Impeachment and the Independent Counsel: A Dysfunctional Union

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When Independent Counsel Kenneth Starr submitted to Congress a report of his investigation of President Clinton and defended that report in testimony before the House Judiciary Committee, Professor Ken Gormley was in a unique position to comment on the implications of the statutory authorization for Starr's report. Having just published a biography of Watergate Special Prosecutor Archibald Cox, Professor Gormley is expert not just in the history of the independent counsel statute but also in the careful consideration that Cox and others since him have given to their appropriate roles as special prosecutors. Professor Gormley, along with Cox and Stanford Law School professors Gerald Gunther and Pamela Karlan, took part in a panel discussion at Stanford Law School on October 15, 1998, entitled "The Future of the Independent Counsel." This discussion was part of a tribute to Cox on the occasion of the twenty-fifth anniversary of his firing by President Nixon in the fall of 1973, in what has come to be known as the "Saturday Night Massacre." In this special commentary, Professor Gormley expands upon an argument he made at that tribute: that Starr's report and its political aftermath reveal previously unrecognized flaws in the independent counsel statute. Section 595(c), the provision that mandates independent counsels to submit to Congress any "substantial and credible evidence" related to impeachment, raises particular problems. Professor Gormley argues that it is likely that sitting presidents are constitutionally immune from criminal prosecution while in office and it is therefore improper for them to be subjected to the prosecutorial powers of an independent counsel, simply as a vehicle to gather impeachment-related material for Congress.

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Further, Gormley argues, the impeachment referral provision represents an impermissible congressional usurpation of the power of the independent counsel—an executive officer—by making him a pre-impeachment deputy of the legislature. It thus constitutes an improper evasion of Congress' political accountability in the Framers' plan for impeachment. Professor Gormley concludes by offering specific suggestions for curing these serious defects in the independent counsel statute when the act sunsets next June. The reader should note that this issue of the Stanford Law Review went to press on December 10, 1998, as the House Judiciary Committee debated whether to approve articles of impeachment against the President.

INTRODUCTION

Just when we thought we had unearthed all of the many flaws in the independent counsel law,1 the recent issuance of the Starr Report2 of White-water Independent Counsel Kenneth Starr and his testimony in Congress3 supporting the movement to impeach President Clinton have exposed another constitutional defect in the statute. It interfaces in a dangerous fashion with the impeachment provisions of the U.S. Constitution. The congressional oversight provisions of the independent counsel statute include section 595(c), which mandates that "[a]n independent counsel shall advise the

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2. The name "Starr Report" is a convenient shorthand for a collection of government documents published in September 1998, soon after Independent Counsel Kenneth Starr transmitted his report to Congress on September 9, 1998. In contemporaneous discussions of Independent Counsel Kenneth Starr's investigation, and in this commentary, "Starr Report" refers particularly to the first volume of those documents, issued September 11, 1998, entitled REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(c), H.R. DOC. NO. 105-310 (1998) [hereinafter STARR REPORT]. That document is also described in its table of contents as "Volume I: Referral." (The Starr Report can be found in a special supplement in N.Y. TIMES, Sept. 12, 1998, at B1.) The collection of documents also includes APPENDICES TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(c) SUBMITTED BY THE OFFICE OF THE INDEPENDENT COUNSEL, H.R. DOC. NO. 105-311 (1998) [hereinafter APPENDICES TO THE STARR REPORT]. The Appendices to the Starr Report were issued in two parts on September 18, 1998 and contain an item labeled "Volume II: Appendix," as well as items labeled Volumes III through VII, each described within the materials as a "Document Supplement." Finally, the collection includes SUPPLEMENTAL MATERIALS TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(c) SUBMITTED BY THE OFFICE OF THE INDEPENDENT COUNSEL, H.R. DOC. NO. 105-316 (1998), issued in three parts on September 28, 1998.


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House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel’s responsibilities under this chapter, that may constitute grounds for an impeachment.”

This referral provision, which has been contained in the Watergate era statute since its adoption in 1978, was added to ensure that the product of an independent counsel’s work would be available to Congress in the event a criminal investigation led to an impeachment inquiry. Yet as recent events have revealed, if the principal target of a special prosecutor’s investigation happens to be the President, serious problems lie beneath the surface of the referral provision’s seemingly benign language. This commentary will argue that where the President’s conduct is at issue, it is constitutionally improper, as well as unwise as a policy matter, to allow the independent counsel to interact with the legislative branch in the fashion that section 595(c) dictates.

The serious problems with the referral provision did not become apparent until twenty years after its enactment, section 595(c) finally made its debut. In January 1998, Independent Counsel Kenneth Starr received permission to expand his investigation from the Whitewater land deal into allegations that President Bill Clinton lied under oath in Paula Jones’ sexual harassment lawsuit when he denied having a sexual affair with White House intern Monica Lewinsky, and thereafter covered up that false testimony. In the tumultuous months that followed, as the Lewinsky scandal widened into a national drama, Starr became the first independent counsel—and the first

5. See Julie R. O’Sullivan, The Interaction Between Impeachment and the Independent Counsel Statute, 86 Geo. L.J. 2193, 2247 n.208 (1998). The final Senate bill containing the special prosecutor provisions, S.555, included permissive language that authorized (but did not require) the special prosecutor to turn over such materials to the legislature, as follows: “A special prosecutor may advise the House of Representatives of any substantial and credible information which such prosecutor receives that may constitute grounds for impeachment of the President, Vice President, or a justice or judge of the United States.” S. REP. NO. 95-170, at 172 (1977) (emphasis added). The final House bill, H.R. 9705, took a different course, making such action by the special prosecutor mandatory: “A special prosecutor shall promptly advise the House of Representatives of any substantial and credible information which such special prosecutor shall receive that may constitute grounds for impeachment.” H.R. REP. NO. 95-1307, at 19 (1978). When the bill emerged from a joint House-Senate conference committee, it included the House’s mandatory language but omitted the word “promptly.” See S. DOC. NO. 95-127, at 50 (1978); H.R. REP. NO. 95-1756, at 50 (1978). Apart from this history, there is scant evidence of Congress’ thinking in drafting the impeachment referral language. Some minor massaging of the language took place when Congress reauthorized the statute in 1987; otherwise, section 595(c) has remained intact. See O’Sullivan, supra, at 2248 n.210.

government prosecutor in history—to subpoena a sitting President to testify before a grand jury.7 In carrying out his duty under section 595(c), Independent Counsel Starr turned over to Congress a lengthy report which outlined the "substantial and credible evidence" he had gathered that might be relevant to impeachment.8 The Starr Report set out eleven possible grounds for impeachment, including perjury, witness tampering, obstruction of justice, and abuse of power, all flowing from Clinton’s conduct in the Lewinsky affair.9 The House Judiciary Committee, armed with the independent counsel’s information, immediately began deliberations concerning the initiation


9. See STARR REPORT, supra note 2, at 129-30; see also Peter Baker & Susan Schmidt, Starr Alleges ‘Abundant Lies’: President Denies Impeachability, WASH. POST, Sept. 12, 1998, at A1. Starr also delivered to the House of Representatives raw transcripts of the President’s testimony before the grand jury, 36 sealed boxes of grand jury material, and the actual videotape of the President’s electronic appearance before the grand jury. By an overwhelming margin of 363 to 63, the House voted to release the Starr Report in its entirety, and charged the Judiciary Committee with determining which remaining materials (if any) to make public. Within eight days, the Judiciary Committee decided—with votes cast sharply along partisan lines—to release the actual videotape of the President’s grand jury testimony, considered potentially embarrassing and damaging to Clinton. The American public spent the next week consuming the salacious details of the Starr Report, the grand jury testimony, and the four-hour videotape of the President, all of which were posted on the Internet and televised worldwide. Congress also released the graphic grand jury testimony of Monica Lewinsky, explaining her sexual relationship with the President in intimate detail. For contemporaneous accounts of the delivery of the mass of this material to Congress and its subsequent release to and consumption by the public, see Peter Baker & Susan Schmidt, Clinton Declares Attempt to ‘Set Me Up’: Videotape of Aug. 17 Grand Jury Testimony Shown to Millions, WASH. POST, Sept. 22, 1998, at A1; Francis X. Clines, Tape Shows Nation a Clinton Irate and Sad: House Releases Testimony by Lewinsky, N.Y. TIMES, Sept. 22, 1998, at A1; Juliet Eilperin & Dan Morgan, Clinton Videotape Set for Release: House Panel Votes to Make Testimony Available to Public at 9 A.M. Monday, Sept. 19, 1998, at A1; and Guy Gugliotta & Juliet Eilperin, Vote on Report Briefly Unites House: Releasing Starr Document Leaves Lawmakers Uneasy, Embarrassed by Details, WASH. POST, Sept. 12, 1998, at A14.
of impeachment proceedings against the President. Starr himself testified before the Judiciary Committee as its chief witness.

The referral of the impeachment-related Starr Report to Congress, the concomitant release of the grand jury testimony and videotape, and Starr’s own testimony in the House have revealed serious, previously invisible flaws in the independent counsel statute. First, the statute authorizes special prosecutors to investigate sitting Presidents who may not be subject to criminal prosecution while in office, and requires those prosecutors to supply evidence to Congress for use in the purely political process of impeachment. Not only does this combination of provisions encourage a premature use of the grand jury and the independent counsel’s extraordinary prosecutorial power, but it also turns the independent counsel into a pre-impeachment deputy for the legislative branch, co-opting him (and the executive branch) into performing certain political functions that the Framers carefully reserved to Congress.

Second, even if the independent counsel can prosecute a sitting President (a dubious proposition at best), the impeachment referral provision of section 595(c) obliterates the prosecutor’s ability to function as a prosecutor. Section 595(c) not only allows but mandates that the independent counsel wear two incompatible hats: one as a detached criminal prosecutor hired to conduct a neutral criminal investigation on behalf of the executive branch, and the other as a pre-impeachment deputy for the House of Representatives, gathering evidence that may be relevant to Congress’ impeachment work. The latter job inevitably clashes with the prosecutor’s ability to handle his or her criminal case in a responsible fashion. It also disrupts the work of the grand jury, which (in effect) is forced to accuse public officials of wrongdoing without indicting—something that is generally disfavored in American jurisprudence. At the same time, section 595(c) allows Congress to evade its own constitutional responsibility for initiating impeachment proceedings by passing it off to an outside entity, thus sidestepping the political accountability that was an essential ingredient of the Framers’ impeachment plan.

This commentary will urge that the only solution to these problems is for Congress to scrap the impeachment referral provision entirely, if it renews

11. See Mitchell, supra note 3.
12. The theory behind appointing an independent counsel is that the Department of Justice faces a potential conflict (or appearance thereof) in investigations of high-ranking executive officials. Thus, the independent counsel will be free of such perceived conflict. See TERRY EASTLAND, ETHICS, POLITICS AND THE INDEPENDENT COUNSEL 4-5 (1989); KATY J. HARRIGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 1-4 (1992).
13. See text accompanying notes 146-161 infra.
the independent counsel statute in some amended form in 1999. That is only a first step, however, toward clarifying the blurred line between Congress' duties and those of the independent counsel. The unprecedented transmission of the Starr Report to Congress has disclosed a great deal more about the dysfunctional interface between special prosecutors and legislators when their paths intersect in the dim terrain of impeachment. If the functions of the executive and legislative branches are to remain distinct (as the Framers envisioned) when it comes to examining alleged misconduct by public officials, Congress must address—through a comprehensive legislative plan—related ambiguities that have haunted American jurisprudence since the Constitution was drafted.

The most important of these uncertainties relates to the vexing question: Can a sitting President be indicted and prosecuted while holding office? Scholars and statesmen have debated this question since the founding of the nation, without resolution. As will be seen, it holds the key to resolving many riddles regarding impeachment. Until Congress faces the indictment-prosecution issue and provides a definitive answer, the proper scope of an independent counsel's power (and that of the legislature) to investigate a sitting President will remain hopelessly confused.

Congress should make explicit, via statute, that the President cannot be indicted or prosecuted while holding office. This approach is strongly indicated by constitutional history and the application of the separation of powers doctrine. Although Congress cannot dictate what separation of powers means under the Constitution, it can certainly moot this troublesome issue by requiring (statutorily) that a President must be impeached or leave office before an indictment or prosecution can occur. Simultaneously, however, Congress should amend the independent counsel statute to make clear that special prosecutors can legitimately investigate sitting Presidents—but only pursuant to carefully delineated rules, by which evidence is collected and sealed for use in future criminal prosecutions after the President has left office. Congress must also provide that the statute of limitations is tolled, as to all criminal actions relating to the President, during his term in office. In that way, the independent counsel will be equipped to go forward with his investigation in a responsible fashion and carry out his legitimate duties as a prosecutor. But he will be stripped of any ability to act as an appendage to


15. The terms "indicted" and "prosecuted" are being used in a generic sense in this commentary. Some states do not follow the federal model, and instead initiate criminal prosecutions in ways other than through grand jury indictments. See generally GEORGE J. EDWARDS, JR., THE GRAND JURY (AMS Press 1973) (1906). In this commentary, however, I use these terms broadly to refer to the initiation of criminal prosecutions in whatever form, under either state or federal procedures.
Congress in the distinct impeachment process, which is a political function reserved solely for the legislative branch.

I. INDICTING AND PROSECUTING A SITTING PRESIDENT

As with many issues that define the nebulous boundaries among the three branches of American government, there has never been a firm answer to the question whether a sitting President can be brought before the judicial branch and subjected to the same criminal penalties that apply to other citizens. However, the historical record has answered with a tentative “no.”

