Cleaning Up the Legal Debris Left in the Wake of Whitewater

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We have learned a lot in the twenty-five years since Watergate. During the scandal itself, we confirmed that the President is not above the law. We learned that executive privilege is constitutionally protected, but that it is not absolute.\(^1\) And, we learned that a need exists for an independent counsel, but that we don’t necessarily need a statute to establish such an office.

Watergate and the Nixon era spawned several so-called “reforms”: the establishment of the independent counsel statute,\(^2\) presidential immunity from civil damage suits for official action,\(^3\) and public ownership of the President’s official papers.\(^4\) It is interesting and appropriate, on the silver anniversary of these events, to evaluate these reforms: are they shining sterling or tarnished mistakes? What have we learned in the twenty-five years since Watergate?

I submit we have learned several important lessons.

First, it is dangerous to sue a sitting President as if he were an ordinary citizen.

Second, it is dangerous to have an independent counsel statute, at least as it is presently constructed.

Finally, the evidentiary privileges related to the Office of the President are extremely complex and in need of clarification.

The recent events involving Bill Clinton, Kenneth Starr, Monica Lewinsky, Paula Jones et al. have raised complicated and important questions. It is difficult to decide them in the heat of battle, especially when the stakes are


high for the country and our system of government. To be sure, the courts must deal with these issues as they arise, as they have done. But, overall, it is unfortunate that the courts have had to decide these difficult questions in the midst of what can accurately be called a political war. I hope that Congress will revisit some of these questions in the abstract and with distance, rather than in the throes of battle.

The following are some of the proposals I would recommend to Congress:

First, Congress should consider enacting a law providing presidents with temporary immunity from civil damage actions while they are in office. Recent events make it clear that one cannot sue a sitting President as if he is an ordinary citizen. Doubters should ask the following question: is there any other defendant who, after winning on summary judgment, might nonetheless face impeachment and be willing to pay $850,000 to settle a suit most people believe lacks merit?

Second, Congress should reconsider the wisdom and necessity of the independent counsel statute. Conventional wisdom is that Watergate taught us that we needed an independent counsel statute. The irony is that Watergate was resolved without such a statute. I believe most people think the investigation and resolution of Watergate was reasonably bipartisan and responsible. In my opinion, the same cannot be said, so far, of the ongoing investigation of Whitewater and the Lewinsky matter.

Third, Congress should reexamine the various privilege issues that have arisen in the context of the Starr investigation of President Clinton. Three different privileges were litigated during this period: executive privilege, attorney-client privilege, and a protective function privilege for Secret Service agents. The courts addressed each issue as it arose, as they were required to do. But I would urge Congress to dispassionately examine these privilege issues in what, hopefully, will be a calm after the present storm.

Allow me to discuss these suggestions individually.

First, I believe the Supreme Court was wrong when it held in Clinton v. Jones that civil damage suits against a sitting president can proceed while he is in office. I have argued since Paula Jones first filed her case in 1994 that the suit should be delayed until the President is out of office. Relying on Nixon v. Fitzgerald, where the Supreme Court inferred an absolute immunity for presidents for civil damage actions based on official conduct, I and several other constitutional law scholars filed an amicus brief in the Jones case, arguing that sitting presidents should have temporary immunity from such damage actions.

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while they are in office. Unfortunately, the Supreme Court disagreed. The Court emphasized the aspect of the Nixon decision that expressed concern about the adverse effects such suits could have on the president’s ability to make difficult decisions in his official capacity. The Court downplayed the other aspects of Nixon that worried about the distracting effects such suits could have on the president’s ability to perform generally. The Court in Jones concluded that there was little reason to fear a “deluge” of civil suits and that such suits could proceed without being unduly distracting. The Court asserted: “... if properly managed by the District Court, it appears to us highly unlikely [that the Paula Jones case will] occupy any substantial amount of [the President’s] time.”

I would submit that the events since the Supreme Court’s decision in May 1997 have proven the Court’s prediction naive and wrong. The litigation involving Paula Jones has distracted the President, and the country, for a considerable time. Without the case, we may never have known about Kathleen Willey and Monica Lewinsky, two women whose identity surfaced only during the avid discovery pursued by Paula Jones’s lawyers. One might argue that District Judge Susan Webber Wright could have limited discovery, but our discovery process is notoriously wide-ranging. Had the President been temporarily immune from the Paula Jones litigation, we probably would have learned of Lewinsky, not in the middle of the President’s term, but only after he was out of office. Had we learned of her later when Clinton was no longer president, then only Clinton, not the whole country, would pay the price. The Court was wrong to worry only about a deluge of such suits. What the current crisis makes abundantly clear is that a single suit is enough to distract and maybe destroy a Presidency. We now have a new dangerous political weapon, and we must do what we can to dismantle it.

