83] *See* Peter J. Wallison, *Clinton's Claim of Privilege Is A Crime,* Wall St. J., Oct. 19, 1998 at A26 (stating that "Presidents have routinely waived executive privilege and attorney-client privilege when they had no objection to disclosing the information involved. President Reagan waived both [executive and attorney-client privilege] in the Iran-Contra matter, without adverse effect on the privileges themselves"); *see also* Final Report of the Independent Counsel for the Iran/Contra Matter, Vol. III at 704 (comments of former President Ronald Reagan).

[84] Paul Curran, *Answer the Questions, Mr. President,* Wall St. J., June 4, 1998 at A18 (contrasting President Carter's public pledge to cooperate and his subsequent conduct, including raising no claims of privilege, with President Clinton's public pledge to cooperate and his subsequent claims of privilege).

[85] Lindsey testified before the grand jury on November 20, 1997, February 18 and 19, March 12, and August 28, 1998.

[86] Blumenthal testified before the grand jury on February 26, June 4, and June 25, 1998.

President and Director of Oval Office Operations)[87] asserted executive privilege before the grand jury.[88] The staff members asserted the privilege despite former White House Counsel Lloyd Cutler's 1994 written opinion that the Administration would not invoke executive privilege in cases involving personal wrongdoing by any government official.[89] Lindsey, Blumenthal, and Hernreich's assertion of executive privilege to avoid answering questions[90] forced the Independent Counsel to file motions to compel each respective witness's testimony before the grand jury.[91]

[xxiiii] Immediately prior to a March 20, 1998 hearing on the motion to compel, the White House—without explanation—dropped its executive privilege claim as to Hernreich.[92] On May 1, 1998, Chief Judge Johnson granted the government's motions to compel Lindsey and Blumenthal to testify before the grand jury,[93] expressly rejecting the White House's assertions of executive privilege, attorney-client privilege, and work product protection.[94]

On July 27, 1998, the D.C. Circuit affirmed Chief Judge Johnson's order with respect to denying Lindsey's claim of "government" attorney-client privilege and rejected the White House's claim of "personal" attorney-client privilege.[95] Accordingly, the court of appeals affirmed Chief Judge Johnson's order compelling Lindsey to testify before the grand jury.[96]

[xxiv] On August 4, 1998—months after President Clinton had withdrawn his prior claim of executive privilege—White House Special Counsel Lanny Breuer appeared before the grand jury and invoked executive privilege.[97] Breuer refused

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[87] Hernreich testified before the grand jury on February 25 and 26, March 26 and 31, and June 16, 1998.

[88] The President also invoked executive privilege with respect to the testimony of White House counsels Cheryl Mills and Lanny Breuer. *See, e.g.*, Mills 8/11/98 GJ at 71–73; Breuer 8/4/98 GJ at 22–23.

[89] Lloyd N. Cutler, White House Counsel, Legal Opinion (Sept. 28, 1994).

[90] *See, e.g.,* Lindsey 2/18/98 GJ at 45–48 (Lindsey also asserted attorney-client privilege and work-product protection); Blumenthal 2/26/98 GJ at 10–13; Hernreich 2/25/98 GJ at 37–38.

[91] *See* Motion to Compel Bruce R. Lindsey to Testify, *In re: Grand Jury Proceedings,* Misc. No. 98–95 (D.D.C. Mar. 6, 1998); Motion to Compel Sidney Blumenthal to Testify, *In re: Grand Jury Proceedings,* Misc. No. 98–96 (D.D.C. Mar. 6, 1998), and Motion to Compel Nancy Hernreich to Testify, *In re: Grand Jury Proceedings,* Misc. No. 98–97 (D.D.C. Mar. 6, 1998).