Several Watergate era figures have concurred. Archibald Cox, during his six-month tenure as the first Watergate Special Prosecutor, agonized over separation of powers issues and concluded that President Nixon most likely could not be indicted for Watergate crimes so long as he served as Chief Executive. Cox was reluctant even to name the President an unindicted coconspirator, for fear that this designation would violate the spirit if not the letter of the Constitution.16 Leon Jaworski, who succeeded Cox as chief prosecutor in the Watergate case, concluded in an internal memo that it would be irresponsible to allow the grand jury to indict President Nixon because “the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused.”17 Robert Bork, President Nixon’s Solicitor General, reached a similar conclusion during the crisis that culminated in the nolo contendere plea of Vice President Spiro Agnew.18

The arguments against permitting the indictment of a sitting President are compelling, both on a legal and prudential plane. It is true that some federal officials can be, and have been, prosecuted while in office—dating back to the indictment of Vice President Aaron Burr for murder in 1804.19 However, as a matter of constitutional history and separation of powers theory,
most indicators point towards impeachment of the President as a prerequisite to criminal action against him. Although there are sound arguments on both sides of the debate, and no prosecutor or President has ever tested the boundaries of the issue, it would be wise for Congress to declare statutorily that impeachment must precede indictment and prosecution in the unique case of the President. Given the American structure of government, this is the only sensible approach. A statutory solution to this unsettled question would go far toward correcting the awkward interrelationship between special prosecutors and legislators, helping to define their respective roles when it comes to the uncertain terrain of impeachment.

A. Text

The Constitution speaks in terms that might suggest that impeachment should precede indictment in all cases. Article I, Section 3 provides:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.20

One natural reading of this provision is that impeachment and removal of any "civil officer" must come first; the party convicted can "nevertheless" be subjected to criminal indictment afterward. Such a view dominated for much of the twentieth century, well beyond Watergate.21 Only after the prosecution in the 1980s of federal judges Harry E. Claiborne, Alcee Hastings, and Walter L. Nixon, Jr.—all of whom were indicted and convicted prior to their respective impeachments—was this broad theory deflated.22 It is now widely accepted that federal judges, Vice Presidents, cabinet officials, and other

21. Not all scholars embrace this interpretation of Article I, Section 3. Raoul Berger argues in challenging this reading of the language:

It does violence to language to twist this into a requirement that an impeachment must precede indictment. The implication of "shall nevertheless be liable" to indictment is that the given party is already liable, that the words are merely designed to preserve existing criminal liability rather than to qualify it. It would be unreasonable to attribute to the Framers an intention to insulate officers from criminal liability by mere appointment to office; like all men they are responsible under the law.

Berger, supra note 18, at 1123 (footnotes omitted). According to Berger, the "sole purpose" of Article I, Section 3 was to "forfend the double jeopardy argument," rather than to establish a mandatory sequence for impeachment and indictment. Id. at 1127.

22. For discussions of the Claiborne, Hastings, and Nixon cases, see MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 31-46 (1996) and Alexa J. Smith, Federal Judicial Impeachment: Defining Process Due, 46 HASTINGS L.J. 639, 650-56 (1995). In an earlier Seventh Circuit case, Judge Otto Kerner (a former governor of Illinois) had attempted to argue that he could not be prosecuted without first being impeached. The Seventh Circuit examined the question in great detail and found his argument meritless. See United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974). Judge Kerner resigned before he could be impeached.
"civil officers" can be subject to criminal prosecution prior to, or concurrent
with, the commencement of impeachment proceedings. The language of
the Constitution does not prohibit such a sequence.

Yet none of this resolves the distinct, more perplexing question relating
to the indictment or prosecution of the President, who occupies a unique
niche in our American constitutional scheme. Although the text of Article
I, Section 3 does not itself resolve this constitutional conundrum, debates
from the nation's founding period and a careful consideration of the separa-
tion of powers doctrine shed considerable light on the subject.

B. History

The records of the Constitutional Convention and ratification debates
contain a strong suggestion that, when it comes to the impeachment and
prosecution of a sitting President, a specific sequence must be followed. In
Federalist No. 69, Alexander Hamilton directly addressed the issue, stating
that the President would be "liable to be impeached, tried [and] removed
from office; and would afterwards be liable to prosecution and punishment
in the ordinary course of law." In Federalist No. 77, he wrote that the
Chief Executive would at all times be "liable to impeachment, trial, dismis-
sion from office, incapacity to serve in any other, and to the forfeiture of life
and estate by subsequent prosecution in the common course of law."

23. Aaron Burr was indicted in two states (New York and New Jersey) for the murder of Al-
exander Hamilton in a pistol duel, during Burr's term as Vice President. See NATHAN SCHACHNER,
AARON BURR 255-57 (1961); William H. Rehnquist, The Impeachment Clause: A Wild Card in the
Constitution, 85 NW. U. L. REV. 903, 907 (1991). Vice President Spiro Agnew was likewise sub-
jected to criminal prosecution while in office, pleading nolo contendere (and resigning) to avoid
criminal punishment. See Memorandum for the United States, In re Spiro T. Agnew, Civil No. 73-
965 (D. Md. Oct. 5, 1973), cited in Berger, supra note 18, at 1123 n.71. For a review of the leading
cases regarding the impeachment of federal judges, see GERHARDT, supra note 22, at 88-91.

24. Indeed, the debate relating to the impeachment provision in the Constitutional Convention
focused almost exclusively on the President. The language regarding the "Vice President and all
civil officers" was thrown in almost as an afterthought. See Berger, supra note 18, at 1126-27. One
could argue, of course, that the Framers never intended to treat the President differently from other
officials, since they were all grouped together. See id. at 1127. The stronger argument, though, is
that the draftsmen regarded the case of impeachment of the President as a separate and more im-
portant matter. Much of the historical evidence suggesting that the Framers intended impeachment
to precede criminal prosecution seems to have related to the President alone; it is unlikely that they
intended their comments to apply to other officials, who occupied a different place in the constitu-
tional scheme.

25. THE FEDERALIST No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (em-
phasis added).

26. THE FEDERALIST No. 77, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (em-
phasis added). More generally, Hamilton, writing in Federalist No. 65, insisted that
the punishment which may be the consequence of conviction upon impeachment is not to ter-
minate the chastisement of the offender. After having been sentenced to a perpetual ostracism
from the esteem and confidence and honors and emoluments of his country, he will still be li-
able to prosecution and punishment in the ordinary course of law.
Gouverneur Morris of Pennsylvania, an influential delegate to the Constitutional Convention, agreed: "A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment."\textsuperscript{27} The debates and writings of the time are laden with suggestions that the President, as the sole head of the executive branch, could face criminal prosecution only after being removed from office through noncriminal impeachment proceedings in the House and Senate.

Justice Joseph Story, in his noted treatise on constitutional law, likewise adopted this view: "Among [the executive's incidental powers] must necessarily be included the power to perform [its functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office ...."\textsuperscript{28} Although not all commentators have accepted this reading of history,\textsuperscript{29} Story's position still garners widespread support nearly two centuries later.\textsuperscript{30} At a minimum, it is safe to say that the historical evidence—although not conclusive—provides weighty support for the proposition that the Constitution's Framers inclined in this direction.

C. Separation of Powers

When we add the separation of powers doctrine to the mix,\textsuperscript{31} along with a touch of common sense, the results are compelling. Enormous problems
arise if the President is subjected to indictment and prosecution while in office, even if he may be subjected to certain other kinds of process.

It was in the 1807 trial of Aaron Burr for treason that Chief Justice John Marshall first ruled that a subpoena *duces tecum* could be directed to a sitting President, Thomas Jefferson. Over a century and a half later, the Supreme Court in *United States v. Nixon* relied on Burr to hold that a sitting President could be required to turn over evidence (tapes and other documents) relevant to a criminal proceeding because of the specific need to ensure that justice be done in an ongoing criminal case. “The generalized assertion of [executive] privilege,” wrote Chief Justice Burger, “must yield to the demonstrated, specific need for evidence in a pending criminal trial.” At the same time, the Supreme Court in *Nixon* carefully avoided the question whether a sitting President could be indicted, recognizing that this presented an entirely different kettle of fish.

In the more recent Supreme Court decision of *Clinton v. Jones*, which opened the way for the Lewinsky morass, the Court held that President Clinton was subject to a private civil lawsuit during the term of his Presidency. Invoking the Court’s pronouncement in *Nixon*, Justice Stevens wrote that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”

Yet the Supreme Court’s declarations in *Clinton, Nixon*, and *Burr*, relating to a President’s subjection to civil suit or to subpoena, do little to address the substantially distinct question whether a sitting President can be indicted or prosecuted. And the argument that a President is “just another citizen” when it comes to answering to criminal charges supplies no satisfactory answer.

ory of Montesquieu, Madison maintained that absolute separation among the three branches was not required; rather, some overlap was both necessary and desirable. See id. at 302-03.

34. Id. at 713.
35. See id. at 687 n.2. The Court even refused to address whether “the grand jury acted within its authority in naming the President as an unindicted coconspirator.” Id. Because the resolution of that issue was “unnecessary to resolution of the question whether the claim of privilege is to prevail,” certiorari was dismissed as improvidently granted on that question. Id.
37. Id. at 1649 (quoting *Nixon*, 418 U.S. at 706). Moreover, Justice Stevens concluded in the *Jones* case that the “burden on the President’s time and energy that is a mere by-product of such review” was not onerous enough to justify staying all private actions against the President until he left office. *Id.* at 1650. Nonetheless, the Court in *Jones* gave significant latitude to the trial judge managing the case to take into account the demands of the President’s schedule, in making decisions about timing, scope of discovery, scheduling of trial, and so forth, so as not to disrupt the President in carrying out his duties. See id. at 1651.

The power to indict and prosecute necessarily brings with it the power to arrest, incarcerate, and subject an accused to a criminal trial. In the United States, the President is the sole head of the executive branch (not a ceremonial figurehead as under the British system), so the prospect of subjecting this particular official to criminal prosecution would present disastrous consequences far beyond the mere "distraction" problems raised and rejected in the Nixon and Jones cases. The President, pursuant to Article II of the Constitution, is the Commander in Chief of the Army and Navy, and of the militia of the several states when called into federal service. He is the Chief Executive, overseeing all other executive departments. He can grant reprieves and pardons for offenses against the United States; make treaties with the advice and consent of the Senate; appoint ambassadors, judges, and Justices of the Supreme Court; and veto federal legislation. There is no other official like him in the entire American system of government.

The doctrine of separation of powers prohibits any branch of government from crippling another branch of government. Yet subjecting a sitting President to indictment, arrest, prosecution, trial, and incarceration would surely cripple that office. As Professor Alex Bickel wrote during the thick of Watergate, "the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial." Raoul Berger had a quick response to the professor from Yale: "While it is true that the presidency 'cannot be conducted from jail,' it is unrealistic to postulate that a convicted President could not be released on bail pending appeal. . . . If the President lacked the sensitivity to resign, an impeachment could speedily follow . . . ." But Berger missed the mark here. No separate rules exist, in the Constitution or statute books, to protect the nation if the President is treated as an "ordinary" criminal defendant. No special rules exist concerning the length of permissible incarceration, availability of bail (which is not even guaranteed under the federal Constitution), habeas corpus, and other matters governing criminal prosecution, when a President is the accused. In the absence of a whole new set of ground rules, how do we avoid crippling the executive branch if the President can be prosecuted like an ordinary street criminal?

38. See U.S. Const. art. II, § 2, cl. 1.
39. See U.S. Const. art. II, § 2, cl. 1-2. The provisions relating to the power to veto legislation are found in U.S. Const. art. I, § 7, cl. 2.
40. Bickel, supra note 30, at 15.
41. Berger, supra note 18, at 1133 (footnote omitted).
42. See United States v. Salerno, 481 U.S. 739, 752-53 (1987) (holding that the Eighth Amendment prohibition against excessive bail does not require that bail be made available in all cases).
43. The trial judge would not even have the same luxury of managing the case to accommodate the President's schedule, as the Jones Court suggested was appropriate in a civil suit against
Judge George MacKinnon of the U.S. Court of Appeals for the D.C. Circuit confronted this question during the tumultuous events of Watergate. He concluded that, as a matter of necessity, the President could only be forced to answer criminal charges after being removed from office. To indict, prosecute, arrest, or punish a President before impeachment "would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties." 44

As a few hypotheticals will illustrate, the criminal prosecution of a sitting President simply does not fit our American scheme of government. If Governor Ross Barnett of Mississippi had wished to halt President John F. Kennedy's enforcement of the federal civil rights laws during the "Ole' Miss crisis" of 1962, 45 could Barnett have lured the President to Mississippi and arrested him, holding him in jail until he reconsidered the federal government's position on the meaning of "equal protection" under the Fourteenth Amendment? If a group sympathetic to Iraq had wished to prevent President Bush from launching "Operation Desert Storm" in 1991, and had been able to locate a local magistrate willing to sign an arrest warrant, could it have removed Bush to a jail cell in the District of Columbia overnight to prevent him from instructing his generals to attack? If Paula Jones, instead of filing a civil suit, had lodged a charge of criminal assault and battery against Bill Clinton in Ochiltree County, Texas, where 79.2 percent of the electorate voted against Clinton in the 1996 presidential election 46 and generally viewed Clinton disfavorably, would we allow a local judge and twelve jurors to determine whether President Clinton would serve out the remainder of his term, or (conversely) be sentenced to twenty-four months in the Ochiltree County jail?