Obviously, President Clinton must bear much of the blame for providing the fodder for these investigations. That, however, does not explain why the country must be held hostage. All these salacious details could have been investigated after the President left office. Then only he, and not the whole country, would have been distracted and punished.

But it is highly unlikely that the Supreme Court will revisit this question of temporary immunity for the presidency. So I am hopeful that Congress will seriously consider the Supreme Court’s suggestion in the Jones case, that if

10. Id. at 705-08.
11. Id. at 702, 708.
12. Id. at 702.
Congress believes the president should have temporary protection from civil suits while in office, Congress should enact some form of temporary immunity.\textsuperscript{13} Let me stress that such protection would be for the benefit of the country and the office of the Presidency, not for the particular incumbent. Specifically, I would urge Congress to establish something like the law it enacted years ago to protect soldiers in the military. Under the Soldiers' and Sailors' Civil Relief Act of 1940, the government provides immunity from suits for the military while they are in active duty.\textsuperscript{14}

Such temporary immunity would not put the President above the law. Indeed, the Supreme Court in the Jones case specifically noted that the President was not seeking to be placed "above the law."\textsuperscript{15} The right to invoke temporary immunity would simply recognize the President's "unique status in the constitutional scheme."\textsuperscript{16} Unlike the other two branches, the Executive Branch is represented by only one individual, the President of the United States. The irony is that by not giving the President some form of temporary immunity, the President winds up with fewer rights and less protection than the average defendant. Because of political constraints, it is much more difficult for the President to engage in legal strategies, rely on hair-splitting definitions, or invoke constitutional privilege such as the right against self-incrimination, tactics that are lawful, common, and acceptable approaches for the average defendant. The experience our country has endured since the Supreme Court held that Paula Jones could proceed has not been good for the Office of the Presidency or for the country.\textsuperscript{17} The most effective remedy to protect future presidents from politically inspired lawsuits while they are in office is for Congress to adopt some form of temporary immunity for sitting presidents.

Second, I would urge Congress to repeal the independent counsel statute, or at least substantially modify it. I now believe that Justice Scalia was right in Morrison v. Olson\textsuperscript{18} when he warned us of the dangers of the independent counsel statute. He was incredibly prophetic when he asked "what if they [the judges appointing the independent counsel] are politically partisan . . . and se-

\textsuperscript{13} Id. at 709 (stating "[i]f Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.").

\textsuperscript{14} See Soldiers' and Sailors' Civil Relief Act, ch. 888, 54 Stat. 1178 (1940)(codified as amended at 50 U.S.C. app. 501 (1988), amended by the Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, 105 Stat. 34). Originally intended to protect soldiers from default judgments against them while fighting World War II, the act, as amended over the years, generally suspends civil actions against active-duty military personnel. Like any law that would grant the President temporary immunity, it recognizes that civil actions should be delayed to accommodate greater national purposes.

\textsuperscript{15} 520 U.S. at 697.

\textsuperscript{16} Nixon v. Fitzgerald, 457 U.S. at 749.

\textsuperscript{17} It is also not fair to the individual who happens to hold the office.

\textsuperscript{18} 487 U.S. 654 (1988).
lect a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment?"19

As you know, the statute sunsets on June 30, 1999. If Congress cannot agree on a revision, it will expire and disappear. Others in this symposium will address in depth the specifics of the act and how it should be modified. Let me briefly describe several modifications I would suggest, if Congress decides to re-enact some type of independent counsel statute.

First, I would reduce the number of officials who can be targets of an independent counsel investigation. Specifically, an independent counsel should be considered to investigate alleged wrongdoing only by the President, Vice President, and the Attorney General. For the investigation of alleged wrongdoing by other cabinet officials, I believe we can trust the Department of Justice.

Second, I would give the Attorney General more tools with which to conduct the initial investigation and would raise the triggering threshold, making referral to an Independent Counsel more difficult.20

Third, I would provide time limits and budgetary constraints on the Independent Counsel’s investigation. Any extensions of these limits would have to be petitioned for, justified, and sanctioned by the appointing officials. This would allow for some reasonable, public check on the investigation.