[92] *See* Tr. at 7–10, *In re: Grand Jury Subpoenas to Bruce Lindsey, Sidney Blumenthal, and Nancy Hernreich,* Misc. Nos. 98–095, 98–096, and 98–097 (D.D.C. Mar. 20, 1998). Hernreich later acknowledged that the executive privilege was not hers to assert, withdrew any prior attempt to assert it, and agreed to testify. *See* Hernreich 3/26/98 GJ at 3–8. Before the grand jury, Hernreich ultimately testified: "I am now free to answer questions about those conversations." *Id.* at 3–4.

The assertion of executive privilege for Hernreich, an assistant who managed the secretarial work for the Oval Office, was frivolous. *See* Hernreich 2/25/98 GJ at 5–7. At the time that President Clinton was invoking executive privilege for one assistant, another assistant (Betty Currie) had already testified extensively. *See* Currie 1/27/98 GJ at 1–88. Even though the White House withdrew this claim, such an invocation caused a needless, but substantial, expenditure of litigation resources and delay of the grand jury process.

[93] Order, *In re: Grand Jury Proceedings,* Misc. Nos. 98–095, 98–096 and 98–097 (D.D.C. May 1, 1998).

[94] *See* Mem. Opinion, *In re: Grand Jury Proceedings,* Misc. Nos. 98–095, 98–096 & 98–097 (D.D.C. May 1, 1998).

[95] *See In re: Bruce R. Lindsey (Grand Jury Testimony),* 158 F.3d 1263 (D.C. Cir. 1998). The D.C. Circuit affirmed Chief Judge Johnson's May 1, 1998 order with respect to denying Lindsey's claim of attorney-client privilege and work product protection; however, the court held that the President could use Lindsey as an intermediary between himself and his private counsel, and that when he acted merely as an intermediary, the President's attorney-client privilege in communication with private counsel would apply to Lindsey's role as mere intermediary. *Id.* at 1280–82.

[96] *In re: Lindsey,* 158 F.3d. 1263 (D.C. Cir. 1998).

[97] Breuer 8/4/98 GJ at 96–97, 108–09.

to answer questions about whether the President told him about his relationship with Lewinsky or whether they had discussed the gifts President Clinton had given to Lewinsky.[98] On August 11, 1998, Chief Judge Johnson denied the executive privilege claim and ordered Breuer to testify.[99]

That same day, Deputy White House Counsel Cheryl Mills appeared before the grand jury and also repeatedly asserted executive privilege at President Clinton's direction.[100] The privilege was asserted not only for Mills's communications with the President, senior staff, and staff members of the White House Counsel's Office, but also for Mills's communications with private lawyers for the President, private lawyers for grand jury witnesses, and Betty Currie.[101]

When President Clinton testified before the grand jury on August 17, 1998, attorneys for this Office—at the grand jury's request—asked the President about his assertions of executive privilege and why he had withdrawn the claim before the Supreme Court.[102] The President replied: [xxv]

> I didn't really want to advance an executive privilege claim in this case beyond having it litigated, so that we, we had not given up on principal [sic] this matter, without having some judge rule on it. . . . *I strongly felt we should not appeal your victory on the executive privilege issue.*[103]

Notwithstanding this testimony, four days later, on August 21, 1998, the President filed a notice of appeal with respect to the executive privilege claim for Lanny Breuer, which Chief Judge Johnson had denied ten days earlier.[104] The President also asserted executive privilege when Bruce Lindsey appeared again before the grand jury on August 28, 1998—even though the President had dropped the claim of executive privilege for Lindsey while the case was pending before the Supreme Court in June.[105]

B. Secret Service "Protective Function" Privilege.

In addition to the President's and his staff's spurious claims of executive privilege and attorney-client privilege, the Secretary of the Treasury, with the full support of the Department of Justice, including the Solicitor General of the United States, claimed that the United States Secret Service ("Secret Service")—a federal law enforcement agency obligated by statute to cooperate in federal criminal investigations[106]—could shield its agents from giving testimony to a federal grand jury under a privilege referred to as the "protective function" privilege. The Independent Counsel sought the testimony from the President's Secret Service detail in an effort to obtain evidence from individuals who were likely to have [xxvi]

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[98] *Id.* at 96–97, 108–09.

