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INVESTIGATING THE PRESIDENT: THE SUPREME COURT AND THE IMPEACHMENT PROCESS*

Martin H. Belsky[†]

I. INTRODUCTION

The Constitutional procedure for investigating the President is relatively simple and straightforward. The process begins in the House of Representatives, "which shall have the sole Power of Impeachment."¹ As a matter of tradition, the House has employed its Judiciary Committee to investigate and report on charges made against the President.² After their recommendation, the House, by majority vote, can refer any or all charges to the Senate for trial.³ The Senate "shall have the sole Power to try all Impeachments."⁴ The Chief Justice presides over the trial and conviction requires the vote of two-thirds of those senators present.⁵

The maximum penalty available to the Senate is removal from office⁶ and potential disqualification from holding any further public office.⁷ Of course, conviction of impeachment does not preclude indictment, trial, judgement and punishment for offenses in accordance with law.⁸ The offenses that serve as the basis for removal are similarly simple but vague. They are "Treason, Bribery, or other High Crimes and Misdemeanors."⁹ The Constitution does not indicate what burden of proof is required for impeachment or conviction.¹⁰ In fact, it does not define what

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1. U.S. CONST., art. I, § 2.

2. See CHARLES BLACK, *IMPEACHMENT: A HANDBOOK* at 6 (1974).

3. See *Impeachment and the U.S. Congress*, CONG Q., March, 1974 at 1.

4. U.S. CONST., art. I, § 3.

5. See *id.*

6. See *id.* The specific language of § 3 is that "Judgement in cases of Impeachment shall not *extend further* than to removal from office." (emphasis added). Whether lesser penalties are available, such as a censure, is the subject of continuing debate and is beyond the scope of this paper. See Linda Greenhouse, *It's Impeachment or Nothing, Panel is Told by Experts*, N.Y. TIMES, Nov. 10, 1998, at A1.

7. See U.S. CONST., art. I, § 3. Conviction can include "disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States." *Id.*

8. See BLACK, *supra* note 2, at 40-41 (stating that criminal procedures must be after impeachment and conviction).

9. U.S. CONST., art. II, § 4.

activities are included within the phrase "High Crimes and Misdemeanors" to justify an impeachment or later conviction.¹¹

Except for the explicit requirements in the Constitution, the procedures and standards of impeachment are left first to the House of Representatives and then to the Senate.¹² Clearly, it is inconceivable that a court would overturn any conviction and removal of a President by the Senate because of faulty procedures.¹³ As one commentator noted, "[t]here are ten rules about judicial review of the judgements of the Senate on impeachments. The first rule is that the courts have, in this, no part to play. The other nine rules don't matter."¹⁴ This doctrine should apply to all aspects of the impeachment process, not just the judgement. Undoubtedly, it is in the area of impeachment in which the Supreme Court should find a political question precluding judicial review.¹⁵

This article suggests the Supreme Court has significantly, but indirectly, gotten involved in the impeachment process. It is true that the Court has given a clear indication that the impeachment and trial procedures are non-justiciable political questions.¹⁶ Still, in a series of decisions going back to *United States v. Nixon* [hereinafter *Watergate Tapes case*],¹⁷ the Court has consistently minimized Presidential immunities in judicial proceedings and supported broad power to judicially supervise investigations of Presidential conduct.¹⁸ These investigations in turn have become the modern mechanism for pre-impeachment Congressional review.¹⁹

10. See BLACK, *supra* note 2, at 15-18. John Labovitz, a member of the Nixon Impeachment Inquiry staff of the House Judiciary Committee has indicated that in the Nixon investigation, no impeachment article was approved unless a majority felt there was "clear and convincing evidence." JOHN LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 90 (1978).

11. See *Impeachment and the U.S. Congress*, *supra* note 3, at 6-7 (March 1974) (citing then Congressman's Ford's comment that an impeachable offense is first whatever a majority of the House and then two-thirds of the Senate "consider it to be at any given time in history"); BLACK, *supra* note 2, at 37 (phrase should be limited to offenses which are "extremely serious," which in some way "corrupt or subvert the political or criminal process" and which are "plainly wrong in themselves" to any "good citizen.").

12. See *Impeachment and the U.S. Congress*, *supra* note 3, at 10-14 (describing the rules for impeachment and trial in the House and Senate).

13. See Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

14. BLACK, *supra* note 2, at 62-63.

15. See MICHAEL GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 143-46 (1996).

16. See *Nixon v. United States*, 506 U.S. 224 (1993).

17. 418 U.S. 683 (1974).

18. The Supreme Court has consistently applied strict separation of powers formulas to conflicts between the executive and legislative branches. See, e.g., *Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (concerning the line item veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (concerning a budget act); *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (concerning a one-house veto). In contrast, it has taken a more pragmatic approach to situations where the judiciary is given broader authority. See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997) (concerning district court supervision of civil proceeding against the President); *Mistretta v. United States*, 488 U.S. 361 (1989) (concerning sentencing panels and commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (concerning appointment and supervision of special prosecutors).

19. Compare LABOVITZ, *supra* note 10, at 49 (1978) (discussing the impeachment of President Andrew Johnson which occurred after a ten month investigation by House Judiciary Committee) and *id.* at 184-200 (discussing the House Judiciary Committee using evidence prepared by Special Prosecutors office, Senate Watergate Committee, and its own staff and witnesses), and Brian Kelly & Major Garrett, *Will This Play Ever End*, U.S. NEWS & WORLD REPORT, Nov. 30, 1998 at 21-24 (discussing the House Judiciary Committee relying on evidence submitted by Independent Counsel and Summary of Information provided by Independent Counsel in his testimony to Committee).