Wisely, the Constitution reserves such judgments to the entire American people, through the collective deliberation of the United States House of Representatives and the Senate. 47

the President, see 117 S. Ct. at 1651, because the trial court would be constrained by statutes strictly governing the prosecution of criminal cases, such as the Speedy Trial Act. See 18 U.S.C. § 3161 (1994). Significantly, the Supreme Court in Jones scrupulously observed that the Court had never "confront[ed] the question whether a court may compel the attendance of the President at any specific time or place." 117 S. Ct at 1643.


45. For a discussion of the Ole' Miss crisis, see Ken Gormley, Archibald Cox: Conscience of a Nation 162-63 (1997).


47. The Framers specifically kept the impeachment duties away from groups outside the legislature, even the courts, because the danger of political mischief in so urgent a national matter.

Criminal prosecution differs dramatically from both civil trial and impeachment. Neither of the latter requires a party's presence at the proceeding.\(^48\) Neither of the latter involves the threat of incarceration. A criminal proceeding, which can last as long as the presiding judge deems necessary and appropriate (witness the nine-month O.J. Simpson trial),\(^49\) demands the defendant's uninterrupted presence unless he surrenders his Fifth and Sixth Amendment rights, including his rights to an impartial trial and to confront witnesses. In any event, the state can compel the defendant to attend (in shackles if necessary), because it holds the power to incarcerate, set terms of bail, and physically ensure a defendant's presence at his trial.\(^50\) It is fine to invoke the words of Bracton, "Non sub homine sed sub Deo et lege," for the proposition that no man—not even the President—is above the law.\(^51\) Yet practical limits must cabin Bracton's words if we are to protect our tripartite American system of government against upheaval. The President, after all, is the "unitary" head of the executive branch.\(^52\) Unlike a Supreme Court Justice, a Senator, or even a state governor (whose power is shared with other elected or appointed executive officials), the President under the Constitution holds and wields the entire power of the executive branch.\(^53\) Arresting and imprisoning the Chief Executive is thus like arresting and imprisoning all nine Justices of the Supreme Court simultaneously, or all one hundred members of the U.S. Senate. Without the Chief Executive, the branch of government which he oversees is effectively paralyzed. As Professor

\[\text{"forbids the commitment of the trust to a small number of persons."} \quad \text{THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961).} \]

\(^{48}\) Impeachment is not a common law trial at which the President has Fifth Amendment rights, so "his presence is not necessary." Sloan & Garr, supra note 30, at 448 n.144.


\(^{50}\) The presence of a federal criminal defendant at every stage of the criminal proceedings, including the trial, is required. See FED. R. CRIM. P. 43(a). A defendant can technically waive this right. See FED. R. CRIM. P. 43(b)(1). However, this is primarily designed to allow a trial to go forward when a recalcitrant defendant seeks to disrupt it by refusing to attend. Waiver of the right to attend one's criminal trial is certainly not favored. Indeed, it often requires the approval of the court, in both felony and misdemeanor cases. See 27 MOORE'S FEDERAL PRACTICE §§ 643.02(2), 643.08 (3d ed. 1998). Federal Rule of Criminal Procedure 43's requirement that defendants be present at trial flows from the common law right of the criminal accused to do so in order to protect his or her constitutional rights. See Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (guaranteeing the defendant's right to be "present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure").

\(^{51}\) The literal translation is "Not under man, but under God and the law." For a discussion of this Latin adage in the context of the Watergate crisis, see GORMLEY, supra note 45, at 302-03. Others prefer to quote from the trial of Aaron Burr, where the United States Attorney George Hay stated that the President is "but a man . . . but a citizen." See 1 THOMAS CARPENTER, THE TRIAL OF COLONEL AARON BURR 90-91 (Washington City, Westcott & Co. 1807), quoted in Berger, supra note 18, at 1111 n.1.

\(^{52}\) See Akhil Reed Amar & Brian C. Kalt, The Presidential Privilege Against Prosecution, 2 NEXUS 11, 12-13 (1997) (contrasting this "unitary executive" with other government officials).

\(^{53}\) See id.
Bickel wrote: "In the presidency is embodied the continuity and indestructibility of the state."\textsuperscript{54}

Nor does the Twenty-Fifth Amendment appear to provide a solution in the event of the arrest or incarceration of the Chief Executive. That amendment, born of the chaos following the assassination of President Kennedy, provides for the Vice President to step into the top position only if the President is "removed" from office (i.e., impeached by the House and convicted by the Senate), or if the President resigns or dies.\textsuperscript{55} No failsafe mechanism exists if the President is alive and well but trapped \textit{incommunicado} in a prison cell. Moreover, other provisions in the Constitution seem utterly senseless if the scenario plays itself out. For instance, if the President were indicted and convicted prior to impeachment, he would technically remain empowered to make presidential decisions, since nothing in the Constitution strips him of the power to act as Chief Executive until he is impeached. Moreover, the President would most likely be authorized to pardon himself, since Article II, Section 2 grants the President power to pardon any citizen for offenses against the United States "except in Cases of Impeachment."\textsuperscript{56}

This is why a current of common sense runs through the Constitutional Convention and ratification debates, suggesting that a President shall be impeached first, and prosecuted later. Vice President John Adams and Senator Oliver Ellsworth (later Chief Justice of the United States) addressed the question during one sidebar in a congressional coatroom. When it came to the President, they told a colleague in the first Senate, "[y]ou could only impeach him and no other process [w]hatever lay against him."\textsuperscript{57} The Senate colleague asked whether this meant that a President could commit "[m]urder in [the] [s]treets" and remain free until impeachment? Came the answer: "Why [w]hen he is no longer President, [y]ou can indict him."\textsuperscript{58} To support their view that this correctly interpreted the impeachment clause, the two statesmen pointed out that otherwise every judge and justice in the country could "exercise any [a]uthority over [the President] and [s]top the [w]hole

\textsuperscript{54} Bickel, \textit{supra} note 30, at 15.


\textsuperscript{56} U.S. \textit{Const.} art. II, § 2, cl. 1 (emphasis added). For an argument that, despite this fairly clear language, the President cannot pardon himself, see Brian C. Kalt, \textit{Pardon Me?: The Constitutional Case Against Presidential Self-Pardons}, 106 YALE L.J. 779 (1996).

\textsuperscript{57} THE \textit{DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES} 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

\textsuperscript{58} \textit{Id.} The more complete answer to the Senator who posed the question about the President committing murder is that Congress in such a case would certainly act within a short amount of time to impeach him. In the interim, the President would technically remain Chief Executive, just as he would if he were awaiting criminal trial.

[m]achine of Government." Thomas Jefferson later concurred, concluding that an opposite rule would place the executive branch in a subservient position to the judicial branch. Jefferson wrote to a prosecutor in the Aaron Burr case in 1807: "But would the executive be independent of the judiciary . . . if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?"

In the Clinton era, as the nation finds itself engulfed in a criminal investigation of the President which has transmogrified itself into an impeachment proceeding, the issue of "impeachment versus indictment" has once again surfaced. It forms the baseline for determining what action legitimately can be taken with respect to a President accused of misbehavior while in office. Brett M. Kavanaugh, who has served as counsel in the office of Whitewater Independent Counsel Kenneth Starr since 1994, answered that question eloquently in a recent Georgetown symposium:

The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, [and] the military or economic consequences to the nation could be severe . . . . Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor—whether it be the Attorney General or special counsel—and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made—in the Congress of the United States.

Both the separation of powers doctrine and the history of the Constitution support Kavanaugh’s view.

II. THE INTERFACE BETWEEN THE INDEPENDENT COUNSEL AND IMPEACHMENT

How, specifically, does the issue of indictability of a sitting President intersect with the special prosecutor’s exercise of power under the independent counsel statute? How does it relate to the recent decision by Independent Counsel Starr to turn over to the House of Representatives a voluminous report, grand jury testimony, boxes of secret grand jury material, and the

59. Id.


62. Kavanaugh, supra note 17, at 2159 (footnote omitted).
videotaped testimony of President Clinton, and to appear as a witness before the Judiciary Committee, pursuant to Congress’ statutory command that the special prosecutor “advise the House of Representatives of any substantial and credible information” relating to impeachment.\(^{63}\) Although the question whether a President can be criminally prosecuted remains on the periphery of discussion concerning the independent counsel law,\(^{64}\) it is essential in assessing whether Starr’s delivery of an impeachment report at the command of a federal statute comports with the American constitutional scheme. If one starts with the presumption that the President cannot be indicted or prosecuted—a view that the preceding discussion suggests carries great force—then the process by which Starr gathered information and delivered it to Congress raises disturbing questions. For if the President cannot be indicted, what was the purpose of empaneling the grand jury in the Lewinsky matter? What was the purpose of subpoenaing the President to testify before that body? If the President cannot be indicted or prosecuted while in office, Independent Counsel Starr’s vigorous pursuit of the Lewinsky investigation is arguably nothing more than a warmup act for Congress’ impeachment proceedings. This raises the serious question whether the special prosecutor’s office and the powerful resources of the executive branch at his disposal have been co-opted by Congress to carry out a purely political function.

If, on the other hand, a sitting President can be indicted and prosecuted prior to impeachment, then section 595(c) of the independent counsel statute is flawed and dangerous for a different set of reasons. In mandating that the special prosecutor turn over to Congress all “substantial and credible evidence” relevant to impeachment, the statute undermines the special prosecutor’s central function. It allows Congress to throw into the public (and political) domain information which must remain confidential if it is to be useful to the prosecutor when he or she ultimately proceeds to trial.\(^{65}\) If the President can indeed be indicted and prosecuted while in office, section 595(c) commands the special prosecutor (who stands as the alter ego for the Attorney General) to do that which any conscientious prosecutor considers anathema: surrender critical evidence, the dissemination of which may obliterate his or her case.

The independent counsel statute thus clashes horribly with the constitutional provisions relating to impeachment. The impeachment referral provision of section 595(c) enlists the special prosecutor in the service of Congress in the most sensitive of all political tasks: deciding whether to initiate

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64. This author’s study of the congressional debates leading up to the enactment of the special prosecutor law revealed no significant discussion of this constitutional issue. See Gormley, supra note 1. The two leading books on the subject are likewise barren of any reference to the indictment-prosecution question. See EASTLAND, supra note 12, at 31-65; HARRIGER, supra note 12, at 40-72.
65. See text accompanying notes 127-145 infra.

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impeachment proceedings against a President. Yet our constitutional scheme makes no place for a criminal prosecutor in this extraordinary decisionmaking process.

To understand how section 595(c) both offends the Constitution and undermines the proper work of the special prosecutor, it is essential to examine the basic principles underlying the theory of impeachment in the American constitutional system.

A. Impeachment in the United States

Article I, Section 2 of the United States Constitution provides that the House of Representatives "shall have the sole Power of Impeachment." 66 The lower chamber of Congress has exclusive power to draft and adopt articles of impeachment (the equivalent of an indictment), and present them to the Senate. The Senate, thereafter, possesses the "sole Power to try all Impeachments," 67 and must convict by a two-thirds vote of those present. 68 Article II, Section 4, stipulates that the President, Vice President, and other civil officers can be convicted, and removed from office, only upon proof that they engaged in "Treason, Bribery, or other high Crimes and Misdemeanors." 69 Taken together, these terse provisions supply the sole textual guidance for Congress' most serious constitutional task.

There have been only fifteen impeachments by the House of Representatives in the history of the Republic, seven of which led to convictions in the Senate. 70 All of those convictions have involved federal judges. As of this writing, only one President, Andrew Johnson, has been impeached by the House. (President Richard Nixon escaped that fate, after articles of impeachment were approved by the House Judiciary Committee, by resigning. 71)

The history of the impeachment provisions of Articles I and II of the Constitution reveals a steady picture of what the Framers envisioned in con-

68. See id.
70. See GERHARDT, supra note 22, at 23. For a list of federal officials impeached since the nation's founding, see id. at 23 n.3. See also Firmage & Mangrum, supra note 29, at 1033 & n.44; Emily Field Van Tassel, Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992, 142 U. PA. L. REV. 333, 336 n.14 (1993). The latter two articles place the number of impeachments at 16, because they include District Judge Mark H. Delahay, who resigned in 1873 after the House voted to impeach him but before it had approved formal articles of impeachment against him. See GERHARDT, supra note 22, at 23. Professor Gerhardt omits Judge Delahay from his tally.
71. See GERHARDT, supra note 22, at 27.

structing this political and legal mechanism. First, by excluding criminal penalties from the impeachment process they designed, the Framers departed from the English system, which included provisions for criminal sanctions. Article II, Section 4 provides only that the impeached official “shall be removed from Office” upon conviction. Article I, Section 3 provides that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States.” By sharply distinguishing between criminal prosecution and impeachment, the Framers made clear that impeachment was not a means for redressing and punishing offenses against the state, but rather a political safeguard designed to preserve the state and its system of laws from internal harm. Simply put, it was not built to mete out punishment.

In drafting the impeachment provisions, the Framers spent considerable energy in ensuring that the substantial power and responsibility associated with this process was carefully located within the appropriate branches of government. It was no accident that each duty fell where it did. The original “Virginia Plan” for a national government included a provision that the impeachment trial would take place in the “national judiciary.” The Framers rejected this proposal (as well as a draft prepared by the Committee on Detail that would have allowed the Supreme Court to try impeachment cases), because it believed that the judiciary did not possess the “degree of credit and authority” for such a monumental task. Judges were a small group, relatively isolated from the citizenry, and their decisions would not carry sufficient public support.