[99] Mem. Order, *In re: Grand Jury Proceedings,* Misc. No. 98–278 (D.D.C. Aug. 11, 1998).

[100] Mills 8/11/98 GJ at 53–54.

[101] *Id.* at 53–54, 64–66, 71–74, 77–78.

[102] Clinton 8/17/98 GJ at 167.

[103] *Id.* (emphasis added).

[104] Notice of Appeal, *In re: Grand Jury Proceedings,* Misc. No. 98–278 (D.D.C. Aug. 21, 1998).

[105] Lindsey 8/28/98 GJ at 4–8. The Independent Counsel did not move to compel Lindsey's testimony due to the impending September 9, 1998 referral of information to the United States House of Representatives.

[106] 28 U.S.C. § 535(b).

been in a position to observe critical events relating to the conduct under investigation.[107] The Secretary of the Treasury's assertion of the previously unknown "protective function" privilege resulted in the refusal of active Secret Service agents to answer questions before a grand jury in an ongoing criminal investigation.[108]

On April 10, 1998, the Independent Counsel moved to compel members of the Secret Service to testify before a grand jury in the District of Columbia about observations and communications involving Monica Lewinsky and the President.[109] The Department of Justice argued that the Secretary of the Treasury, as the cabinet officer who oversees the Secret Service, had asserted the "protective
[xxvii] function" privilege.[110] They argued that this privilege shielded from disclosure any "information learned by Secret Service agents and officers while performing protective functions in physical proximity to the President where the information would tend to reveal the President's contemporaneous activities."[111]

On May 22, 1998, Chief Judge Johnson granted the motion to compel.[112] She concluded that no such protective function privilege existed.[113] The court recognized that the protective function privilege has no history in federal law and that the Secret Service has, in fact, "testif[ied] in judicial and non-judicial proceedings with respect to President Nixon's taping system and John Hinckley's attempted assassination of President Reagan."[114] The court found "that the Secret Service's own history, the lack of any constitutional support for the claimed privilege and the federal case law regarding newly asserted privileges under [Fed. Rules Evid.] Rule 501 all weigh against recognizing the privilege."[115]

The Secretary of the Treasury immediately appealed the decision to the D.C. Circuit where the appeal was briefed and argued by the Department of Justice and filed on behalf of Attorney General Reno.[116] Amici Curiae former Attorneys General of the United States William P. Barr, Griffin B. Bell, Edwin B. Meese, and
[xxviii] Richard L. Thornburgh opposed the Secretary of the Treasury's position.[117] Although former President George Bush supported the assertion of the privilege, former Presidents Carter and Ford did not.[118] On July 7, 1998, finding that recog-

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[107] For example, on the issue of whether Lewinsky and the President were "alone," the Secret Service officers' and agents' testimony confirming that they were in fact alone on numerous occasions was authoritative and incontrovertible. *See, e.g.*, Ferguson 7/17/98 GJ at 23–35 (alone for approximately 45 minutes); Ferguson 7/23/98 GJ at 18–24; Bordley 8/13/98 GJ at 19–30 (alone for approximately 30 to 35 minutes); Garabito 7/30/98 GJ at 25–32; Byrne 7/30/98 GJ at 7–12, 29–32 (alone for 15 to 25 minutes); Muskett 7/21/98 GJ at 9–13, 22–32 (alone on Easter Sunday 1996). *See also* Fox 2/17/98 GJ at 19–20, 31, 33–37, 42, 49–50, 60–61, 66–67; *see also* Referral to the United States House of Representatives Pursuant to 28 U.S.C. § 595(c) Submitted by the Office of the Independent Counsel at 35 (Sept. 9, 1998) (discussing corroborative aspects of Officer Fox's testimony).

[108] *See In re: Grand Jury Proceedings,* Misc. No. 98–148 (NHJ), 1998 WL 272884, at *1 (D.D.C. 1998).

[109] *See id.* at *1.

[110] *See id.* at *4.

[111] *Id.* at *1.