II. PRESIDENTIAL IMPEACHMENT AS A NON-JUSTICIABLE POLITICAL ISSUE

In the 1993 case of *Nixon v. United States* [hereinafter *Federal Judge Case*],²⁰ federal judge Walter L. Nixon, Jr. challenged the procedures by which he was convicted by the Senate and removed from office. Specifically, he argued that Article I, § 3 of the Constitution provides that the Senate is to “try” an accused and therefore proceedings in the Senate must be in the nature of a judicial trial.²¹ The Supreme Court held the issue was a political question and non-justiciable.²²

There are several reasons why this should be held a non-justiciable question. First, the legislative history of the Constitutional Convention made it clear there was no intent to allow judicial review of impeachment proceedings or of trials resulting from impeachment.²³ In addition, the Constitution itself gives the “sole” power of impeachment to the House and the duty of trial to the Senate.²⁴ Finally, allowing judicial review would mean a lack of finality and no real relief.²⁵

The Supreme Court specifically indicated its concern about judicial review of a Presidential impeachment proceeding:

This lack of finality [if there was judicial review of impeachment proceedings] would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgement of conviction were invalidated.²⁶

The potential for harm is especially troublesome because of the President’s foreign policy responsibilities. The “briefest uncertainty about who is properly the President puts national security at risk.”²⁷

Thus, it seems clear that the Supreme Court will never directly intervene in an impeachment investigation or trial. In fact, the federal courts seem unwilling to intervene directly in any Congressional investigation of the President.²⁸ However, prosecutorial investigations of the President under judicial supervision are a different

20. 506 U.S. 224 (1993).

21. *See id.* at 230-31.

22. *See id.* at 226 (1993). In his concurrence, Justice Souter envisioned “different and unusual circumstances that might justify a more searching review of impeachment proceedings.” *Id.* at 253.

23. *See id.* In fact, trials of impeachments were originally proposed at the Constitutional Convention to be done by the Supreme Court but was transferred to the Senate. *See* RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 116-19 (1974).

24. *See Nixon v. United States*, 506 U.S. 229-31.

25. *See id.* at 236-37.

26. *Id.* at 236.

27. GERHARDT, *supra* note 15, at 145.

28. The Circuit Court of Appeals for the District of Columbia held that the Senate Watergate Committee, investigating the alleged abuses by President Nixon, had no right to relevant White House tapes. *See Senate Select Campaign Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

matter.²⁹ Even though the evidence collected by such investigations is available for impeachment, the Court has yet to find any conflicts between a prosecutor and the supervising judiciary against the President to be non-justiciable political questions. Rather, the Court in the *Watergate Tapes case* and later decisions intervened to provide broad investigatory power to the Courts and Special Prosecutors and minimal immunities for the Executive.

III. SETTING THE PROSECUTORIAL AGENDA: WATERGATE AND THE SPECIAL PROSECUTOR

In 1974, for only the second time in the history of the United States,³⁰ the House of Representatives considered articles of impeachment against a President.³¹ The information presented to the House Judiciary Committee came from public sources, including records and testimony from the Senate Watergate Committee and evidence and testimony collected by the Special Prosecutor and the Grand Jury convened by the Special Prosecutor.³² In other words, if a Special Prosecutor receives information, it eventually is available for an impeachment inquiry and later trial.³³

This was the context of the review by the United States Supreme Court of a demand for certain White House tapes recorded by President Nixon in the *Watergate Tapes case*. In a speedy³⁴ and unanimous decision written by Chief Justice Burger,³⁵ the Court ordered subpoenaed materials to be turned over to the federal district court to weigh the importance of the material against the "high degree of respect due the President of the United States."³⁶

The Supreme Court specifically considered two arguments made by the President asserting the Court should not enforce the subpoena. First, the President argued this was a political question and non-justiciable because the dispute was between the chief executive and one of his subordinates.³⁷ The President urged "the

29. The Supreme Court was willing to quickly hear a request by a prosecutor and supervising judge to obtain evidence from the President and subsequently forced the President to turn over White House tapes to the trial judge and then a Special Prosecutor investigating the same alleged abuses. See *United States v. Nixon*, 418 U.S. 683 (1974).

30. President Andrew Johnson was, in fact, impeached. He missed getting convicted in the Senate by one vote. See *Impeachment and the U.S. Congress*, *supra* note 3, at 4-5.

31. See U.S. HOUSE, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 1974. H.R. Rep. 93-1305 (2d Sess. 1974).

32. See LABOVITZ, *supra* note 10, at 189. The staff organized these into separate "statements of information." *Id.*

33. After the Supreme Court ordered the release of contested White House tapes, the full recordings were made available to the staff and committee members of the House Judiciary Committee conducting the impeachment inquiry. See *id.*

34. The chronology is as follows: On March 1, 1974, the grand jury returned an indictment charging individuals with various offenses, and including the President as an unindicted coconspirator. On April 18, 1974, a subpoena duces tecum was issued to the President asking for certain tapes and writings. On May 20, 1974, the district court denied a motion to quash. The district court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. On May 24, the Special Prosecutor filed a petition for a writ of certiorari before judgement. On May 31, the petition was granted with an expedited briefing schedule. Argument was held on July 8, 1974. The decision was rendered on July 24, 1974. See *United States v. Nixon*, 418 U.S. 683, 689-91 (1974).

35. Justice Rehnquist did not participate in the decision. See *id.* at 683.

36. *Id.* at 715.

37. See *id.* at 692.

federal courts should not intrude into areas committed to the other branches of government."³⁸ Then, the President argued "the separation of powers doctrine precludes judicial review of a President's claim of privilege."³⁹ The Court could have decided, for policy reasons, it was not entering this quagmire. After all, investigations of the President have a defined procedure in the Constitution,⁴⁰ and if the President refuses to honor a subpoena, that could form the basis of an impeachment article.⁴¹

Instead, the Court almost summarily rejected these arguments, deciding that whether a subpoena should be enforced is the "kind of controversy courts traditionally resolve."⁴² Similarly, the Court rejected the idea that separation of powers mandates the Chief Executive alone must decide what is within the scope of the executive privilege.⁴³ The "judicial power of the United States vested in the federal courts by Art. III, §1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive can share with the Judiciary the veto power. . . ."⁴⁴ The Supreme Court saw itself as the ultimate arbiter—to balance a claim of privilege against the "right to every man's evidence."⁴⁵

This special authority of the federal courts to oversee investigations of even the President was reconfirmed in *Morrison v. Olson*.⁴⁶ As a result of the perceived success of the use of the "independent" special prosecutor in the Watergate investigation,⁴⁷ legislation was passed in 1978 to provide a continuing mechanism for appointment of independent or special counsel to investigate allegations against high-ranking federal officials, including the President.⁴⁸ Ten years later, the statute was challenged before the United States Supreme Court.⁴⁹ All the Justices except Justice Scalia voted to uphold the statute.⁵⁰

38. *Id.* at 692-93.