As Alexander Hamilton wrote in Federalist No. 65: “The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most

73. See Firmage & Mangrum, supra note 29, at 1032, citing 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2510, at 1016 (1907).
75. U.S. CONST. art. I, § 3, cl. 7.
77. See Smith, supra note 22, at 642-44.
78. See NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 605-06 (Adrienne Koch ed., 1966) [hereinafter NOTES OF THE DEBATES]; 2 RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 21-22; see also LABOVITZ, supra note 72, at 2-16 (discussing the process of drafting the Constitution’s impeachment provisions).
80. See Smith, supra note 22, at 642.
distinguished characters of the community forbids the commitment of the trust to a small number of persons." 81

The Framers deliberately selected the House of Representatives as the proper body to initiate the impeachment inquiry, because it most closely reflected the will of the American citizens. But fearing that the House might be too easily influenced by the shifting winds of politics, the Framers separated the power to initiate impeachment proceedings from the power to try such cases and enter convictions. Unless the impeachment powers were scrupulously held in check, the House could effectively remove a President at will. The Senate, on the other hand, was a safer bet. Senators, unlike their House counterparts, did not face reelection every two years and could more easily resist the "passions of the whole community." 82 The Senate could therefore render its verdicts based upon "real demonstrations of innocence or guilt." 83

Thus, the vesting of the impeachment powers exclusively in Congress and the division of those powers between the legislature's two chambers were essential components of the elaborate impeachment apparatus.

The Framers' careful choice of "high crimes and misdemeanors" as the standard for impeachable offenses was a second conscious step in building the cautious impeachment machinery. It reflects their intent that impeachment reach only serious misconduct that threatens the well-being of the state. An early version of the impeachment language in the draft Constitutions provided that the President could be "removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery or corruption." 84 The Committee of Eleven then changed the language by limiting it to "treason or bribery." 85 Concerned that this truncated language would not "reach many great and dangerous offenses," George Mason of Virginia moved to insert the words "or maladministration" after "bribery." But Madison objected that "maladministration" was "[s]o vague a term [that it] would be equivalent to tenure during the pleasure of the Senate." 86 Madison therefore proposed substituting the words "or other high crimes and misdemeanors against the State" for "maladministration." The

81. THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Framers were also concerned that if the judiciary conducted the impeachment trial, there might be double jeopardy problems or allegations of bias if the courts later handled the criminal prosecution of the accused as well. See id. at 399; Smith, supra note 22, at 643.
82. NOTES OF THE DEBATES, supra note 78, at 337.
83. Id.; see also THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
84. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 27, at 185-86. This draft was presented by the Committee of Detail of the Constitutional Convention, on August 6, 1787. See id.
85. Id. at 550.
86. Id.
Convention later deleted the phrase "against the State," leaving the language that the Constitution contains to this day.87

The phrase "high crimes and misdemeanors" traces back to the impeachment of the Earl of Suffolk in 1386.88 Under English precedent, the phrase denoted certain serious crimes akin to treason and bribery ("high crimes"), as well as certain serious political offenses that were not necessarily indictable as crimes ("high misdemeanors").89 The Framers thus viewed impeachable acts as "great offenses."90 Madison spoke about a President perverting his administration "into a scheme of peculation or oppression."91 Benjamin Franklin referred to such "obnoxious" acts that, absent an impeachment mechanism, might lead to "assassination" of the Chief Executive.92 Hamilton spoke of "offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."93 Echoing and encapsulating many of the Framers' views, Joseph Story described impeachment in his treatise on constitutional law as "a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person or his property, but simply divests him of his political capacity."94


Whether or not the President can be indicted and prosecuted while in office, the independent counsel statute wreaks havoc on the Framers' careful design, subverting the impeachment mechanism in at least five critical respects.

87. See id. at 545, 550-52; see also Labovitz, supra note 72, at 2-16.
88. See Firmage, supra note 76, at 683 (citing 1 T. Howell, State Trials 84, 91 (Cobbett's Collection 1810)). The Earl of Suffolk was accused of applying appropriated funds to purposes other than those specified. Under English law, embezzlement was not yet a crime. See Sloan & Garr, supra note 30, at 427.
89. See Simpson, supra note 72, at 30-49; Firmage, supra note 76, at 684-85; Sloan & Garr, supra note 30, at 427.
91. 2 Records of the Federal Convention, supra note 27, at 65-66.
92. Id. at 65.
94. 1 Story, supra note 28, § 803, at 568.
1. If the President cannot be prosecuted while in office, the statute encourages a premature use of the grand jury and the special prosecutor’s power.

If one assumes that a sitting President cannot be indicted and prosecuted, as a matter of constitutional history and separation of powers doctrine, the statute encourages a premature and artificial exercise of prosecutorial power. The law allows the independent counsel to become in effect a prosecutor without a valid target. Like the hunter who sights a twelve-point buck before the legally established hunting season, the independent counsel is able to load up his rifle and chase his prey into the open, without the ability to shoot. This exercise, aside from its sheer inefficiency, raises serious questions about the legitimacy of the process. If a President must be impeached or otherwise leave office before the criminal justice machinery begins to operate, what is the justification for an independent counsel’s investigation and grand jury inquiry prior to impeachment? The collection of evidence, use of subpoenas to call witnesses, and convening of the grand jury all become artificial devices designed to “smoke out” the President and aid in gathering impeachment material for Congress.

There are several responses to this concern in the context of the recent Lewinsky investigation. First, one may argue that the Lewinsky case is simply a mirror image of Watergate: Both cases involved a President as target; both evolved from a traditional criminal investigation into an impeachment inquiry. A certain amount of interplay between Congress and a special prosecutor is inevitable in such high-profile cases, one can say.

That argument is not especially compelling, however. In Watergate, the criminal inquiry did not focus primarily on the President himself. Rather, the grand jury was actively investigating a number of high-level executive officials who were ultimately indicted, including former Attorney General John Mitchell, presidential advisers H.R. Haldeman and John Ehrlichman, and others. The Watergate Special Prosecution Force’s investigation of President Nixon was appended to its investigation of other executive officials who were clearly prosecutable. The decision of the two Watergate prosecutors not to indict the President (and in the case of Jaworski, to name him an “un-


97. A central reason for Cox subpoenaing the White House tapes was that potential defendants, including John Dean, insisted that the tapes were essential to proving their own innocence. See GORMLEY, supra note 45, at 284-88.
indicted coconspirator\textsuperscript{39}) underscored the legitimacy of the grand jury investigation quite apart from the probe of the President. The same was true in the Iran-Contra matter, where Presidents Reagan and Bush were background figures in an investigation that focused primarily on high-level executive officials including Secretary of Defense Caspar Weinberger, National Security Advisors John Poindexter and Robert C. McFarlane, and National Security Council member Lieutenant Colonel Oliver North.\textsuperscript{99}

Contrast the Monica Lewinsky matter, in which the central target of the investigation, as a practical matter, has always been President Clinton. It is true that Monica Lewinsky was a nominal target; the special prosecutor initially sought to explore connections between the Lewinsky matter and Whitewater.\textsuperscript{100} But such a presumed connection was never the focus of the investigation. Nor was this a subject fit for the costly and extraordinary machinery of the independent counsel statute, without the involvement of President Clinton. Other than the President, none of the actors whom Starr investigated in the Lewinsky matter—Lewinsky herself, presidential secretary Betty Currie, or Clinton friend Vernon Jordan—were "covered individuals" within the meaning of the mandatory provisions of the independent counsel law, since none held a high-level executive office covered by section 591(b) of the independent counsel statute.\textsuperscript{101} None of them—standing alone—would have justified triggering the mandatory appointment of a new special prosecutor or the referral of the Lewinsky case to an existing one.\textsuperscript{102} Thus,
unlike the Watergate probe, the Lewinsky investigation was built upon a tenuous foundation. If the President cannot be indicted and prosecuted while in office, the underpinning for the Lewinsky investigation, at least under the mandatory provisions of the independent counsel statute, is extremely weak.

The independent counsel statute does not, and should not, authorize the special prosecutor, who acts as a surrogate for the Attorney General and the Department of Justice, to investigate mere "political" offenses by the President that may be good fodder for an impeachment exercise but do not constitute violations of the federal criminal code. Indeed, Attorney General Reno’s request of the three-judge panel to expand Starr’s Whitewater jurisdiction specifically referenced Reno’s preliminary investigation of Monica Lewinsky and others, and asked that Starr be granted power “to further investigate and determine whether prosecution is warranted.” The statute does not, and should not, authorize noncriminal investigations, even those designed to expose reprehensible behavior by a President. Nor can the statute empower the independent counsel to seek that form of “punishment” associated with impeachment—namely, removal of the President from of-

recusal option that always remains open to the attorney general. As a practical matter, Attorney General Reno had no reason to exercise such an option absent the alleged criminal involvement of the President. In short, there was no need for the extraordinary measure of appointing an independent counsel to investigate the otherwise pedestrian charges in the Monica Lewinsky case, absent the alleged criminal involvement of President Clinton.


104. See text accompanying notes 151-162 infra. Although it is true that ordinary grand juries may on occasion serve a “reporting” function by revealing official misconduct other than through an indictment, this function is cautiously employed and is itself controversial. For a lively discussion of the reporting function and several examples of its use, including Watergate and a 1985 Alaska grand jury report recommending the initiation of impeachment proceedings against the governor, see generally Barry Jeffrey Stem, Revealing Misconduct By Public Officials Through Grand Jury Reports, 136 U. PA. L. REV. 73 (1987). See also text accompanying notes 146-176 infra. It seems particularly inappropriate for a grand jury specially empaneled to work with a special prosecutor to take on this reporting function, unless the special prosecutor is legitimately able to bring indictments under the statute. In an analogous situation, the Department of Justice Manual specifically provides that, given the legislative history of the Organized Crime Act (which allows special grand juries to issue reports regarding “organized crime” in limited circumstances), a special grand jury “should not investigate for the sole purpose of writing a report.” 7 DEPARTMENT OF JUSTICE MANUAL § 9-11.330, at 9-280 (Supp. 1992-1), cited in PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 3:22 (3d ed. 1995 & Supp. 1997); see also note 158 infra and accompanying text.

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That sanction can be imposed by Congress alone. By authorizing the independent counsel to use the machinery of the executive branch primarily to pursue a "defendant" who cannot be prosecuted, the statute permits the criminal justice system to be used as a prop for a pre-impeachment exercise designed to accomplish political ends.

A second response to the concern over an independent counsel’s investigation of a target who cannot be prosecuted is as follows. Even if a sitting President cannot be brought to trial, the special prosecutor should be permitted to investigate the President while he is still in office, seek an indictment from the grand jury, and then place that indictment under seal. This would serve to preserve evidence and testimony while fresh, allowing the prosecution of a former President at a later date.

Such a justification has some allure. Yet it is unsatisfying for several reasons. Assuming that the Constitution prohibits active prosecution of a President until after he is impeached or leaves office, it is improper to allow a grand jury to formally indict a sitting President, even if the special prosecutor places the indictment under seal. One can argue, as Professor Tribe has done quite eloquently in a letter to Senator John Ashcroft of the Senate Judiciary Committee, that nothing in the Constitution specifically forbids indictment of the Chief Executive, even if it is true that he cannot be prosecuted. Indeed, some would contend that indictment is a healthy option, because it allows the public to be made aware of criminal charges against the President, and may provide useful steam for an impeachment inquiry if the President has broken the law. But this is a dangerous game, as a constitutional matter, and surely runs counter to the Framers’ plan and the separation of powers doctrine. Either the President can be subjected to criminal prosecution or he cannot. It is appropriate to investigate a President, alone or in conjunction with other targets. But once a true bill is signed and an indictment is returned against an individual, the grand jury has taken a critical step in the process. It has determined that probable cause exists to believe that the target has committed a crime. With this step, the criminal justice machinery is set in motion.

106. See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 207 (Philadelphia, H.C. Carey & I. Lea 1825) ("[T]he sentence which [the Senate] is authorized to impose [in an impeachment trial] cannot regularly be pronounced by the courts of law."); see also O’Sullivan, supra note 5, at 2228.

107. See text accompanying notes 203-206 infra.


109. This point was raised in a thoughtful Letter from Laurence Tribe, Professor, Harvard Law School, to Ken Gormley, Professor, Duquesne University School of Law (Nov. 30, 1998) (on file with the Stanford Law Review), in response to an earlier draft of this commentary.
Indicting a President and placing the indictment under seal creates horrible problems no less serious than hauling the Chief Executive before a criminal tribunal. Once the details of the indictment are made public (either officially or leaked), the President can be effectively crippled, with no practical ability to rebut charges that carry the force of the United States government behind them. He cannot appear before the grand jury and invoke the Fifth Amendment, as a practical matter, because such a course would amount to political suicide. He cannot prepare his defense and obtain a speedy trial as guaranteed by the Sixth Amendment, in order to clear himself of charges, until he leaves office voluntarily or otherwise. In the end, the President is probably better off enduring a full-blown criminal trial then watching an indictment dangle above his head like the Sword of Damocles. At least in a criminal proceeding he can invoke the myriad protections that accompany it, rather than allowing himself to be hung out to dry—in full view of the American public and the world community—for the rest of his Presidency. If constitutional history and the separation of powers doctrine dictate that a President cannot be prosecuted while in office, they perforce dictate that he cannot be the subject of a criminal indictment, sealed or otherwise.