[112] *See id.* at *6.

[113] *See id.* at *5.

[114] *Id.* at *3.

[115] *Id.*

[116] *See In re: Sealed Case,* 148 F.3d 1073, 1074 (D.C. Cir. 1998).

[117] *Id.; see also* Brief of the Amici Curiae in Opposition to the Proposed "Protective Function" Privilege at 4–7, *In re: Sealed Case,*148 F.3d 1073 (D.C. Cir. 1998) (No. 98–148 (NHJ)) (reflecting identity and interest of Amici Curiae former Attorneys General of the United States).

[118] *Id.* at 1075–77.

nition of the privilege "depends entirely upon the Secret Service's ability to establish clearly and convincingly both the need for and the efficacy of the proposed privilege,"[119] a unanimous panel of the D.C. Circuit held: "We do not think . . . that the Secret Service has shown with . . . compelling clarity . . . that failure to recognize the proposed privilege will jeopardize the ability of the Secret Service effectively to protect the President."[120] Accordingly, the D.C. Circuit affirmed the district court's decision denying recognition of the privilege.[121]

The Secretary of the Treasury, again through the offices of the Department of Justice, sought a stay of the district court's order pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court.[122] The district court and court of appeals denied the stay.[123] The Secretary of the Treasury, represented by the Solicitor General, then filed a petition for certiorari.[124] Chief Justice [xxix]
William H. Rehnquist, acting as the Circuit Justice for the D. C. Circuit, denied an application for a stay pending disposition of the petition.[125] On November 9, 1998, the Supreme Court denied certiorari.[126]

The rejection of the protective function privilege by the D.C. Circuit delayed by more than three months the receipt of testimony from Secret Service agents and officers and resulted in even further litigation ending in the Supreme Court nearly six months after the original assertion of the privilege.

C. Attorney-Client Privilege (Crime-Fraud).

On February 2 and 9, 1998, a grand jury in the District of Columbia issued two subpoenas to attorney Francis D. Carter.[127] The grand jury sought to obtain evidence from Lewinsky's lawyer during the time she prepared and filed a false affidavit in the *Jones v. Clinton* lawsuit.[128] The subpoenas requested that Carter testify and turn over certain documents related to his representation.[129] Carter moved to quash the subpoenas under a number of privileges.[130]

In an unpublished order, Chief Judge Johnson rejected Carter's arguments [xxx]
that attorney-client privilege and work product immunity would justify his refusal to comply with the subpoena.[131] The court held that the crime-fraud exception to these doctrines applied because "Ms. Lewinsky consulted Mr. Carter for the

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[119] *Id.* at 1076.

[120] *Id.*

[121] *See id.*

[122] Emergency Motion for a Stay and an Order Under the All Writs Act Pending Disposition of Petition for Rehearing In Banc, *In re: Sealed Case,* No. 98–3069 (D.C. Cir. July 15, 1998).

[123] Mem. Order, *In re: Grand Jury Proceedings,* Misc. No. 98–148 (D.D.C. July 16, 1998); Order, I*n re: Sealed Case,* No. 98–3069 (D.C. Cir. July 16, 1998).

[124] Petition for a Writ of Certiorari, *Rubin v. United States,* No. 98–93 (July 1998).

[125] Opinion, *Rubin v. United States,* No. 98–93 (July 17, 1998).

[126] *See Rubin v. United States,* 525 U.S. 990, 119 S.Ct. 461 (1998). Justice Ginsburg dissented from the denial of certiorari, asserting the Supreme Court should act as the "definitive judicial arbiter in this case." *Id.* Justice Breyer also dissented from the denial of certiorari, stating the Supreme Court should hear the case because of the importance of the President's physical security in our system of government. *See id.* at 990, 119 S.Ct. at 462. The D.C. Circuit later denied the suggestion for rehearing *en banc*. *In re: Sealed Case,* 129 F.3d 637 (D.C. Cir. 1997).