Fourth, I would consider putting the appointment power in officials other than judges. The Starr investigation shows how the power to appoint and control the independent counsel can have a tarnishing effect on the judiciary, making it appear too political.

Finally, I would reconsider the wisdom and constitutionality of the provision in the independent counsel statute that requires the independent counsel, if he or she finds “substantial and credible information . . . that may constitute grounds for an impeachment,” to send a referral to the House of Representatives.21 I believe this delegation of congressional authority to the independent counsel is constitutionally suspect and dangerous. Specifically, it entrusts too much of the House’s constitutional responsibility to decide whether to initiate an impeachment inquiry to the independent counsel who is unelected and unaccountable.22 Once the independent counsel drives his van to the steps of the House of Representatives and drops his 36 boxes of “evidence,” it is very difficult for the House to decide quietly that there is nothing impeachable in the boxes. The House is virtually forced to vote to start an impeachment inquiry.

19. Id. at 730 (Scalia, J., dissenting).
That distorts the impeachment process, which is designed to be a dispute between the two elected branches, Congress and the President. Indeed, it is no accident that the Constitution vests "the sole power to impeach" in the branch most accountable to the people, the House of Representatives which faces the electorate every two years. The use of an unaccountable intermediary to trigger impeachment transforms and grossly distorts the process. A decision to initiate an impeachment inquiry should be a more difficult, and more carefully thought-out process, than what we witnessed in the Fall of 1998 when the House voted to initiate an impeachment inquiry.23

At a minimum, I would make the referral to the House non-mandatory. But is that alone sufficient? I’m not sure. The report of Leon Jaworski’s investigation and the Grand Jury’s Report and Recommendation on Watergate were sent to the House Judiciary Committee without an independent counsel statute.24 And if one believes, as I do, that a sitting president cannot be criminally indicted and tried,25 but that he can be investigated, then it is not clear what the investigator should do if he finds evidence of impeachable offenses. This is an issue warranting further study. Whether or not a new independent counsel statute gets enacted next year, we know from the Jaworski experience in the Nixon investigation that this question may still arise even without an independent counsel statute.

Lastly, we should consider, in the event a special prosecutor or independent counsel decides to send a referral to the Congress, what to do with grand jury materials that are traditionally required to be secret under the Federal Rules of Criminal Procedure Rule 6(e).26 Starr’s decision to turn the materials over to the House, ostensibly with the approval of the Special Division that appointed him, was in my opinion questionable. Normally, exemptions from Rule 6(e) must be sought from the presiding judge.27 Thus, I am unsure why Independent Counsel Starr sought approval from the Special Division instead of the presiding judge, Chief Judge Norma Holloway Johnson, other than the

25. Is a Sitting President Subject to Compulsory Criminal Process?, Hearings Before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Committee on the Judiciary, 105th Cong. (Sept. 9, 1998) (statement of Susan Low Bloch, Professor of Law, Georgetown University Law Center).
26. See FED. R. CRIM. P. 6(e).
obvious possible explanation that the Special Division would be easier to persuade than Judge Johnson. Moreover, Congress’s decision to put the report on the internet, without even reading or screening it was, to say the least, questionable.\(^{28}\) We must, after the current controversy is resolved, consider these issues dispassionately.

Finally, after examining the questions raised by presidential immunity and the independent counsel statute, Congress should reexamine the various privilege issues that arose in the course of the Whitewater investigation: executive privilege, attorney-client privilege,\(^ {29}\) and a protective function privilege.

With respect to executive privilege, there is little that Congress can or should do. In the case of *United States v. Nixon*,\(^ {30}\) the Supreme Court established a constitutionally protected executive privilege, but the President’s need for confidentiality must be balanced against the grand jury’s need for information relevant to a criminal investigation.\(^ {31}\) In the Starr investigation, when Bruce Lindsey invoked executive privilege, Chief Judge Johnson emphasized that conversations between the president and his aides are presumptively privileged.\(^ {32}\) Significantly, she rejected Starr’s argument that executive privilege cannot apply to discussions regarding private conduct.\(^ {33}\) But, relying on *United States v. Nixon*, Judge Johnson found that the claim of privilege would have to yield to the grand jury’s need for the information.\(^ {34}\) That judgment followed *Nixon* and thus left little that Congress can or should do with respect to executive privilege.