This does not mean that an independent counsel has no legitimate function vis-à-vis a sitting President. Indeed, it will be argued later in this commentary that Congress should enact legislation allowing the independent counsel to investigate a President (without indicting him), as long as the special prosecutor places all relevant evidence under seal until the President has left office. This is a sensible approach that fits nicely with the independent counsel statutory scheme. Unfortunately, it is not the approach that Congress has created. Such a neat “evidence under seal” approach is nowhere set forth or authorized in the independent counsel statute. There is no provision for “tolling” the statute of limitations so that the evidence gathered and placed under seal could be used by the prosecutor at a later date. The statute, in other words, provides no mechanism for implementing such a middle-ground approach. The loose statutory language instead creates ill-defined options that encourage the type of free-wheeling investigation of a President that occurred in the Monica Lewinsky case, with no clear explanation why a special prosecutor should be convening a grand jury, gearing up the criminal prosecutorial apparatus, and pursuing a President whom he cannot prosecute. In sum, if the President cannot be indicted while in office, the statute aids and

110. A similar point is made in the Letter from Laurence Tribe to Senator John Ashcroft, supra note 108, at 4-5. See also Klopfer v. North Carolina, 386 U.S. 213 (1967) (stating that 6th Amendment speedy trial right was violated by North Carolina procedural device that allowed indictment to hang over the head of a defendant indefinitely).

111. See text accompanying notes 203-206 infra.

abets the transformation of the criminal justice system into an instrument of the quite distinct—and quite political—impeachment exercise.

2. If the President can be indicted and prosecuted while in office, the referral provision allows Congress to avoid improperly its own political responsibility for initiating impeachments.

Assuming now that the President can be indicted or prosecuted while in office, the independent counsel statute still undermines a central purpose of the impeachment provisions as designed by the Framers. The statute allows Congress to evade its constitutional responsibility at the critical “initiation” stage, and pass off this inherently political judgment to an unelected official in the executive branch, who is immune from the political influence of the citizenry. The Framers believed that even allowing nine Supreme Court Justices to render sensitive impeachment decisions was not good enough. The serious nature of the impeachment task “forbids the commitment of the trust to a small number of persons.” A fortiori, allowing one unelected special prosecutor (who has been appointed by three senior judges) to undertake this responsibility guided by the independent counsel statute’s “astoundingly low” threshold is an unsatisfactory substitute for the collective judgment of the House of Representatives.

It is true that Congress need not abide by the recommendation that the independent counsel makes in an impeachment report. But as the hoopla surrounding the Starr Report has underscored, any “impeachment referral” under section 595(c) is bound to be stamped with the imprimatur of legitimacy, propelling the impeachment inquiry to an advanced level before any separate congressional investigation has occurred.

113. Professor Julie O’Sullivan, in an insightful work on the subject, has outlined three different theories under which the independent counsel statute arguably invades the “political province of impeachment.” O’Sullivan, supra note 5, at 2228. First, the “Practical Displacement Theory” advances that the statute serves as a “substitute” for impeachment, allowing Congress to achieve partisan ends by weakening or destroying a President, without having to take risks associated with impeachment proceedings. See id. at 2228-36. Second, the “Pre-Emptive Function Theory” suggests that the independent counsel law substitutes a criminal inquiry for a political one, and “change[s] the focus of public attention from whether the targeted official has breached the public trust and deserves to be removed from office to whether the official technically violated a particular criminal statute.” Id. at 2245. Third, the “Impeachment Delegation Theory” (which Professor O’Sullivan finds most persuasive) posits that the statute allows Congress to cede “control over the initiation, timing, content and perhaps outcome of impeachment inquiries to a constitutional third party, thus allowing Congress to avoid its responsibilities as well as public accountability.” Id. at 2251. O’Sullivan’s last category would therefore correspond most closely to the point made here.


in the House of Representatives, and that body alone, the delicate political task of determining what constitutes a "high crime or misdemeanor" at any moment in history. Yet the statute shifts that determination to the special prosecutor, in the first instance. Kenneth Starr, in setting forth his list of eleven potential impeachable offenses in his report to Congress, made a series of detailed judgments as to what "may constitute grounds for an impeachment"—and thus, by implication, what may rise to the level of "high crimes and misdemeanors." Starr further fleshed out his position in testimony before the House Judiciary Committee, suggesting that perjury and obstruction of justice could satisfy the definition of the latter constitutional phrase. But this was not the job of a special prosecutor. The Constitution reserves this task for the House of Representatives, for good reason.

Approves a Broad, Open-Ended Impeachment Inquiry, N.Y. TIMES, Oct. 9, 1998, at A1. This transformed itself swiftly into an impeachment hearing in the House Judiciary Committee, with Starr himself as a key witness. See Mitchell, supra note 3. The heavy reliance upon the Starr Report has been consistent and apparent. One Judiciary Committee aide reportedly stated: "We have the facts, so why should we gather more evidence?" William Neikirk, Some Challenge Panel’s Reliance on Starr Report but Both Sides Leery of More Testimony, CHI. TRIB., Nov. 28, 1998, at 4. Some Judiciary Committee members (particularly Democrats) sought to limit the impeachment inquiry to the four corners of the Starr Report. See Ronald Brownstein, Battle Lines Harden as Vote Nears on Clinton, BUFF. NEWS, Oct. 4, 1998, at A1. Other Committee members awaited word from Starr as to whether he would send more materials, because "we would consider ourselves duty-bound to consider whatever he sends us." Dan Balz & Peter Baker, Daschle, Gephardt Decry Clinton Legal Tactics: Party Leadership Urges Quick Action, WASH. POST, Sept. 15, 1998, at A1 (quoting Rep. Hyde). Thus, the Starr Report has driven the impeachment inquiry, rather than serving as one source of information complementing Congress’ own work.

117. Gerald R. Ford, then the minority leader of the House of Representatives, stated during a 1970 effort to impeach Supreme Court Justice William O. Douglas:

What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. . . . [T]here are few fixed principles among the handful of precedents.


118. See STARR REPORT, supra note 2, at 1, 129.

119. See Starr’s Prepared Testimony, supra note 3. Indeed, Starr’s ethics adviser, Professor Sam Dash, resigned his position specifically because he believed that Starr had "serve[d] as an aggressive advocate for the proposition that the evidence . . . demonstrates that the President committed impeachable offenses." Starr’s Ethics Adviser Resigns: Ex-Watergate Counsel Sam Dash Opposed Committee Testimony, CHI. TRIB., Nov. 20, 1998, at 1.

120. In Nixon v. United States, 506 U.S. 224 (1993), the case involving Judge Walter Nixon, the Supreme Court made clear that impeachment proceedings were a matter uniquely within the province of the legislative branch, and it was inappropriate for the judicial branch to interfere in the Senate’s handling of those proceedings. See id. at 229-30. For criticism of Starr’s determination of possible “high crimes and misdemeanors,” as a usurpation of Congress’ exclusive function, see 144 CONG. REC. S11,953 (daily ed. Oct. 8, 1998) (statement of Sen. Levin).

121. As Professor Julie O’Sullivan recently wrote:

An [independent counsel] is a prosecutor charged with determining whether given subjects committed federal crimes, and as such is fundamentally unsuited to decide the entirely different question of whether a subject’s behavior—in technical violation of the law or not—constitutes a sufficient breach of the public trust to warrant invocation of the extraordinary constitu-

Congress' ability to shift the responsibility for initiating impeachment investigations to the independent counsel, pursuant to section 595(c), allows the legislature to escape political accountability for the task, which was essential to making the impeachment process work. Once presented with the *Starr Report*, members of the House are free to proclaim: "We received this extensive Report from the independent counsel; now we have a sacred duty to hold impeachment hearings and determine if the Report holds water!" If voters make a collective judgment that the Lewinsky investigation was ill-conceived and a poor basis for initiating impeachment proceedings, members of Congress can swiftly cast the blame on Kenneth Starr. The independent counsel, on the other hand, can point to the mandatory impeachment-referral language of the statute, and protest: "I was only doing my job!" Section 595(c) allows finger-pointing in all directions.

This dysfunctional relationship between special prosecutor and legislator undermines the constitutional design of the impeachment provisions. The Framers contemplated that the principal safeguard against hasty, overtly partisan decisions in exercising this awesome impeachment responsibility was vesting the powers of initiation and investigation exclusively in the House, and making Representatives answerable to their constituents if that power were wrongly exercised. Legislators would be forced to enter into the impeachment thicket with great trepidation, fearful of risking political capital with each move. Section 595(c) of the independent counsel statute destroys that political check, allowing Congress to push the special prosecutor into the thicket head first and mandate that he supply a report advising Congress if there are any burrs, vipers, or black widow spiders in the brambles.


123. See Akhil Reed Amar, *The Special Prosecutor Law Is a Constitutional Nightmare*, WASH. POST. NAT'L WKLY. EDITION, Sept. 28, 1998, at 21 ("There is a dangerous dance here. Starr does the dirty work and hands his report to Congress, which then publicizes it and even releases evidence gathered under grand jury secrecy. But neither takes full responsibility for its joint product.").


3. The impeachment referral provision undermines the criminal prosecutorial function of the independent counsel.

Assuming (again) that it is possible to indict and prosecute the President while he is in office, section 595(c) of the statute creates other worrisome problems. By requiring the independent counsel to turn over to Congress “any substantial and credible information” relating to impeachment, the statute transforms the dutiful criminal prosecutor into an appendage of the legislature, and makes it impossible for him to do his job properly. Pinned with the badge of Congress, the special prosecutor is obligated to serve as a pre-impeachment officer for the House of Representatives, a function directly at odds with his role as prosecutor. The duty to turn over secret grand jury information and confidential evidence gathered by his office not only undermines the prosecutorial mission of the independent counsel, but it obliterates the Framers’ careful design, by which the criminal justice machinery and the impeachment apparatus were assigned to separate branches of government.126

Section 595(c) in essence commandeers the special prosecutor—who stands as the alter ego of the Attorney General, wielding the considerable power of the executive branch—and puts him to use for the benefit of the legislative branch. The job of a prosecutor, who (if he is to gain a conviction) must scrupulously adhere to the cautious, secretive, often picayune processes that define the criminal justice system, is the polar opposite of the job of a legislator engaged in the public, political assessment of whether impeachment is warranted. As Professor Akhil Amar has observed: “[O]rdinary prosecutors who uncover gross misbehavior that does not constitute a statute-book offense keep this to themselves.”127 Ordinary prosecutors, when they unearth conduct that is prosecutable, keep it secret and confidential until the time of trial, staying as far away from Congress as possible. The impeachment referral provision upsets this natural equilibrium, forcing the independent counsel to act, frequently, against his own best prosecutorial instincts.

Archibald Cox, as Watergate special prosecutor, fought doggedly though unsuccessfully to prevent Senator Sam Ervin’s Senate Watergate Committee from holding televised hearings that might poison Cox’s criminal case

126. See Morrison v. Olson, 487 U.S. 654, 693 (1988) (holding the independent counsel statute constitutional, in part, because it did not “unduly interfer[e] with the role of the Executive Branch”). Chief Justice Rehnquist wrote that the doctrine of separation of powers constituted “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.” Id. (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam)). He found no such aggrandizement of the legislature’s power inherent in the statute, because other than maintaining the ability to remove an errant special prosecutor by impeachment, Congress “retained for itself no powers of control or supervision over an independent counsel.” Id. at 694. Yet the impeachment referral provision, which has escaped attention until recently, accomplishes precisely the sort of legislative usurpation that the Morrison Court warned against.