39. *Id.* at 703.

40. See *supra* text accompanying notes 1-15.

41. In fact, the House Judiciary Committee included as one of its Articles of Impeachment, the refusal to comply with earlier subpoenas, albeit those issued by the Committee. See LABOVITZ, *supra* note 10, at 228-48.

42. *United States v. Nixon*, 418 U.S. 683, 696 (1974). See also *id.* at 697 (stating issues are "traditionally justiciable;" and within the "traditional scope of Art. III power").

43. See *id.* at 704.

44. *Id.* at 704. But see *Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (declaring that line item veto, authorized by the Congress cannot be used by the President because it violates separation of powers).

45. *United States v. Nixon*, 418 U.S. at 706. The test established for this weighing was:

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of in camera inspection, and any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution.

Id. at 684-685.

46. 487 U.S. 654, 676 (1988).

47. See Katy Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 493-506 (1998); see also, Nick Bravin, *Is Morrison v. Olson Still Good Law: The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1104 (1998).

48. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 49, 591-99 (1994) (Title VI)); see also Martin H. Belsky, *Considering the Independent Counsel Statute*, 27 PHILADELPHIA BAR REPORTER 17, Oct. 1998.

49. See *Morrison v. Olson*, 487 U.S. 659 (1998).

50. See *id.* at 659-60.

After first rejecting a technical argument that the statute was invalid because of the prosecutor appointment procedure,⁵¹ the Supreme Court then considered an argument that allowing the judicial branch to appoint the independent counsel allows that branch to encroach into areas reserved for other branches.⁵² The statute allows a "Special Division" of the United States Court of Appeals for the District of Columbia Circuit to appoint the independent counsel and to define that person's jurisdiction.⁵³ Because the Special Division does not specifically review the actions of the independent counsel, there is "no risk of partisan or biased adjudications of claims regarding the independent counsel by that court."⁵⁴

In his dissent, Justice Scalia questioned the validity of this absolutist statement. He argues, "[w]hat if they [the panel of judges in the Special Division who select the independent counsel] are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the Administration, or even to the particular individual who has been selected for this special treatment? There is no remedy . . ."⁵⁵

The Court quickly disposed of the argument that the Independent Counsel statute violates "separation of powers." The Court distinguished this situation, where powers are given to the judiciary, from a case "where Congress [is seeking] to increase its own powers at the expense of the Executive Branch."⁵⁶ The powers given to the Judiciary are "well within the traditional power of the Judiciary."⁵⁷ These statements form the basis for Justice Scalia's angry dissent. The statute, he argues, goes against executive power.⁵⁸

Justice Scalia notes that the Court would never allow an accretion of judicial or legislative power to vest in the Executive Branch, nor allow the powers of the other two branches to vest in the Legislative Branch.⁵⁹ So, why did the Court allow its own branch the power to encroach on the power of the Executive?

51. The technical argument was that the independent counsel was a "principal officer" and thus under Article II, could only be appointed by the President with the advice and consent of the Senate. The Court found that the independent counsel could be considered an "inferior officer" and could therefore be appointed by the courts. *Id.* at 670-77.

52. *See id.* at 681.

53. *Id.* at 661 n.3.

54. *Id.* at 683.

55. *Morrison v. Olson*, 487 U.S. 654, 730 (1988) (Justice Scalia dissenting). This is precisely, some argue, what happened in the Whitewater Investigation. Robert Fiske, Jr. had been appointed to investigate some earlier allegations against President Clinton and his Administration. He issued a report that exculpated the President and angered Republican leaders and they asked for his replacement. Attorney General Reno then referred the Whitewater Investigation to the Special Division. Judge Sentelle, a member of the Special Division, then had a meeting with two conservative lawmakers from North Carolina who had been critical of Mr. Fiske (Senators Lauch Faircloth and Jesse Helms). Immediately thereafter, the Special Division decided not to reappoint Fiske, who had been on the job nine months and had developed a staff and procedures, "despite the obvious efficiency" of doing so, and instead appointed Kenneth Starr, a former judge on the District of Columbia Circuit and the former Solicitor General in the Bush Administration. Bravin, *supra* note 47, at 1126-27. Starr's impartiality has been the subject of challenge. Prior to his appointment as special prosecutor, he had agreed to file a brief opposing Presidential immunity in the Paula Jones case. One of Starr's witnesses—allegedly tying President Clinton to Whitewater—had been paid by a conservative political and business leader, as part of that individuals "Arkansas Project" intended to assist in any way with the denigration of President Clinton. *Id.* at 1129-30.

56. *Morrison v. Olson*, 487 U.S. 654, 683 (1988).

57. *Id.* at 695.

58. *See id.* at 706.

59. *See id.* at 709-10.

Scalia makes an analogy to the justiciability doctrine. Congress can "impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes."⁶⁰ Both actions are non-reviewable. Similarly, the power to appoint prosecutors rests in the Executive and Congress should not restrict this power, nor should the Courts enforce any such restriction.⁶¹

The *Watergate Tapes* case and the series of *Special Prosecutor*⁶² cases set the pre-impeachment agenda. Investigations of the President can be undertaken by judicially appointed independent counsel who are independent of the Executive and under the supervision of the federal courts.⁶³ The evidence they gather is available to the House and Senate for impeachment proceedings.⁶⁴ Thus, the federal courts, and ultimately the Supreme Court itself, could decide what evidence is available and what rights the President has in challenging any proceedings and evidence. Twenty-four years later, the federal courts, and ultimately the Supreme Court did just that.

IV. SETTING THE PROSECUTORIAL AGENDA: WHITEWATER, JONES, LEWINSKY AND THE INDEPENDENT COUNSEL

In December of 1998, the House of Representatives impeached the President of the United States by approving articles of impeachment for perjury and obstruction of justice charges.⁶⁵ In February of 1999, after holding a full trial with Chief Justice William Rehnquist presiding, the United States Senate acquitted President Clinton on both charges.⁶⁶ The basis for these charges was the report issued by the Independent Counsel.⁶⁷ This Counsel was first appointed to investigate allegations that the President, his wife, and others were involved in a fraud surrounding a land deal in Arkansas [Whitewater].⁶⁸

The Independent Counsel was later given authority to investigate other alleged improprieties by the President, including alleged perjury by the President when he testified in a civil suit filed by Paula Jones.⁶⁹ Ultimately, the Independent Counsel

60. *Id.* at 711.