Regarding the claim of attorney-client privilege for government attorneys, Judge Johnson was confronted with three different views. The White House argued the existence of an absolute attorney-client privilege between the President and White House Counsel.\(^ {35}\) The Independent Counsel argued that no such privilege was available at all.\(^ {36}\) The Department of Justice, in an ami-
cus brief, took a middle position that the judge ultimately adopted.37 Specifically, Judge Johnson held that the President possesses an attorney-client privilege when consulting with White House counsel.38 But, she concluded that the privilege was qualified, not absolute; the privilege may be overcome when a prosecutor presenting a case before a federal grand jury can show a sufficient need for the subpoenaed communication, and the inability to get the information from other sources.39

The President appealed the question of attorney-client privilege to the Court of Appeals for the District of Columbia.40 In a 2-1 decision, the Court of Appeals affirmed the District Court’s ruling that Lindsey had to testify, but on grounds that significantly narrowed the District Court’s view of the privilege.41 The majority held that no attorney-client privilege exists between the President and White House Counsel if the communications contain information of possible criminal offenses.42 It rejected the District Judge’s use of a balancing test.43

The White House petitioned for certiorari and on November 9, 1998, the Supreme Court denied the petition, with two justices, Ginsburg and Breyer, dissenting from the denial. In their view, the issue was sufficiently important and difficult to warrant the Court’s attention.44

In light of the Supreme Court’s refusal to address the issue, at least at this time, it is particularly important that Congress do so. Specifically, Congress should study the question of attorney-client privilege for government employ-

37. In re Grand Jury Proceedings, 5 F. Supp.2d. at 32 (citing and summarizing the Attorney General’s amicus brief).
38. Id. at 33-4.
39. Id. at 33, 36-7.
40. The President appealed Judge Johnson’s decision to the United States Court of Appeals for the District of Columbia in the case of In re Bruce R. Lindsey, 148 F.3d 1100 (D.C. Cir. 1998), contesting both her ruling as to executive privilege and her ruling on the question of attorney client privilege. The Independent Counsel sought expedited consideration by the United States Supreme Court. In response, the President decided to drop the appeal of the executive privilege aspect of the case but continued to defend the claim of attorney-client privilege. His decision to drop the executive privilege claim was not surprising. The District Judge’s construction of executive privilege was generous, and her balancing followed the Supreme Court decision in United States v. Nixon. The Supreme Court was unlikely either to grant cert on that issue or to give a more expansive construction of executive privilege. The Supreme Court rejected Starr’s request for expedited consideration, United States v. Clinton, 118 S.Ct. 2079 (1998), and therefore the appeal with respect to attorney client privilege for government lawyers continued in the Court of Appeals.
41. In re Bruce R. Lindsey, 148 F.3d at 1101.
42. Id. at 1114.
43. Id. at 1119 (Tatel, C.J. dissenting from Part II & concurring in part and dissenting in part from Part III).
ees who confide in government lawyers. It should invite testimony from government attorneys who can describe the nature and extent of the problem and how they think it should be resolved. This is a very difficult question and should be resolved only with the benefit of past experiences by government attorneys.45

It is particularly important to address the question with respect to the relationship between White House Counsel and the President. As the Starr investigation made clear, impeachment is always a possibility, and that may influence the judgment about the necessity for and extent of the protection of legal advice provided to the President. The critical question in this analysis is who is the client? There are several possible answers: the United States, the Office of the President, the President. I think all will agree that White House Counsel does not represent the President as an individual. At most, White House Counsel represents the Office of the President or the President in an official capacity. To say that it represents the United States is too broad, especially when one contemplates the possibility of impeachment proceedings. During an impeachment, it is the Congress versus the Office of the President. Congress has its attorneys and one would think the President should have one, too, presumably White House Counsel. Each lawyer represents his own branch; neither represents the United States. If this is the case, then a basis exists for the argument that all conversations between the President and White House Counsel should be presumptively privileged, because, as we can see from the Starr investigation, an investigation of the President can easily turn into an impeachment inquiry. It seems odd to consider a privilege coming into effect only after an impeachment inquiry is imminent or announced. As Justices Breyer and Ginsburg noted in their dissent from the denial of certiorari in the Lindsey case:

The divided decision of the Court of Appeals makes clear that the question presented by this petition has no clear legal answer and is open to serious legal debate... Whether or when other opportunities for this Court to consider the issue arise depends upon whether or when the President, or other Government employees, will risk disclosing to Government lawyers significant matters that, under the Court of Appeals' decision, are not privileged. They may very well choose the cautious course, holding back information from Government counsel, perhaps hiring outside lawyers instead. I believe that this Court, not the Court of Appeals, should establish controlling legal principle in this disputed matter of law, of importance to our Nation's governance.46

For the reasons given by Justices Breyer and Ginsburg, Congress should examine this difficult and very important question.