[127] *See In re: Sealed Case,* 162 F.3d 670, 672 (D.C. Cir. 1998) (per curiam).

[128] *See id.*

[129] *See id.*

[130] *See id.*

[131] *See id.* at 673 (describing the district court's decision).

purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice."[132] The court directed Carter to comply with the subpoenas except to the extent that his compliance would "disclose materials in his possession that may not be revealed without violating Monica S. Lewinsky's Fifth Amendment rights."[133]

Lewinsky, Carter, and the Independent Counsel all appealed the district court's order.[134] The D.C. Circuit agreed with the Independent Counsel's position that full compliance with the grand jury's subpoenas did not implicate Lewinsky's Fifth Amendment rights.[135] The D.C. Circuit remanded the case to the district court,[136] and Carter subsequently testified and turned over the requested materials.[137]

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[132] *Id.* (internal quotation marks omitted).
[133] *Id.* (internal quotation marks omitted).
[134] *See id.*
[135] *See id.* at 675.
[136] *See id.*
[137] *See, e.g.,* Carter 6/18/98 GJ at 6.

VII. The Independent Counsel's Announcement of His Findings and Conclusions in the Madison Guaranty/Whitewater Investigation Was Entirely Lawful and Appropriate.

On August 31, 2000, United States Senator Carl Levin charged that the Independent Counsel would be "defying the law" by announcing his findings and conclusions in the Whitewater/Madison Guaranty investigation.[138] On September 7, 2000, Senator Levin addressed the charge that such an announcement would violate the independent counsel statute in letters to the Special Division and to the Attorney General.[139] He also made a statement on the floor of the United States Senate charging that the disclosures, which he claimed to consist of material in the final report, were subject to lawful disclosure only by order of the Special Division.[140]

In a September 8, 2000 letter, the Independent Counsel responded that Senator Levin's charge was unjustified because the Independent Counsel's public statement was not a portion of a final report and because the U.S. Attorneys' Manual expressly authorizes public statements about matters that "'have already received substantial publicity.'"[141] The Special Division and the Attorney General, charged with oversight of the Independent Counsel, expressly declined to take any action despite Senator Levin's request that they do so.[142]

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[138] Press Release, Statement of Senator Carl Levin, (D–MI) on Independent Counsel Robert Ray's Intention to Release His Conclusions in the Whitewater Matter (Aug. 31, 2000).

[139] Letter from Carl Levin, United States Senate Committee on Governmental Affairs, to Robert W. Ray, Office of the Independent Counsel (Sept. 7, 2000).

[140] 146 Cong. Record S8274 (daily ed. Sept. 8, 2000) (statement of Senator Levin).

[141] Letter from Robert W. Ray, Independent Counsel, to the Honorable Carl Levin, United States Senator 3 (Sept. 8, 2000).

[142] Letter from Judge David B. Sentelle to Senator Carl Levin (Sept. 7, 2000); Letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, to Senator Carl Levin (Jan. 9, 2001) (declining to take any further action and acknowledging that (1) no report had been filed, (2) the announcement was generally limited to publicly disclosed matters, (3) the subjects were exonerated in the announcement, and (4) "the Department necessarily should accord Mr. Ray a significant degree of independence and deference on matters within his jurisdiction").

VIII. Conclusion

[xxxii]

The allegations of professional and other misconduct and the claims of a right to withhold evidence ultimately were rejected. Nevertheless, the many attacks that accumulated during the course of the investigation had a substantial impact on the prompt completion of this Office's work, delaying in some cases for months access to available evidence. Responding to these allegations and claims also increased substantially the expense of this investigation, but it was essential to do so in order for the Independent Counsel to fulfill the mandates sought by the Attorney General and conferred by the Special Division. The Independent Counsel's prosecutorial decisions could not have been appropriately made unless the investigation and the grand jury had access to all relevant evidence. Moreover, it was imperative that this Office defend itself against unfounded allegations of misconduct. Public confidence in the integrity of the prosecutorial decisions of the Independent Counsel demanded nothing less.