61. *See id.* at 714-15.

62. *In re Bruce Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub nom.* Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997); *Morrison v. Olson*, 487 U.S. 654 (1988).

63. *See generally In re Bruce Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub nom.* Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997); *Morrison v. Olson*, 487 U.S. 654 (1988).

64. *See* 28 U.S.C. § 595(c) (1994).

65. *See* Francis Clines, *After the Vote, a Pause; then Back-Pats and Glumness*, N.Y. TIMES, Dec. 20, 1998, at A1.

66. *See* Peter Baker & Helen Dewar, *Clinton Acquitted; Two Impeachment Articles Fail to Win Senate Majority; Five Republicans Join Democrats in Voting down Both Charges*, WASH. POST, Feb. 13, 1999 at A1.

67. *See* Alison Mitchell, *The Nation: Impeachment Maneuvers; Wrapping Things Up, in Knots*, N.Y. TIMES, Nov. 15, 1998 at E3. *See also* Don Van Natta, Jr., *Backing Off (A Little)*, N.Y. TIMES, Nov. 15, 1998 at A28.

68. *See* Bravin, *supra* note 47, at 1129.

69. *See* THE STARR REPORT: THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT at 39 (Forum Prima 1998) (hereinafter STARR REPORT); *see also In re Bruce Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) *cert. denied sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998);

and the House Judiciary Committee moved away from any allegations of impeachable or criminal conduct involving Whitewater and focused exclusively on allegations of perjury, obstruction of justice, and abuse of power.⁷⁰

The alleged perjury by the President arose in a deposition given by the President in a federal civil suit filed by Paula Jones⁷¹ alleging that in 1991, President Clinton, then Governor of Arkansas, made improper sexual advances toward Jones and that when she rejected these advances, she was punished by her work superiors.⁷² In his deposition, President Clinton was asked about any sexual encounters with White House Intern, Monica Lewinsky.⁷³ He denied having sex with Lewinsky.⁷⁴ The Independent Counsel gathered evidence, including a partial recantation by the President, and reported to the House Judiciary Committee that this was perjury in a court proceeding and thus an impeachable offense.⁷⁵

The President vigorously opposed any deposition in the Jones case, so long as he was a sitting President. Specifically, he asked the district court "to dismiss . . . without prejudice and to toll any statute of limitations [that may be applicable] until he is no longer President."⁷⁶ The district court denied the request for immunity, ordered discovery to proceed, but ordered a delay in any trial until after the completion of Clinton's Presidency.⁷⁷ The Eighth Circuit upheld the denial of immunity and went further holding there was no need to delay trial.⁷⁸

Following the precedent established by the Supreme Court in the *Watergate Tapes case*, the Eighth Circuit indicated its confidence in the federal judiciary to exercise its traditional discretion, being "sensitive to the burdens of the presidency and the demands of the President's schedule" to avoid any separation of powers problems.⁷⁹ The President promptly appealed. Before the Supreme Court, the President's counsel argued for a political question resolution of the issue.⁸⁰ They

Bravin, *supra* note 47, at 1130. The Independent Counsel was also given authority to investigate claims that there were improprieties in the firing of employees from the White House Travel Office. See Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998).

70. See STARR REPORT, *supra* note 69; see also Alison Mitchell, *House Will Decide: GOP Counsel Lays out 15 Reasons to Move Against President*, N.Y. TIMES, Oct. 6, 1998 at A1; Alison Mitchell, *The Testing of a President: The Overview; Judiciary Panel, In Party Votes, Urges Impeachment Hearings*, N.Y. TIMES, National Edition, Oct. 6, 1998 at A1.

71. See David Stout, *From a Modest Start to a Threat to the Presidency*, N.Y. TIMES, Nov. 15, 1998, at A28.

72. See Clinton v. Jones, 520 U.S. 681, 685 (1997). After the decision in this case, the case was remanded back to the district court. The district court later found insufficient bases for the claim to proceed. See also Dan Balz & Thomas Edsall, *After Paula Jones*, WASH. POST, Nov. 23, 1998, at 10.

73. See STARR REPORT, *supra* note 69, at 313-32.

74. See *id.*

75. See *id.* Some have argued that the Independent Counsel, having first written a brief on behalf of Paula Jones for the Supreme Court, and then working with Linda Tripp to use tapes of Monica Lewinsky's conversations, manipulated the Jones case and the follow-up, to secure a new charge against the President. See Anthony Lewis, *The Starr Questions*, N.Y. TIMES, Oct. 20, 1998 at A31; Richard Ben-Veniste, *The Case Against Ken Starr*, N.Y. TIMES, Oct. 23, 1998 at A23.

76. Clinton v. Jones, 520 U.S., 681, 686 (1997).

77. See Jones v. Clinton, 879 F. Supp. 86, 88 (E.D. Ark. 1996), *cert granted*, 518 U.S. 1016, *aff'd sub nom.* Clinton v. Jones, 520 U.S. 681 (1996).

78. See Jones v. Clinton, 72 F.3d 1354, 1363 (8th Cir. 1996).

79. *Id.* at 1361.

80. See 520 U.S. 681, 684 (1997).

argued the judicial branch, represented by a federal district court judge, should not interfere with the activities of the President.⁸¹ The President, they urged, under traditional separation of powers analysis, should be able to set his own time schedules and not report to a federal judge and have that judge set his priorities.⁸²

The Supreme Court, as it did in the *Watergate Tapes case*, quickly rejected any separation of powers argument. According to the Court, the courts are merely exercising their traditional Article III powers,⁸³ and the judiciary should be trusted to handle any problems. The Court stated there will be “no unacceptable burden on the President’s time and energy.”⁸⁴ The Court went on to say the district court will “properly manag[e]” the case so it will be “unlikely to occupy any substantial amount of [the President’s] time.”⁸⁵ The court reaffirmed the primacy of the Judiciary Branch by finding, “[t]he Federal district court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims.”⁸⁶