46. 119 S.Ct. at 466.
The third privilege litigated in the Starr investigation is the protective function privilege for Secret Service agents who protect the President. When Starr subpoenaed several Secret Service agents, the Department of the Treasury, the agency responsible for the Secret Service, asserted this privilege. They argued that if agents were required to testify against the President, future presidents would keep them at a distance and thus jeopardize the President’s safety and the nation’s security.\(^{47}\)

Both the District Court\(^{48}\) and the Court of Appeals\(^{49}\) rejected the claim of such a privilege, and the Treasury petitioned for a writ of certiorari. The Supreme Court rejected the petition,\(^{50}\) a response that was not surprising and, in fact, one that I predicted.\(^{51}\) While the issue is important, no conflict existed in the circuits (since this was a case of first impression) and the government’s argument was weak. It was crippled by the President’s failure to assert the privilege as his own. I understand why politically the President did not want to assert another privilege, but without him, the claim is strained. Most privileges are between two people, designed to protect and foster candid conversations, and thereby preserve the relationship. Thus, for example, privileges exist between attorney and client, doctor and patient, and husband and wife.\(^{52}\)

The oddity with the asserted protective function privilege is that it is not designed to protect candid conversations between a secret service agent and anyone else. The sought-after privilege is to enable the President to have candid conversations with whomever he pleases, viewing the secret service agent, who by law is required to be by the President’s side,\(^{53}\) as mere “wallpaper.” It seems essential, therefore, that the privilege be controlled not by the wallpaper, but by the President, waivable and assertable as he chooses. Under the logic presented in the Court of Appeals and in the petition to the Supreme Court, the Secret Service and subsequent Presidents could waive a prior President’s protection; but that possibility would likely make sitting Presidents keep his protectors at a distance and thus undermine the whole reason for establishing the protective function privilege in the first place. Only if the President can control the waiving of the privilege, even when he is no longer in office, will he feel comfortable with his bodyguard so close to his side.\(^{54}\)

I suspect many people believe there should be some limits on the ability of


\(^{49}\) In re Sealed Case, 148 F.3d at 1077.


\(^{51}\) Presentation of this paper at St. Louis University on Oct. 16, 1998.


prosecutors to haul Secret Service agents into court to testify about the President’s private activities. The problem is that it is difficult, although not impossible, for the judiciary to craft such protection and to articulate its extent and limitations. Congress, the creator of the Secret Service and the institution that mandates the Service’s responsibility to protect the President, is better equipped to define such protection. Obviously, it is too late to do much to protect President Clinton, but I am hopeful that Congress will see the desirability of addressing the question for future executives.

One more issue that I hope Congress can address is the question of accession to the Office of the Presidency. Under the Presidential Succession Act, the order of succession is as follows: Vice President, Speaker of the House and then President of the Senate Pro Tempore. The events of this past year have made me realize that it is at best odd, and perhaps even unconstitutional, to have someone in line for the presidency—the Speaker of the House and the President of the Senate—with a significant role in the impeachment and removal of those he would replace. I think, at a minimum, Congress should reconsider the wisdom of this.

In conclusion, let me say that when Professor Joel Goldstein called me last year, in the fall of 1997, to invite me to this symposium evaluating what we have learned on the twenty-fifth anniversary of Watergate, I had no idea how clairvoyant he was. Who would have thought he could orchestrate an impeachment inquiry to fall right in the middle of this conference. I hope that next time Joel plans a conference, he tries to anticipate and evaluate the potential unintended consequences. I got particularly nervous when I heard that Joel was planning a conference next year to celebrate the 50th anniversary of “War of the Worlds.”

ADDENDUM
Since this symposium was held in October 1998, the impeachment process has continued and culminated in a vote on December 19, 1998 to impeach President Clinton. It is too early to predict the eventual outcome, but these events clearly make it imperative that we reassess many of the questions raised in this paper and in the Symposium generally.

55. 3 U.S.C. § 19(a) - (b).