127. Amar, supra note 123, at 22.

against potential Watergate defendants.\textsuperscript{128} When Congress suggested that it might summon former White House Counsel John Dean to testify about his involvement in the Watergate coverup and grant Dean “use immunity,” Cox gathered up the Special Prosecution Force’s evidence against Dean and locked it in a safe, so that he could separate his own criminal case from the material made public by Congress. Cox took these extraordinary steps in order to blunt the arguments by Dean’s lawyers that Congress’ immunity deal, and the public airing of Dean’s testimony, would destroy the special prosecutor’s ability to fairly prosecute him in the future.\textsuperscript{129} Cox’s successor, Leon Jaworski, likewise was concerned about congressional interference in his criminal prosecution. He worried primarily about pretrial publicity and securing a fair trial for President Nixon if Nixon were ever criminally prosecuted.\textsuperscript{130}

In the Iran-Contra affair, independent counsel Lawrence Walsh clashed regularly with Congress, and sought to build a wall between his investigation and that of the legislature.\textsuperscript{131} He ran into enormous problems when the Senate promised immunity to Lieutenant Colonel Oliver North, a key witness, and then chose to broadcast his testimony in televised hearings.\textsuperscript{132} Congress’ action in this instance all but destroyed the independent counsel’s case against North and other criminal defendants. Indeed, Walsh considered quitting after Congress placed North’s testimony in the public domain.\textsuperscript{133} Walsh wrote afterwards: “I recognized in Congress a rival operation that could undo my work before it produced any results.”\textsuperscript{134}

A natural goal of any special prosecutor acting as prosecutor, then, is to avoid having his case decimated by Congress. The legislature sniffing out impeachment charges performs a function quite different from that of a prosecutor nailing down evidence in his criminal case. There are many rea-

\begin{thebibliography}{133}
\bibitem{128} See \textsc{Gormley}, supra note 45, at 269-74.
\bibitem{129} See \textit{id}. at 269-70, 280; Interview with Archibald Cox (Oct. 26, 1998); see also \textsc{Doyle}, supra note 16, 67-68, 127-28.
\bibitem{130} Jaworski faced this concern at many junctures. He decided to turn over limited materials to Congress for its impeachment inquiry, and thereafter to support tacitly the resignation and pardon of the President, only because he concluded—in part due to the extensive media coverage of the House Judiciary Committee hearings—that Nixon could not receive a fair criminal trial. See \textsc{Jaworski}, supra note 98, at 224, 226-27, 231, 233, 237-38, 241-42; text accompanying notes 163-164 \textit{infra}.
\bibitem{131} For examples of Walsh’s conflicts with Congress and his efforts to distance himself from that body, see \textsc{Walsh}, supra note 99, at 30-31, 50, 58-59, 85-86. Walsh worried that the congressional grant of immunity to North and others might taint evidence. See \textit{id}. at 58. He also worried about the impact of pretrial publicity upon the ability to ensure defendants a fair trial. See \textit{id}. at 125, 231-34.
\bibitem{132} See \textit{id}. at 89-92, 126-35, 182-84, 252-53.
\bibitem{133} See \textit{id}. at 138. Congress’ grant of immunity to North was largely responsible for the court of appeals’ ultimate reversal of the conviction that the independent counsel won against North. See \textit{id}. at 252-53.
\bibitem{134} \textit{Id}. at 31.
\end{thebibliography}

sons why a prosecutor must be wary of turning over evidence in an ongoing criminal investigation, even to Congress. There is a danger that pretrial publicity will make it impossible to find an impartial jury. There are problems that flow from the grant of congressional immunity, once evidence is disgorged. There are myriad problems associated with shattering the secrecy of grand jury proceedings. There are problems with ensuring the defendant a fair trial and procedural due process if evidence is made public outside the protective walls of the courts. There are potential conflicts with Justice Department procedures if a federal prosecutor (including an independent counsel) is mandated to make declarations about criminal conduct and impeachable offenses, inconsistent with his duties as a federal prosecutor. There are ethical concerns that constrain a prosecutor’s behavior, even when commanded to act in a certain fashion by the legislature—indeed, it was such complex ethical concerns that caused Professor Sam Dash, Kenneth Starr’s

135. In *Shepard v. Florida*, 341 U.S. 50 (1951), the Court overturned the convictions of four accused rapists, after the widespread publication of a reported confession which the jurors read or heard about. Justice Jackson, concurring in the result, concluded that this prejudicial pretrial publicity deprived the accused of their Sixth Amendment right to a fair and impartial trial. See id. at 53. Although in the years since *Shepard* the Court has been cautious in overturning convictions based upon pretrial publicity, see, e.g., *Patton v. Yount*, 467 U.S. 1025 (1984), the recent explosion of media coverage and high-profile cases has renewed concerns about such publicity jeopardizing the fairness of trials. See Amy B. Sosin, *Twenty-Seventh Annual Review of Criminal Procedure, Trial: Influences on the Jury*, 86 GEO. L.J. 1638, 1653-59 (1998). See generally Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39 (1996). Certainly, the unprecedented publication of the *Starr Report* and the broadcast of President Clinton’s grand jury testimony worldwide, along with the publication of grand jury testimony of Monica Lewinsky (and others) and Starr’s own testimony in the House of Representatives, will raise serious and novel questions about pretrial publicity if a criminal prosecution is pursued. See Ken Gormley, *Starr Should Cut Deal with Clinton*, NEWSDAY, Oct. 2, 1998, at A53 (arguing that Starr should make a deal to drop the threat of criminal perjury charges in exchange for the President’s stipulation to untruthful testimony).

136. Besides the obvious problem that a witness granted immunity by Congress will inevitably claim immunity in a criminal proceeding, there is an additional problem that other potential defendants will be tipped off when the prosecutor’s “evidence” is revealed through congressional hearings.

137. See, e.g., BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 2.4(f) (1998) (discussing the many reasons for maintaining grand jury secrecy). Indeed, Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the unauthorized disclosure of grand jury testimony by a prosecutor, even to another government agency for investigative purposes, without court approval. See FED. R. CRIM. P. 6(e); see also GERSHMAN, supra, § 2.4(f)(3).


ethics adviser, to resign when Starr testified in the House Judiciary Committee. All of these natural concerns of a prosecutor would ordinarily cause an independent counsel to steer as far wide of Congress as possible.

The independent counsel statute thus allows Congress, in the words of James Madison, to “mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.” By quietly undermining the independent counsel’s position as a neutral and detached prosecutor, section 595(c) raises many of the same concerns—such as double jeopardy and fair trial issues—that caused the Framers to worry about injecting any other branch of government into the impeachment process. Starr’s delivery of his report to Congress and his testimony in the House Judiciary Committee may have constituted a great assistance to the legislature in conducting its impeachment work, but it severely undercut Starr’s position as criminal prosecutor. Indeed, it may have destroyed any realistic chance Starr might have in the future to prosecute Clinton and others under investigation in the Lewinsky matter.

4. The impeachment referral provision forces the grand jury (in effect) to perform an illegitimate reporting function.

Besides undermining the work of the special prosecutor, the impeachment referral provision effectively forces the grand jury to carry out an improper reporting function for the benefit of Congress. Historically, grand

140. Professor Dash resigned his position as Starr’s ethics adviser because he believed that Starr had violated his duties as a prosecutor (as well as the constitutional doctrine of separation of powers) when he became an “aggressive advocate” in favor of impeachment, in the political forum of the House Judiciary Committee. See Starr’s Ethics Adviser Resigns, supra note 119; George Lardner, Jr., Dash’s Departure Reflects Long Reputation for Independence, WASH. POST, Nov. 21, 1998, at A8; Letter of Resignation from Ethics Adviser and Starr’s Letter in Response, N.Y. TIMES, Nov. 21, 1998, at A10 (text of Dash’s resignation letter and Starr’s response); Samuel Dash, Letters to the Editor: Sam Dash Replies, WASH. POST, Nov. 24, 1998, at A18 (follow-up letter explaining reasons for Dash’s resignation). Starr indicated that he believed that the referral provision of the independent counsel statute make it appropriate, if not necessary, that he appear and explain his report. See Letter of Resignation from Ethics Adviser and Starr’s Letter in Response, supra; Lardner, supra. See generally MONROE FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 216-36 (1990) (discussing the ethical duties of prosecutors); A.B.A., STANDARDS FOR CRIMINAL JUSTICE AND DEFENSE FUNCTION (3d ed. 1993) (same).

141. For a discussion of such efforts during Watergate, see DOYLE, supra note 16, at 67-68 and GORMLEY, supra note 45, at 269-71.

142. THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961). In more recent times, the Supreme Court has made clear that the legislature should not perform tasks that belong uniquely to the executive branch. See Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). In a similar manner, the executive branch should not be forced to perform tasks that the Constitution assigns to the legislature.

143. See Amar, supra note 123, at 21. The Framers worried about allowing judges to participate in the impeachment proceedings for many of the same reasons. See note 81 supra.

144. See Gormley, supra note 135, at A53.

145. See id.
juries have at times issued reports to comment upon evidence they uncovered of misconduct committed by public officials. 146 This reporting function is derived from the presentment function at common law, but is distinct from presentment because the latter is generally a prelude to indictment. 147 Although grand jury reports trace their roots to early American law, 148 in modern times such reports are controversial, to say the least. In New Jersey, where grand juries have issued public reports regularly since the turn of the twentieth century, the state supreme court has praised reports as an indispensable tool by which grand juries can expose wrongdoing by public officials, without indicting them. 149 In New York, on the other hand, where grand jury reports likewise enjoyed a long tradition, the state's highest court concluded three decades ago that they posed a threat to the criminal justice system, and were improper except where clearly authorized by statute. 150

Several broad criticisms have been leveled at grand jury reports. One early case likened them to a "hit and run motorist": 151 Before an individual accused of wrongdoing can suppress a report, "it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed." 152 Judge Fuld, writing for the New York Court of Appeals in *Wood v. Hughes*, sharply criticized grand jury reports for subjecting their targets to

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147. In English law, presentment was a form of criminal accusation initiated by the grand jury on its "own knowledge or observation." 4 WILLIAM BLACKSTONE, COMMENTARIES *301. It was later adapted by grand juries to report on a variety of criminal subjects. *See* Stern, *supra* note 104, at 84. Today, a presentment generally refers to a statement of facts by grand jurors upon which a government prosecutor subsequently frames an indictment. *See* United States v. Cox, 342 F.2d 167, 188 (5th Cir. 1965) (Wisdom, J., concurring specially) (citing LESTER BERNHARDT ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 157 (1947)). In practice, the grand jury presentment has for some time been all but obsolete in American criminal procedure. *See* Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1103 n.1 (1955) ("The distinction between presentments and indictments is no longer sound."). *But see In re Presentment of Special Grand Jury, 315 F. Supp. 662, 675-77 (D. Md. 1970) (endorsing the continued use of presentments); Renée B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333 (1994) (same). For the history of the grand jury's reporting function in America, see Kuh, *supra*, at 1109-10.


149. *See In re Presentment by Camden County Grand Jury, 89 A.2d 416 (N.J. 1952) ([Presentments without indictment] have been a great force in bringing about many substantial improvements in public affairs.").

150. *See* Wood v. Hughes, 173 N.E.2d 21, 25-26 (N.Y. 1961) ("[A] grand jury may not, under cover of the power to inquire, employ a report to accuse an individual of misconduct or laxity in office any more than it may do so to charge him with misbehavior in private life.").


152. *Id.*

the same "opprobrium" as do indictments but without the same protections for the accused:

A report, ... based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body occupying a position of respect and importance in the community, its potential harm is incalculable.

As a result of these concerns, many states explicitly or implicitly prohibit grand juries from issuing nonindictment reports that accuse individuals of misconduct. Some states allow grand juries to issue reports, but impose strict limitations on how they are to be used, or statutorily limit them to narrow subjects such as the condition of jails or public buildings. In the federal system, the only statutory authority for grand jury reports relates to the investigation of "organized crime" by special grand juries. Otherwise, the use of such reports has fallen into disuse. While the U.S. Supreme Court has never specifically addressed the permissibility or constitutionality of grand jury reports, a number of federal courts have been quick to throw out or expunge portions of grand jury reports, where they enter areas inconsistent with the grand jury's duty as a criminal investigative body.

154. Id.
155. See Beale et al., supra note 138, § 2:2, at 2-10 n.19 (listing 23 states in which grand juries possess no statutory or judicial authority to issue reports); see also Alan Reeve Hunt, Constitutional Law—Judicial Powers—Legality of the Grand Jury Report, 52 Mich. L. Rev. 711, 716-21, 723 n.32 (1954) (discussing the fairness arguments against the use of grand jury reports). One early commentator noted that "the weight of twentieth century authority ... appears to condemn the use of reports by grand juries." Kuh, supra note 147, at 1110. More recently, a group of authors wrote that "the overall trend has been to restrict or even abolish the grand jury's reporting function." Beale et al., supra note 138, § 2:1, at 2-3.
156. See Beale et al., supra note 138, § 2:2, at 2-6 n.1 (listing 27 states in which grand juries have statutory or judicial power to issue reports). For an example of such a state rule, see 119 N.J.R. Cr. R. 3:6-9(c) (1998) (New Jersey court rule limiting issuance of reports to instances in which a public official is being censured for "non-criminal failure to discharge that public official's public duty"). The Alaska Constitution specifically empowers grand juries to "investigate and make recommendations concerning the public welfare and safety." Alaska Const. art. I, § 8.
157. See Beale et al., supra note 138, § 2:2, at 2-6 n.2 (listing numerous limitations upon the grand jury's reporting function in states where permitted); Stern, supra note 104, at 77 n.8.
158. See 18 U.S.C. § 3333(a) (1994). Pursuant to that federal statute, a special grand jury is permitted to issue a report to the supervising court concerning "organized crime conditions in the district" or "noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as a basis for a recommendation of removal or disciplinary action." Id. The statute also incorporates certain procedural safeguards to ensure fairness to the target of the report. See § 3333(b)-(e).
159. See, e.g., Hammond v. Brown, 323 F. Supp. 326, 345 (N.D. Ohio), aff'd 450 F.2d 480 (6th Cir. 1971) (concluding that "a grand jury is without authority to issue a report that advises, condemns or commands, or makes recommendations concerning the policies and operation of public boards, public officers, or public authorities," invalidating report that sought to condemn publicly various individuals at Kent State University for contributing to unrest that culminated in the
The reporting function has been deemed least problematic where the grand jury—in the course of a valid criminal investigation—uncovers evidence of noncriminal wrongdoing by a public official. Where the alleged wrongdoing is clearly noncriminal (and does not implicate due process safeguards), and where the allegation serves an important function in educating the public about misdeeds, some courts have allowed grand juries to issue nonindictment reports. Where, on the other hand, grand jury reports include an explicit or implicit allegation of criminal misconduct, courts have generally banned them. Since grand jury findings are not established pursuant to an adversarial proceeding, a public official may as a practical matter be forever unable to refute charges contained in a report, even where the allegations are untrue. The strong trend, in modern times, is to disallow such a reporting function. The grand jury’s proper job, if it wishes to allege crimes, is to bring an indictment and ensure that the accused enjoys all of the constitutional and statutory safeguards that define our criminal justice system.