Justice Breyer only concurred in the judgement.⁸⁷ As Justice Scalia did in his dissent in the *Morrison case*,⁸⁸ Justice Breyer complained the majority almost cavalierly disregarded the separation of powers argument made by the President. The Chief Executive needs his own “independent authority to control his own time and energy.”⁸⁹ This is not a case, he argues, where the issue is official immunity in a challenge to executive powers; these issues are delegable and others can deal with those challenges with minimal interference with the President’s schedule.⁹⁰ The civil lawsuit filed by Paula Jones, he said, is a personal demand on the President’s time.⁹¹

Historical precedent indicates that even in challenges to the President’s executive actions, immunity would be required when court “orders could significantly

81. *See id.*

82. *See* VINCENT BUGLIOSI, NO ISLAND OF SANITY—PAULA JONES V. BILL CLINTON: THE SUPREME COURT ON TRIAL 38-39 (1998) (referring to the briefs filed by the President’s Counsel, Robert Bennett). Bennett continued: “Even seemingly minor changes in the President’s schedule are imbued with significant portents by observers, both foreign and domestic. It is, therefore, not uncommon for a President to seek to maintain a pretense of ‘business as usual’ to mask an impending crisis.” *Id.* at 39. Illustrations cited by Bennett included President Kennedy’s “cold” masking his need to cancel meetings and consider the Cuban Missile crises; President Reagan and President Carter had similar situations of scheduling duplicity to allow consideration of crises involving respectively Grenada and the American hostages in Iran. *See id.* at 39-40.

83. *See* *Clinton v. Jones*, 520 U.S. 681, 699-706 (1997).

84. *Id.* at 702.

85. *Id.*

86. *Id.* at 710.

87. Justice Breyer’s limited concurrence reads almost like a dissent:

I agree with the majority’s determination that a constitutional defense must await a more specific showing of need; I do not agree with what I believe to be an understatement of the “danger.” And I believe that ordinary case-management principles are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based requirement that district courts schedule proceedings so as to avoid significant interference with the President’s ongoing discharge of his official responsibilities.

Id. at 723-24.

88. It is interesting to note that Justice Scalia did not dissent or even write a separate opinion in the Paula Jones case. In fact, it was reported that Justice Scalia made light of the President’s arguments. *See* BUGLIOSI, *supra* note 82, at 98-100.

89. *Clinton v. Jones*, 520 U.S. 681, 711 (1997).

90. *See id.* at 712-14.

91. *See id.* at 713.

interfere with [a President's] efforts to carry out his ongoing public responsibilities."⁹² Justice Breyer urged that lawsuits against the President personally, by definition, interfere with his time and responsibilities and therefore deserve a delay.⁹³

The majority, of course, rejected these arguments and decided the Judiciary, not the President, should be the arbiter. They found that Judges can balance the risks of undue interference, and "[i]n all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution."⁹⁴ Justice Breyer considered this hubris stating:

I concede the possibility that district courts, supervised by the Courts of Appeals and perhaps this Court, might prove able to manage private civil damage actions against sitting Presidents without significantly interfering with the discharge of Presidential duties . . . Nonetheless, predicting the future is difficult, and I am skeptical. . . . A Constitution that separates powers in order to prevent one branch of Government from significantly threatening the workings of another could not grant a single judge more than a very limited power to second guess a President's reasonable determination (announced in open court) of his scheduling needs, nor could it permit the issuance of a trial scheduling order that would significantly interfere with the President's discharge of his duties—in a private civil damage action the trial of which might be postponed without the plaintiff suffering enormous harm. As Madison pointed out in *The Federalist* No. 51, "[t]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . ."⁹⁵

V. PRIVILEGES, EVIDENCE, AND THE PRESIDENT

This conflict between the President and the federal courts regarding Executive authority versus Judiciary powers continued after the Paula Jones case.⁹⁶ In a case involving attorney-client confidentiality, the Supreme Court, in dictum, quickly reaffirmed its minimization of any special immunities or rights of the President in any criminal or pre-impeachment investigation. The Court found common law privileges, like those involving attorneys and their clients, are entitled to a broad reading and

92. *Id.* at 714.

93. *See id.* at 713.

94. *Id.* at 706.

95. *Clinton v. Jones*, 520 U.S. 681, 723 (1997).

96. The only "win" for the President did not relate to any special privileges or claims that he made in his capacity as Chief Executive. In *Swidler & Berlin v. United States*, the Office of Independent Counsel, as part of its investigation of alleged improprieties in the firing of employees in the White House Travel Office, sought handwritten notes taken by a lawyer, acting as counsel for Deputy White House Counsel, Vincent W. Foster. Foster's lawyers argued that the notes were covered by the attorney-client privilege. The Independent Counsel argued that the privilege does not apply as Foster was now deceased. The Court, in a six to three decision, ruled that the privilege applied posthumously. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2087 (1998).

non-common law privileges, like those involving the President, are to be strictly construed.⁹⁷

Relying on Supreme Court precedents, the courts overseeing the independent counsel's investigations consistently rejected any special privileges by the President and have minimized even the attorney-client privilege when it is applied to the President. In a challenge to a subpoena, the President's wife, an attorney, argued she was entitled to some immunity as to discussions she had with White House counsel and her counsel.⁹⁸ The Eighth Circuit Court of Appeals ruled no executive privilege exists, because Mrs. Clinton is not the President and no private attorney-client privilege exists since her meetings also involved government attorneys.⁹⁹ Additionally, they ruled no government attorney privilege existed because all executive branch attorneys must report to the Attorney General.¹⁰⁰

In another case, the Deputy White House Counsel, Bruce Lindsey,¹⁰¹ was subpoenaed to testify before a grand jury regarding information he obtained from the President about Monica Lewinsky, the President's interactions with her, and how those interactions related to the President's later testimony in the Paula Jones case.¹⁰² He refused to comply, arguing that his conversations were covered both by the attorney-client and executive privileges.¹⁰³ The district court, relying on the *Watergate Tapes case*, quickly disposed of the executive privilege claim finding there was a clear need, and that need outweighed any executive privilege.¹⁰⁴ Regarding the claims of attorney-client privilege, the D.C. Circuit, like the Eighth Circuit, rejected any applicable government attorney privilege,¹⁰⁵ finding advice or discussions the President had with Counsel Lindsey about the Paula Jones case were about a "lawsuit involving President Clinton in his personal capacity" and could not be covered by any government attorney privilege.¹⁰⁶ The Court said the fact they may relate to potential impeachment proceedings was irrelevant.¹⁰⁷

97. See *id.* at 2087-88. The Supreme Court seems to accept the argument made by the Independent Counsel that executive privilege type "privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking." *Id.* at 2087.

98. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 914 (8th Cir. 1997), *cert. denied sub nom.* Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997).

99. See *id.* at 922-23.

100. See *id.* See also John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgement in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 520-21 (1998).

101. Bruce Lindsey technically had two titles: Deputy White House Counsel and Assistant to the President. *In re Bruce Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998).

102. See *id.* at 1267.

103. See *id.*

104. The executive privilege issue was not appealed. Nevertheless, the D.C. Circuit still opened its opinion by reaffirming the district court decision. "The Supreme Court and this court have held that even the constitutionally based executive privilege for presidential communications fundamental to the operation of the government can be overcome upon a proper showing of need for the evidence in criminal trials and in grand jury proceedings." *Id.* at 1266-67 (citing *United States v. Nixon*, 418 U.S. 683, 707-12 (1974)).

105. Circuit Judge Tatel dissented, arguing that there may be an attorney-client privilege applicable to lawyers serving the Presidency. *Id.* at 1283-84.

106. *Id.* at 1270.

107. See *In re Bruce Lindsey*, 158 F.3d 1263, 1276-78 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998).

Thus, to the extent that impeachment proceedings may be on the horizon, the Office of the

As for the attorney-client privilege generally, the Court of Appeals carved out a special balancing rule for special prosecutors investigating a President by finding the President has less rights than an ordinary citizen¹⁰⁸ and a higher justification is required for confidentiality.¹⁰⁹

The President has a special obligation to obey the law and his government lawyer, as an agent of the government, has an obligation to not withhold evidence, but

President contends that White House Counsel must be given maximum protection against grand jury inquiries regarding their efforts to protect the Office of the President, and the President in his personal capacity, against impeachment. Additionally, the Office of the President notes that the Independent Counsel serves as a conduit to Congress for information concerning grounds for impeachment obtained by the grand jury, and, consequently, an exception to the attorney-client privilege before the grand jury will effectively abrogate any absolute privilege those communications might otherwise enjoy in future congressional investigations and impeachment hearings. . . .

....

.... Nor is our conclusion altered by the Office of the President's concern over the possibility that Independent Counsel will convey otherwise privileged grand jury testimony of White House Counsel to Congress. First, no one can say with certainty the extent to which a privilege would generally protect a White House Counsel from testifying at a congressional hearing. The issue is not presently before the court. Second, the particular procedures and evidentiary rules to be employed by the House and Senate in any future impeachment proceedings remain entirely speculative. Finally, whether Congress can abrogate otherwise recognized privileges in the course of impeachment proceedings may well constitute a non-justiciable political question. (citation omitted).

Id.

108. *See id.*

[I]t would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel. When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.

Id. at 1278.

109. *See id.* at 1271-72.

Although the cases decided . . . recognize a government attorney-client privilege that is rather absolute in civil litigation, those cases do not necessarily control the application of the privilege here. The grand jury, a constitutional body established in the Bill of Rights, "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people," while the Independent Counsel is by statute an officer of the executive branch representing the United States. For matters within his jurisdiction, the Independent Counsel acts in the role of the Attorney General as the country's chief law enforcement officer. . . .

....

... Thus, although the traditional privilege between attorneys and clients shields private relationships from inquiry in either civil litigation or criminal prosecution, competing values arise when the Office of the President resists demands for information from a federal grand jury and the nation's chief law enforcement officer. As the drafters of the Restatement recognized, "More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." For these reasons, others have agreed that such "considerations" counsel against "expansion of the privilege to all governmental entities" in all cases. (citations omitted).

Id.

to provide it.¹¹⁰ As noted by the Eighth Circuit earlier, government attorneys have an obligation to report any potential criminal violations to the Attorney General and are therefore duty bound to not withhold evidence.¹¹¹ The Court rejected the argument made by one of its members that denying the President the ability to confide in his government attorney may have a “chilling effect” and cause the President to use only private counsel for his most serious legal or quasi-legal issues.¹¹²

Finally, the President argued that his official duties may make him unavailable to private counsel.¹¹³ In a situation where a special prosecutor is investigating the President and a future impeachment inquiry is possible, he argued, the President should be free to use his White House counsel to convey confidential information to his attorney.¹¹⁴ The D.C. Circuit agreed with the rule but rejected its likely application finding an intermediary can only convey information and can not act with private counsel to plan strategy and provide legal advice.¹¹⁵ Once he does so, he is no longer an agent but an independent entity and the attorney client privilege does not apply.¹¹⁶ If information is given to the President’s private counsel in the presence of his government counsel, then that government counsel must still communicate that information to requesting authorities.¹¹⁷ Over the dissents of Justices Breyer and

110. *See id.* at 1272-73.

With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to “take Care that the Laws be faithfully executed.” . . . Each of our Presidents has, in the words of the Constitution, sworn that he “will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States.” . . . Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.

Id. at 1272 (quoting U.S. CONST. art. II §3).

111. *See id.* at 1275.

112. *Id.* at 1284 (Tatel, J., dissenting in part concurring in part); *see also id.* at 1276 (majority opinion).

113. *In re Bruce Lindsey*, 158 F.3d 1263, 1278-79 (D.C. Cir. 1998), *cert. denied. sub nom. Office of the President v. Office of the Independent Counsel*, 119 S. Ct. 466 (1998).

114. *See id.*

115. *See id.* at 1280-81.

116. *See id.* at 1281.

[T]he district court correctly observed that the intermediary doctrine would not cover instances when Lindsey consulted with the President’s private counsel on litigation strategy. . . . It would stretch the intermediary doctrine beyond the logic of its principle to include Lindsey’s legal contributions as an extra lawyer, and we decline to do so. Those contributions, rather than facilitating the representation of the President’s personal counsel, constitute Lindsey’s own independent contribution to the President’s cause and cannot therefore be said to be covered by the intermediary doctrine. One lawyer does not need another lawyer providing supplementary legal advice to facilitate communications regarding matters of legal strategy. . . . Upon remand, the district court should address when, if ever, Lindsey was acting as a true intermediary and allow him to claim the President’s attorney-client privilege as appropriate.