Admittedly, the line between indictable and nonindictable conduct is often blurred, and so the grand jury and government prosecutor must judge responsibly whether a report is justified and what restrictions should apply to it. Watergate provides a textbook example of this exercise in judgment.

killing of four students on that campus by Ohio National Guardsmen); In re United Electrical, Radio & Machine Workers of America, 111 F. Supp. 858 (S.D.N.Y. 1953) (disapproving of grand jury “presentment” which strongly suggested criminal conduct on the part of labor union and its officers in filing non-Communist affidavits with the National Labor Relations Board); see also In re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F. Supp. 1451, 1461-64 (D. Colo. 1992) (stating it was an open question whether common law authority still existed for federal grand jury reports, but concluding that even if permissible, report in question did not satisfy common law criteria); BEALE ET AL., supra note 138, § 2-2, at 2-13 to 2-14. A number of lower federal courts, however, have allowed reports under limited circumstances. See, e.g., In re Johnson, 484 F.2d 791 (7th Cir. 1973) (upholding authority of federal grand juries to issue reports under appropriate circumstances); In re Report of Grand Jury Proceedings Filed on June 15, 1972, 479 F.2d 458, 460 n.2 (5th Cir. 1973) (approving use of grand jury reports but expunging portions of the report which dealt with purely local affairs of no concern to a federal grand jury); In re Grand Jury, 734 F. Supp. 875, 877 (S.D. Iowa 1990) (concluding that whether a report should be made public involves balancing harm to individuals named in a report against the public interest in disclosure).

160. See, e.g., In re Presentment by Camden County Grand Jury, 89 A.2d 416, 444-45 (N.J. 1952) (“The [nonindictment] presentment is so clearly in the public interest that there can be no doubt of the duty of the grand jury to make it.”); see also Stern, supra note 104, at 81 n.20, 125-26 (and citations).

161. See Stern, supra note 104, at 81 n.20 (and citations); see also BEALE ET AL., supra note 138, § 2-3, at 2-15 to 2-16 (“[T]he major objection to reports criticizing individuals is grounded on a concern for fair play.”); Stern, supra note 104, at 140 (“When a report is used as an alternative to prosecution, the interests of the public official are entitled to substantial weight.”); notes 150 & 159 supra. For a discussion of the Alaska Impeachment Report (related to alleged financial improprieties of the governor), a grand jury report that strongly suggested criminal conduct, but did not indict the public official in question, see Stern, supra note 104, at 115-21.

162. See In re Grand Jury Proceedings, 813 F. Supp. at 1463 (“It is beyond the power of a grand jury to accuse an individual of misconduct without returning a valid indictment against him.”); BEALE ET AL., supra note 138, §§ 2:3, 2:4 (discussing due process concerns related to accusatory grand jury reports).

Special prosecutor Leon Jaworski—in consultation with the grand jury—concluded that the public interest would best be served by turning over to the House Judiciary Committee certain evidence regarding the President’s involvement in the Watergate coverup, for use in Congress’ impeachment inquiry.163 Jaworski had concluded that it was doubtful that the President could be indicted while in office, and (even if indictable) it was unlikely that Nixon could obtain a fair trial due to the scope and intensity of the publicity surrounding the Watergate affair.164 Jaworski thus determined that the evidence gathered by the grand jury was better utilized in the noncriminal impeachment setting. He made this decision after weighing numerous factors, including the fact that turning the material over to Congress might seriously damage (if not destroy) any realistic chance to prosecute President Nixon criminally.

The issue, then, became how to convey the material to Congress in a responsible fashion. Jaworski directed his staff (working in cooperation with the grand jury) to prepare a factual report, setting forth relevant evidence and testimony without embellishment or legal commentary. This “road map” made no accusations against the President, and took no position as to whether he had committed any crimes or impeachable offenses.165 After the grand jury approved the report, it was submitted to the district court. Judge Sirica reviewed the document and determined that—in light of the circumstances—it was appropriate to submit material to Congress in this carefully controlled manner.166 The document was then provided to the House Judiciary Committee under seal (where it remains today).167

The cautious Watergate grand jury report provides a study in contrasts with the recently issued Starr Report, which is laden with unambiguous assertions that President Clinton committed felonies, including perjury, subor-
nation of perjury, and obstruction of justice. When the two models are compared, it becomes evident that the impeachment referral provision of the independent counsel statute has encouraged both the grand jury and the special prosecutor to assume roles at odds with their central duties.

Assuming that a sitting President can be indicted, or that there was some other legitimate purpose for empaneling a grand jury to investigate the Lewinsky matter in the first place, it is nonetheless improper for Congress to mandate that the grand jury issue a report (directly or through the special prosecutor) that spells out alleged criminal conduct in a public and uncensored fashion. Unfortunately, that is precisely what section 595(c) has accomplished. The detailed allegations in the *Starr Report* were essentially compelled by Congress, because these putative crimes formed the predicate for the “substantial and credible” evidence of impeachable offenses that Starr was bound to report. One can argue that the *Starr Report* was the unusual product of a single independent counsel, that went beyond the intended scope of the statute’s referral provisions. But section 595(c) certainly invites such extensive reports, and herein lies a serious problem.

Fine distinctions may be drawn between a grand jury report, which is technically drafted by the grand jury itself, and an impeachment referral like the *Starr Report*, which was drafted by the independent counsel. But such technical distinctions obscure the real spillover from the grand jury’s job to the independent counsel’s. As a practical matter, the *Starr Report* was prepared no differently from the Watergate report. In each case, the prosecutor drafted the report, drawing on evidence gathered by the grand jury. Although Leon Jaworski involved the grand jury more directly in preparing and reviewing the finished draft than did Kenneth Starr, the type of report mandated by section 595(c) is virtually indistinguishable from a classic grand jury report.

In the Lewinsky matter, section 595(c) thus required the independent counsel and grand jury to violate a cardinal rule that governs the modern is-


169. See Linda Greenhouse, *Starr’s Aggressive Advocacy*, N.Y. TIMES, Sept. 12, 1998, at A1 (terming Starr’s report “a document with an attitude”). One can further argue that Congress knew how to use the word “report” in the independent counsel statute, see 28 U.S.C. § 594(h)(1)(B) (1994) (relating to preparation of final report), yet purposely did not use that word in mandating that an independent counsel refer impeachment-related material to Congress. See 28 U.S.C. § 595(c). However, Kenneth Starr took the position that the referral provision of the statute made it appropriate, if not necessary, to spell out the basis for his referral in the *Starr Report* and subsequent testimony. See Letter of Resignation from Ethics Adviser and Starr’s Letter in Response, supra note 140; Lardner, supra note 140.


suance of reports: It compelled the special prosecutor (using the grand jury as a tool) to accuse Clinton and others of crimes without indicting them or affording them the panoply of due process rights at the heart of the American criminal justice system. Although conscientious grand juries (like that empaneled in Watergate) issue reports only after—in conjunction with the prosecutor—weighing the impact such reports will have upon subsequent criminal prosecution and after presenting the proposed report to the court for screening, section 595(c) casts these safeguards to the wind in order to gather more evidence for Congress. It makes the report mandatory, and does not even grant the grand jury a vote in the final product.171

In Watergate, Judge Sirica noted that at least five factors had to be weighed before determining if a grand jury report should be made public, and, if so, in what form. The factors cited by Sirica included:

whether the report describes general community conditions or whether it refers to identifiable individuals; whether the individuals are mentioned in public or private capacities; the public interest in the contents of the report balanced against the harm to the individuals named; the availability and efficacy of remedies; whether the conduct described is indictable.172

As was evident in the transmission of the Starr Report to the House of Representatives, however, section 595(c) of the independent counsel statute bypasses this sort of balancing exercise in favor of a mandatory reporting requirement that does not leave room for the grand jury (or the court which oversees it) to exercise careful judgment. Despite serious issues concerning grand jury secrecy,173 deleterious pretrial publicity that may occur if the report is made public,174 and fairness issues (intermingled with procedural due

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171. In essence, the impeachment referral provision allows an independent counsel to issue a “final report” on a criminal investigation, before that investigation is completed and before a final report is appropriate. See 28 U.S.C. § 594(h)(1)(B). The ability of the independent counsel to release a final report is itself controversial, because of fairness issues it raises with respect to subjects of the investigation. See Julie O’Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 484-85 (1996) (criticizing statutory provision relating to final reports). Responding to such concerns, Congress specifically amended the final reporting provision by eliminating a requirement that special prosecutors explain “reasons for not prosecuting any matter,” in order that they did not lightly suggest improper conduct on the part of individuals not indicted. Compare 28 U.S.C. § 594(h)(1)(B) (1978) (old statutory language that included this controversial language), with 28 U.S.C. § 594(h)(1)(B) (1994) (current statutory language that omits the controversial language). For a discussion of the congressional history of that amendment, see O’Sullivan, supra, at 499. Unfortunately, the impeachment referral provision allows the most dangerous feature of a final report to be unleashed before the issuance of a final report is even appropriate.


process concerns) regarding individuals named in the report, section 595(c) sends the report rocketing to Congress without regard for any of those hazards, eliminating a critical prepublication safety check. In the end, section 595(c) manipulates the grand jury for Congress' own use, and (whether directly or indirectly) undermines the grand jury's historic autonomy in the American constitutional system.

5. The impeachment referral provision amounts to a questionable delegation of a function which the Constitution has vested exclusively in the House of Representatives.

Besides wrecking the sensible constitutional plan established by the Framers, by disrupting the work of the special prosecutor and the grand jury, the impeachment referral provision amounts to a subtle yet dangerous delegation of a legislative duty that is simply not delegable. Despite sporadic appearances in American jurisprudence, a nondelegation doctrine has never captured the enduring support of the Supreme Court. Congress routinely delegates portions of its legislative authority to administrative agencies and other entities outside the legislative branch. It is thus not compelling to argue that Congress is prohibited from parceling out some of its lawmaking power to others with the time and expertise to apply it wisely.

Yet elements of the nondelegation doctrine persist as a necessary corollary to the separation of powers doctrine. There exist a few congres-

175. See Stern, supra note 104, at 126-27 (discussing the importance of fairness and procedural due process in determining whether a report should be released); In re Grand Jury Proceedings, 813 F. Supp. at 1463-65. In the Watergate case, Judge Sirica was so concerned with procedural due process and fairness issues that he invited President Nixon's lawyers and other interested parties to participate in briefing and arguing the issue of whether the report should be released. See June 5, 1972 Grand Jury, 370 F. Supp. at 1221.

176. Unlike the independent counsel, who is an invention of statute, the grand jury has its own constitutional roots in the Fifth Amendment. The grand jury is generally viewed as an arm of the judicial branch. See Levine v. United States, 362 U.S. 610, 617 (1960) ("The grand jury is an arm of the court and its in camera proceedings constitute 'a judicial inquiry.'" (quoting Hale v. Henkel, 201 U.S. 43, 66 (1906))). Yet it possesses a certain amount of autonomy: "Within certain bounds, the grand jury may act independently of any branch of government." June 5, 1972 Grand Jury, 370 F. Supp. at 1222; see also Brown v. United States, 359 U.S. 41, 49 (1959) ("A grand jury is clothed with great independence in many areas, but it remains an appendage of the Court.").

177. For a history of the nondelegation doctrine in American jurisprudence, see Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 7-17 (1982).


179. For recent examples of calls for reinvigoration of the nondelegation doctrine, see Aranson et al., supra note 177, at 63-67 and Lisa A. Cahill & J. Russell Jackson, Nondelegation After Mistretta: Phoenix or Phaethon?, 31 WM. & MARY L. REV. 1047, 1081-84 (1990).

180. For instance, courts on several occasions have suggested that the promulgation of rules of "personal conduct" constitutes an essential legislative function, and therefore cannot be delegated
sional powers that legislature simply cannot delegate away at all, because they are inherently attached to the legislative branch.\textsuperscript{181} The impeachment power falls into this category. By clear design, the Framers located the extraordinary power of initiating impeachment proceedings in the House of Representatives, and the potentially destructive power to try impeachments (and gain convictions) in the Senate. Except for the largely symbolic role of the Chief Justice in presiding over presidential impeachment trials,\textsuperscript{182} the Framers scrupulously kept the nonlegislative branches away from the proceedings.\textsuperscript{183} The Framers were acutely aware of the "demon of faction."\textsuperscript{184} They specifically built walls around the impeachment machinery, to fortify the process against the "danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."\textsuperscript{185} The Constitution carefully divided impeachment tasks between the two chambers of Congress, intending that they remain there. As Professor Tribe has explained, Congress could not establish a "Federal Court of Impeachment" to try impeachments, because Article I, Section 3 assigns that job "solely" to the Senate; Congress simply has no power to "delegate" such a responsibility away.\textsuperscript{186} This is no different from noting, as James O.
Freedman has done, that the President could not delegate his pardon power away. No other individual or entity could replicate "the special qualities of judgment that the Framers sought in selecting him as the one person who would exercise the power to pardon in the name of the nation." 187

In a like fashion, the House of Representatives cannot give away any piece of its impeachment duties. 188 To allow such a delegation would be to shatter the constitutional design which envisions legislative accountability and responsiveness to the electorate. The Framers during the ratification debates discussed and rejected an idea to place the impeachment power in a group "distinct from the other departments of the government." 189 Alexander

and far different from the case of Congress seeking to delegate impeachment duties to an outside entity or another branch of government.