Id.

117. *See id.* at 1282-83.

If the President wishes to discuss matters jointly between his private counsel and his official counsel, he must do so cognizant of the differing responsibilities of the two counsel and tailor his communications appropriately; undoubtedly, his counsel are alert to this need as well. Although his personal counsel remain fully protected by the absolute attorney-client privilege, a Deputy White House Counsel like Lindsey may not assert an absolute privilege in the face of a grand jury subpoena, but only the more limited protection of executive privilege. Consequently, although the President in his personal capacity has at least some areas of common interest with the Office of the

Ginsburg, the United States Supreme Court denied certiorari refusing to consider the issue of the rights of the President to keep conversations with government counsel confidential.¹¹⁸

Another attempt to raise special privileges related to the Chief Executive similarly failed. The Independent Counsel subpoenaed Secret Service agents to appear before a grand jury to testify as to what they observed in respect to the interaction of the President and Monica Lewinsky.¹¹⁹ The Secret Service objected, raising what they termed a "[p]rotective service" privilege.¹²⁰ They asserted that, except when they observe actions or overhear conversations that give reasonable grounds to believe the President committed a felony, they should not be required to testify about information they learned as Secret Service agents performing protective functions.¹²¹ They argued that the "success of [their] protection relies on complete and unquestioned proximity to the President."¹²² Denying this privilege would mean "current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive."¹²³

The Court stated that it would not weigh these risks because first, no prosecutor or grand jury would seek testimony about "innocent" or non-criminal acts of the President and¹²⁴ second, the President "has a very strong interest in protecting his own

Presidency, and although there may thus be reason for official and personal counsel to confer, the overarching duties of Lindsey in his role as a government attorney prevent him from withholding information about possible criminal misconduct from the grand jury.

Id. at 1283.

118. See *Office of the President v. Office of the Independent Counsel*, 119 S. Ct. 466 (1998).

119. See *In re Grand Jury Proceedings*, No. 98-148 (NHJ), 1998 WL 272884, *1 (D.D.C. 1998) (redacted version), *aff'd sub nom. In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied sub nom. Rubin v. United States*, 119 S. Ct. 464 (1998).

120. See *id.*

121. See *id.*

122. *Id.* at *4.

123. *Id.*

124. See *id.*

It is not at all clear that a President would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts. Such actions are extremely unlikely to become the subject of a grand jury investigation. The claim of the Secret Service that "any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation," is simply not plausible.

Id.

Of course, in the present situation, these are precisely the circumstances. The Office of the Independent Counsel was seeking testimony about sexual encounters between the President and Monica Lewinsky—not because they were witnessing criminal conduct but because their testimony would contradict the President's denial in a deposition in the Paula Jones case. As Justice Breyer said in his dissent to the denial of certiorari on the appeal from the D.C. Circuit's affirmation:

First, the complexity of modern federal criminal law, codified in several thousand sections of the United States Code and the virtually infinite variety of factual circumstances that might trigger an investigation into a possible violation of the law, make it difficult for anyone to know, in advance, just when a particular set of statements might later appear (to a prosecutor) to be relevant to some such investigation. Thus, without the privilege, a President could not count on privacy. Rather, he would have to assume, in respect to many Presidential conversations, some genuine risk that a nearby Secret Service agent might later have to divulge their contents.

At the same time there may well be conversations—perfectly lawful conversations, concerning, say, politics or personalities—which a President reasonably would not want divulged. Unless those conversations clearly fall within the bounds of "executive privilege," the bounds of which are

physical safety.”¹²⁵ The district court, citing the *Watergate Tapes case*, made it clear that the Supreme Court indicated it should not recognize new privileges by stating, “the Supreme Court was willing to recognize a new privilege only when the privilege had some history in federal law and enjoyed broad state support, and public policy considerations weighed strongly in favor of recognizing it.”¹²⁶

Since no such history or policy reasons support such a privilege, none exists. As the Supreme Court did in the *Watergate Tapes case*, the district court stressed that there were no good reasons to “overcome” the traditional “grand jury’s substantial interest in obtaining evidence of [a] crime[.]”¹²⁷ Secret Service agents would have to provide information as to this and all future investigations of the President. The D.C. Circuit affirmed.¹²⁸ Relying, as the district court had, on the *Watergate Tapes case*, the Court of Appeals said they would not allow a new privilege which interferes with grand jury judicially supervised proceedings¹²⁹ unless the Secret Service showed a “clear and convincing” need.¹³⁰

The Supreme Court denied certiorari, with dissents by Justices Ginsburg and Breyer.¹³¹ Justice Breyer, as he did in the Paula Jones case, challenged the cavalier approach of the courts to Presidential authority. It is not surprising, he noted, that there are no precedents here for a protective privilege as this “appears to be the first effort in U.S. history to compel testimony by agents guarding the President.”¹³² Justice Breyer continued by stating:

The physical security of the President of the United States has a special legal role to play in our constitutional system. . . . He is the head of state. . . . Thus, one could reasonably believe that the law should take special account of the obvious fact that serious physical harm to the President is a national calamity-by recognizing a special governmental privilege where needed to help avert that calamity.¹³³

He then pointed out the tragic history of attempted and successful assassinations,¹³⁴

unclear, the only way a President could assure privacy would be to create a physical distance between himself and his Secret Service staff. The problem, in other words, arises in respect to ordinary conversations, not in respect to the unusual circumstance of an obvious crime.

Rubin v. United States, 119 S. Ct. 464 (1998).

125. *In re Grand Jury Proceedings*, No. 98-148 (NHJ), 1998 WL 272884, *4 (D.D.C. 1998) (redacted version), *aff’d sub nom. In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied sub nom. Rubin v. United States*, 119 S. Ct. 464 (1998).

126. *Id.* at *2.

127. *Id.* at *5.

128. *See In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied sub nom. Rubin v. United States*, 119 S. Ct. 464 (1998).

129. *See id.* at 1074. The Court specifically said that its ruling as to the Protective function privilege was limited to grand jury proceedings and not to any other situation. *See id.*

130. *See id.* 1079.

131. *See Rubin v. United States*, 119 S. Ct. 461 (1998).