188. The district and appellate courts reviewing the impeachment case of Alcee Hastings in the 1980s may have suggested otherwise. See Hastings v. Judicial Conference of the United States, 657 F. Supp. 672 (D.D.C.), aff'd in part and rev'd in part on other grounds sub nom. In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir.), cert. denied sub nom. Hastings v. Godbold, 477 U.S. 904 (1986). In those cases, Judge Hastings challenged (among other things) provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 331, 332, 372(c), 604 (1982), which set up a procedure by which allegations of judicial misconduct could be investigated by the judiciary itself to determine if disciplinary action was warranted. Section 372(c)(8)(A) of the statute provided that if the Federal Judicial Conference determined "that consideration of impeachment may be warranted, it shall so certify and transmit the determination and record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary." The district court and court of appeals both concluded that this provision was not inconsistent with the power of the House of Representatives to initiate impeachment proceedings. See In re Certain Complaints, 783 F.2d at 1510-12; Hastings, 657 F. Supp. at 675. Those courts reasoned that the provision in question merely "indicate[s] a method by which the Judiciary may bring to the attention of Congress information concerning a judge that may be of possible relevance to Congress's responsibilities under Article I of the Constitution." Id. at 675.

Although one could argue that the impeachment referral provision of the independent counsel statute is no different from the provision upheld in the Hastings cases, there are several important distinctions. First, the provision at issue in the Hastings cases did not undermine the function of the judicial branch, since the judiciary's responsibility under the Act was simply to consider discipline including expulsion. Second, the appeals court in the Hastings matter specifically noted that if the Act permitted the Judicial Conference "to issue some kind of preliminary ruling on impeachability," it might be invalid. In re Certain Complaints, 783 F.2d at 1512. In the case of the independent counsel statute, as is evident in the Starr Report, the special prosecutor is permitted to do just that. Finally, to the extent that the language at issue in the Hastings cases—like the language contained in section 595(c) of the independent counsel statute—is mandatory, it may be unconstitutional even as applied to the judiciary. Since the provision in question allows Congress to shift the responsibility of initiating impeachment proceedings to another branch of government, it may indeed be impermissible. See text accompanying notes 113-125 supra. The Supreme Court has never addressed the issue.

Hamilton, in _Federalist No. 65_, concluded that transferring the impeachment power outside the walls of Congress would “add a new spring to the government, the utility of which would at best be questionable.” 190 The power thus remained securely attached to the legislative branch, and that branch alone.

Is the impeachment referral provision of section 595(c) really a “delegation” of power at all? It appears innocuous enough for Congress to direct an independent counsel to supply a report of evidence relating to impeachment. Agencies and governmental departments (including independent counsels)191 file reports with Congress routinely. The executive branch frequently cooperates with Congress in providing information; for example, the FBI regularly provides Congress with background information relevant to a nominee’s fitness for federal office.192 But there are limits to such inter-branch “cooperation.” Certainly, Congress could not direct the Attorney General to file a report each year, setting forth the name and confidential details of every ongoing criminal investigation being conducted by the Department of Justice,193 because this would undermine a core function of the executive branch.

Yet the reporting requirement of section 595(c) translates into precisely this sort of dangerous command. As discussed earlier, it causes the independent counsel to “take the heat” for one of the most politically sensitive and volatile stages of the impeachment process—its initiation. In the Lewinsky matter, the Starr Report supplanted autonomous investigation by the House Judiciary Committee as the triggering event of impeachment proceedings.194 The House may have gone on to hold hearings and examine the product of the independent counsel, but the spade work associated with a preliminary investigation was done by the special prosecutor and his staff.

Section 595(c) thus allows Congress to hold in abeyance its own considerable powers to initiate impeachment proceedings by issuing subpoenas to witnesses, gathering evidence, holding public hearings, and so on, and “delegate” that nondelegable task to another branch of government. It provides a strong incentive for Congress not to conduct an impeachment inquiry, until the special prosecutor has prepared a report and Congress has had a chance

190. _Id._ Hamilton believed that creating an impeachment court outside the government would be costly, cumbersome, and susceptible to the “demon of faction.” _Id._ at 400-01.
192. See Kavanaugh, _supra_ note 17, at 2156.
194. See note 116 _supra_ and accompanying text.

to gauge the public reaction to that report. If Congress wishes to hire its own special counsel, to assist in its investigation relating to impeachment, that is fine. But that person cannot also work for the executive branch as a criminal prosecutor. Such an arrangement shatters the constitutional structure relating to impeachment.

III. CONCLUSION: A PROPOSED STATUTORY SOLUTION

The most efficient solution to the difficulties engendered by the entanglement of the independent counsel statute with the Constitution's impeachment provisions is simply to eliminate section 595(c) of the statute. The mandate that the independent counsel turn over any "substantial and credible information" relating to impeachment distorts the job of the special prosecutor, undermines the work of the grand jury, and intrudes on Congress' constitutionally defined role in conducting impeachments, creating serious separation of powers problems.

Striking section 595(c) from the statute has few disadvantages. If the independent counsel and the grand jury, in conjunction with the supervising court, determine that it is prudent to provide materials to Congress once Congress has launched its own impeachment inquiry, the independent counsel may elect to do so. Congress may also subpoena the independent counsel, and—like any federal prosecutor—he or she can make a professional and ethical decision whether to comply with that subpoena. This decision will necessarily be made after an assessment of the impact that such disclosure will have upon the prosecutor's criminal case, and consideration of the prosecutor's ability to ensure a fair trial to all potential defendants. Perhaps some—not all—of the evidence will be supplied to Congress in certain cases. Some evidence may be sealed before it is turned over to Con-

195. For other calls to eliminate section 595(c), see O'Sullivan, supra note 5, at 2261-62 and Ryan & Newcomb, supra note 115, at 31-32.

196. For discussions of reasons why for the past hundred years the Justice Department and the House of Representatives have not collaborated on the initiation of impeachments, see GERHARDT, supra note 22, at 30 and O'Sullivan, supra note 5, at 2261 n.248.

197. See O'Sullivan, supra note 5, at 2261-62 (arguing that elimination of the mandatory referral provision "would be relatively costless in that it would not alter Congress's ability to gather relevant information, from the [independent counsel] and other sources, yet it would [eliminate], to the extent possible, the [independent counsel]'s influence on the conduct of impeachments").

198. This is what Leon Jaworski and the Watergate grand jury decided to do, but only after (1) deciding to limit the type and form of information provided to the House Judiciary Committee, and (2) making the prosecutorial judgment that the information was more useful to Congress in the political impeachment forum than it would be in bringing a criminal indictment against President Nixon. See JAWORSKI, supra note 98, at 109-15. In essence, Jaworski determined that a fair criminal prosecution of the President would be so difficult—by that point—that providing the material to Congress under seal was the most prudent course. See text accompanying notes 163-164 supra.

199. See note 193 supra and accompanying text.
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gress,\footnote{The report provided to the Judiciary Committee by the Watergate Special Prosecution Force was, and remains, sealed. See note 167 supra and accompanying text.} with the stipulation that Congress not make this confidential information public until the independent counsel (or the court) approves its disclosure. The special prosecutor, however, must always retain the power to make such critical prosecutorial judgments.

There is another fly in the ointment that must be removed, if the impeachment provisions of the Constitution are to coexist with the statutory independent counsel. After two hundred years of confusion, Congress must resolve the question whether a sitting President can be indicted or prosecuted. Addressing this issue would provide much clearer boundary lines to guide the work of future independent counsels and House Judiciary Committee members. Since constitutional text and history provide no definitive solutions—just strong hints that impeachment must precede prosecution—Congress should moot the issue by producing a statute that serves as a sensible adjunct to the independent counsel law.

Congress should provide, first, that a sitting President—because of the unique nature of his office—cannot be indicted or prosecuted.\footnote{See Scott W. Howe, The Prospect of a President Incarcerated, 2 Nexus 86 (1997) (suggesting that the judiciary could make a similar declaration, not as a matter of constitutional necessity but as an articulation of federal common law).} Congress should further provide that the statute of limitations is tolled as to any criminal charges that might be filed against a sitting President, until he or she leaves office.\footnote{See Amar & Katyal, supra note 30, at 720-23 (discussing tolling statutes of limitations, with respect to the President, in the civil context); Kavanaugh, supra note 17, at 2157 (discussing the same subject in the criminal context).} Concurrently, Congress should establish a mechanism by which the independent counsel may continue to investigate serious allegations of wrongdoing by the President, as now authorized by section 591(b) of the statute.\footnote{See 28 U.S.C. § 591(b) (1994).} This would be accomplished by allowing the independent counsel to place all relevant evidence under seal so that it may be preserved and used properly if and when a criminal prosecution is instituted, after the President leaves office. Although it would be improper to allow the grand jury to formally indict a sitting President—even if the special prosecutor then placed the indictment under seal—evidence could nonetheless be collected, placed under seal, and safeguarded by the court, thus achieving a

\footnote{200. The report provided to the Judiciary Committee by the Watergate Special Prosecution Force was, and remains, sealed. See note 167 supra and accompanying text.}

\footnote{201. See Scott W. Howe, The Prospect of a President Incarcerated, 2 Nexus 86 (1997) (suggesting that the judiciary could make a similar declaration, not as a matter of constitutional necessity but as an articulation of federal common law).}

\footnote{202. See Amar & Katyal, supra note 30, at 720-23 (discussing tolling statutes of limitations, with respect to the President, in the civil context); Kavanaugh, supra note 17, at 2157 (discussing the same subject in the criminal context).}

\footnote{203. See 28 U.S.C. § 591(b) (1994).}

\footnote{204. See notes 107-112 supra and accompanying text. Indictments are commonly sealed for a variety of reasons. See Fed. R. Crim. P. 6(e)(4). Most commonly, they are sealed to ensure that the defendant does not learn of the charges and flee before authorities can arrest him. See Beale et al., supra note 138, § 8:5; Diamond, supra note 104, § 6:40. At times, federal courts also permit indictments to be sealed to toll the statute of limitations (briefly) before filing a superseding indictment, to prevent the harassment of witnesses, and to permit the completion of an investigation. See Beale et al., supra note 138, § 8:5.}

similar result. Indeed, records of several criminal investigations conducted by independent counsels have already been maintained under seal. Thus, the concept is hardly a difficult one for special prosecutors, or the courts, to manage. There are obvious problems with sealing evidence and postponing prosecutions in ordinary cases, but in the unique case of a sitting President the wait is justified by avoiding the constitutional difficulties created if a prosecution goes forward. Indeed, the Framers’ anticipation of a gap between impeachment and criminal prosecution implies that they envisioned a sort of temporary tolling device. Adopting a statutory provision by which evidence can be sealed until a President’s term expires is a sensible means of accomplishing that end.

This package of reforms would mesh easily with the independent counsel law. First, it would mean that special prosecutors would remain focused on their duties as prosecutors and members of the executive branch, rather than drifting into the duties of legislators charged with making political impeachment decisions. Second, as part of their prosecutorial work, independent counsels would remain free to investigate alleged criminal conduct of sitting Presidents—one of the original points of the statute—but only by securing, sealing, and preserving evidence to be used once indictment became permissible. Third, the system would carry with it the significant benefit of discouraging special prosecutors from investigating relatively trivial allegations of criminal conduct. Knowing that a weak criminal investigation would turn into a weak criminal prosecution after the President left office,

205. The three-judge panel assigned to oversee the matter would presumably authorize sealing evidence, just as the federal magistrate or district court typically approves sealing indictments. See Beale et al., supra note 138, § 8:5; Diamond, supra note 104, § 6:40.


207. See Phyllis Goldfarb, When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions, 31 WM. & MARY L. REV. 607 (1990) (naming concerns about due process, speedy trial, and staleness of evidence as among those in an ordinary case in which an indictment is placed under seal and the prosecution postponed); Diamond, supra note 104, § 6:40 (discussing statute of limitations, prosecutorial abuse, due process, and speedy trial concerns where indictments are placed under seal). These problems are lessened, however, if the President is never indicted but evidence is simply placed under seal. See notes 107-112 supra and accompanying text.

208. The statute might have to be amended, however, to eliminate the possibility that a President might take advantage of the fact that he cannot be indicted, by seeking attorneys fees under the statute if he is investigated but not prosecuted. See 28 U.S.C. § 593(f) (1994) (granting court power to award reasonable attorneys fees to an individual if no indictment is brought against him after an independent counsel investigation). The President might have to be exempted from the attorneys fees provision except in limited circumstances, so that he cannot have his cake and eat it too.

209. Even if the independent counsel’s office were terminated, or if the principal investigation were completed while the President still served, such evidence could be assessed by the Department of Justice after the President left office. At that point, the potential conflict of interest presumably would have dissipated. See note 12 supra.
and that impeachment exercises would remain solely within the domain of Congress, independent counsels would have a strong disincentive to lend their talents to marginal cases. Sound prosecutorial discretion, the ethos that drives so many decisions in the real world of the Justice Department, would find new life. Since the independent counsel would be much more a true prosecutor, and much less an appendage of Congress’ impeachment machinery, he or she would be loath to accept a case—even a politically “juicy” case—if it would not likely lead to a successful criminal prosecution when the investigation ended.

In short, by removing the statutory command that binds the independent counsel to Congress, and by creating a framework in which the independent counsel may preserve evidence, toll the statute of limitations, and responsibly investigate Presidents, Congress would empower the independent counsel to carry out his original and vital mission under the statute.

Perhaps, if these reforms are accomplished, some good will result from the Lewinsky morass after all.