132. *Id.* at 462 (Breyer, J., dissenting) (quoting *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998)).

133. *Id.*

134. *See id.* at 463:

The terrible truth, as we all know, is that assassins have killed four American Presidents and have wounded one other. Nine Presidents have been the subject of assassination attempts, including

and referencing President McKinley, noted that "[h]istory also teaches that the difference between life and death can be a matter of a few feet between a President and his protectors."¹³⁵

The Supreme Court should not have allowed lower federal courts to decide this issue. It should have considered the issue itself carefully.¹³⁶ These cases, involving government attorneys and secret service agents indicate that the federal courts will minimize any special protections for the President, while maximizing the powers of special prosecutors to investigate.¹³⁷ Presidential power is thereby diminished,¹³⁸ as Justice Scalia warned in his dissent in the *Morrison* case, and the federal courts, rather than staying out of the fray, have reduced Presidential independence and substantially effected the balance and separation of powers.¹³⁹

attempts that have taken place while the President was in the White House itself. In addition, a would-be assassin fired a pistol at President-elect Roosevelt three weeks before his inauguration, and the United States has accused a foreign government of planning the assassination of former President Bush when he visited Kuwait in 1993.

Justice Breyer attached an Appendix to his opinion describing in detail the assaults and assassinations against Presidents. *See id.* at 463-64.

135. *Id.* at 463:

President McKinley, for example, standing in a receiving line at the Pan American Exposition in Buffalo, was approached by an assassin, gun in hand hidden under a handkerchief. A Secret Service agent next to the President, and noticing the handkerchief, might have stopped the assassin. But there was no agent next to the President, for exposition officials had requested those places. The assassination succeeded.

By way of contrast, when John Hinckley fired shots at President Reagan, a Secret Service agent next to the President immediately pushed the President toward a limousine, another pushed the two men into the car, and a third spread his arms and legs to protect the President (and was hit in the chest). The President's life was saved. When a woman pointed a loaded semiautomatic pistol at President Ford, a Secret Service agent standing next to the President quickly grabbed the weapon with one hand and the woman's arm with the other. After another agent shouted a code warning, two agents grabbed the President and others swiftly surrounded him as they escorted him away. Only two weeks later, a shot was fired at President Ford in San Francisco. The President was immediately shielded and hustled into his limousine. (citations omitted).

136. *See id.* at 462.

137. *See In re Bruce Lindsey*, 158 F.3d 1263, 1285 (D.C. Cir. 1998), *cert. denied, sub nom. Office of the President v. Office of the Independent Counsel*, 119 S. Ct. 466 (1998) (Tatel, J., dissenting in part, concurring in part). "Although the Independent Counsel statute ensures independent, aggressive prosecution of wrongdoing, nothing in that statute disables a President from defending himself or otherwise indicates that Congress intended to deprive the Presidency of its official privileges." *Id.*

138. *See* Neal Devins, *A Loss of Control: Privilege Cases Diminish Presidential Power*, ABA JOURNAL, Oct. 1998 at 26.

139. *See Morrison v. Olsen*, 487 U.S. 654, 697, 713-15 (1988) (Scalia, J., dissenting):

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. . . . The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. . . . In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the independent counsel, and it does substantially affect the balance of powers.

VI. CONCLUSION

In the world of "magic [m]irror[s],"¹⁴⁰ the Supreme Court reflects our legal reality. As a result of Watergate and post-Watergate standards, impeachment is no longer the process used to investigate the President.¹⁴¹ At an impeachment, the President may refuse to comply with certain requests for evidence. Though that refusal may serve as a basis for an article of impeachment, such requests are probably not enforceable as an element of the impeachment process and "may well constitute a non-justiciable political question."¹⁴²

However, special prosecutors or independent counsel, and their grand juries, selected by and under the supervision of the federal courts, have broad power to investigate the President. They and their staffs secure evidence, subpoena witnesses, organize testimony and exhibits, make plea bargains, and attempt to frame public opinion by selective leaks and official reports. They also provide the raw material for the official impeachment process. Information unavailable to an impeachment inquiry directly can be turned over to the inquiry by the independent counsel.¹⁴³ The impeachment process described in the Constitution, involving the Congress, is at the end, and not the beginning of any investigation. The disputes over the impeachment process do not occur in the official political arena of the Congress; they occur in the grand juries and the courts. The President's claims and powers are not debated before and by members of Congress but by "officers of the court" before judges and Justices. The technical rule seems to be that issues involving impeachment are non-justiciable, and the courts, particularly the Supreme Court, are not supposed to get involved. The legal reality is that the courts, and especially the Supreme Court, have become the arena for investigating the President. Their decisions determine the nature of any investigation, its scope, the evidence available, the rights of the President and even the identity of the chief inquisitor.

140. See KERMIT HALL, *THE MAGIC MIRROR* (1989). In his book, Dean Hall quotes Justice Oliver Wendell Holmes, Jr. who said that law is a "magic Mirror" where we can "see reflected, not only our own lives, but lives of all men that have been." *Id.* at 4. In other words, the law and its institutions have to be put into their political, social and historical context. See *id.*

141. See *In re Bruce Lindsey*, 158 F.3d 1263, 1286-87, (D.C. Cir. 1998), *cert. denied. sub nom.* Office of the President v. Office of the Independent Counsel, 119 S. Ct. 466 (1998) (Tatel, J., dissenting in part, concurring in part):

The need for the official presidential attorney-client privilege seems particularly strong after Watergate which, while ushering in a new era of accountability and openness in the highest echelons of government, also increased the Presidency's vulnerability. Aggressive press and congressional scrutiny, the personalization of politics, and the enactment of the Independent Counsel statute—which triggers appointment of an Independent Counsel based on no more than the existence of "reasonable grounds to believe that further investigation is warranted," have combined to make the Supreme Court's fear that Presidents have become easy "target[s]," truer than ever. . . .

142. *Id.* at 1278 (citing *Nixon v. United States*, 506 U.S. 224, 236 (1993)).

143. The Ethics in Government Act, providing for the appointment of independent counsels, specifically provides that such counsel are to "advise the House of Representatives of any substantial and credible information . . . that may constitute grounds for an impeachment." 28 U.S.C. § 595(c) (1994).

