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Ronald D. Rotunda

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Cover Page Footnote

Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law. The author has been a special consultant to the Office of the Independent Counsel investigating matters relating to President Clinton, the real estate allegations often called "Whitewater," and other associated investigations that were sent to the Office by Attorney General Janet Reno. All the material discussed in this Article is from publicly available sources. The author speaks on his own behalf and not on behalf of the Office of Independent Counsel.

INDEPENDENT COUNSEL AND THE CHARGES OF LEAKING: A BRIEF CASE STUDY

Ronald D. Rotunda*

INTRODUCTION

IT has been quite typical for supporters of President Clinton to charge that the Office of Independent Counsel ("OIC") routinely and illegally engaged in "leaking" grand jury materials to the press in the course of investigating various matters involving President Clinton.¹ The frequent complaint is that the alleged "leaking" consists of informing the press of secret matters on the condition that the reporter, when she publishes the material, does not publicly attribute the source. Then the press, whether in the print or broadcast media, will only identify the informant by using code words, such as "sources close to the investigation."

Generally, there is no law prohibiting prosecutors from ever talking to the press (either on or off the record).² Indeed, the person that

* Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law. The author has been a special consultant to the Office of the Independent Counsel investigating matters relating to President Clinton, the real estate allegations often called "Whitewater," and other associated investigations that were sent to the Office by Attorney General Janet Reno. All the material discussed in this Article is from publicly available sources. The author speaks on his own behalf and not on behalf of the Office of Independent Counsel.

1. See, e.g., *National Association of Criminal Defense Lawyers* (C-SPAN television broadcast, July 22, 1999) (including remarks by David Kendall, President Clinton's lawyer) [hereinafter *Criminal Defense Lawyers*].

2. Previous government attorneys, including former independent counsels, have bragged about their off the record discussions with reporters. On the Watergate investigation, for example, see Richard Ben-Veniste & George Frampton, Jr., *Stonewall: The Real Story of the Watergate Prosecution* 40 (1977). The co-authors of this book worked for Watergate Prosecutor Archibald Cox and later, Cox's replacement, Leon Jaworski. Mr. Frampton later became a lawyer for Vice President Gore. See Harvey Berkman, *Gore Enlists Two Veterans for Fund-Raising Inquiry*, *Nat'l L.J.*, Oct. 6, 1997, at A10. Messrs. Ben-Veniste and Frampton explained that the press secretary for the Special Prosecutor would confirm that the Watergate prosecutor was investigating a particular charge. See Ben-Veniste & Frampton, *supra*, at 40. He might also speak "off-the-record" and provide "negative guidance" to the reporters based on "evidence in our possession." *Id.* Mr. Ben-Veniste later worked for Senate Democrats during the Whitewater hearings. More recently, during the Iran-Contra investigation, Independent Counsel Lawrence Walsh admitted that he spent one day a week giving interviews to reporters covering his investigation, thereby explaining why the investigation was so expensive and taking so long. See Lawrence E. Walsh,

President Clinton appointed Deputy Attorney General of the United States, the number-two person in the Department of Justice, has advised that in cases involving "high profile white collar crime," involving "well-known people," prosecutors should be *encouraged* to speak out. He reasoned that first, "the public has a right to be kept reasonably informed about what steps are being taken to pursue allegations of wrongdoing, so that they can determine whether prosecutors are applying the law equally to all citizens,"³ and second, "powerful figures increasingly seem to characterize criminal investigations of their alleged illegal conduct as 'political witch hunts.' This type of epithet only serves to unfairly impugn the motives of prosecutors and to undermine our legal system, and should not go unanswered."⁴

Federal prosecutors, however, may *not* discuss grand jury material, either on or off the record. If they do leak grand jury materials, often called "Rule 6(e) material" after the federal rule that sets out the prohibition,⁵ they violate the rules of ethics⁶ and subject themselves to contempt of court. Widely-circulated charges that the prosecutor is violating the law by leaking information to the press, even if they are untrue, have a cumulative and corrosive effect that serves to shift public attention away from the subject of any investigation and, instead, focuses attention on the investigator.⁷ Many people begin to believe these repetitious, unrelenting, and unrelenting accusations of

Firewall: The Iran-Contra Conspiracy and Cover-Up 163 (1997). He also "guide[d] the reporters away from unsound speculation that could damage [his] credibility." *Id.*

3. Eric H. Holder, Jr. & Kevin A. Ohlson, *Dealing With the Media in High-Profile White Collar Crime Cases: The Prosecutor's Dilemma*, in *White Collar Crime B1, B-1 to B-2* (1995). Eric Holder, who now is Deputy Attorney General, was the U.S. Attorney for the District of Columbia when he coauthored this article. President Clinton appointed him to both positions.

4. *Id.*; see also Model Rules of Professional Conduct Rule 3.6(c) (1997) ("[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recently recent publicity . . ."); Rule 3.8(g) (providing that a prosecutor may make statements necessary to inform the public of the nature and extent of the prosecutor's case).

5. Rule 6(e)(2) of the Federal Rules of Criminal Procedure, entitled "General Rule of Secrecy," provides, in part, that: "A knowing violation of Rule 6 may be published as a contempt of court." Fed. R. Crim. P. 6(e)(2). Courts correctly treat allegations of Rule 6(e) violations with the serious-mindedness that they treat any weighty violation of criminal law. See, e.g., *In re Sealed Case*, No. 98-3077, 151 F.3d 1059, 1062 (D.C. Cir. 1998) (requiring an adversarial hearing because of an alleged Rule 6(e)(2) violation); *Barry v. United States*, 740 F. Supp. 888, 893-94 (D.D.C. 1990) (scrutinizing evidence of a potential Rule 6(e) violation).

6. See Model Rules of Professional Conduct Rule 3.4(c).

7. Notwithstanding the frequent charges of leaking and the various investigations, the public record reveals that no court has ruled that the OIC ever leaked and no court has ever placed anyone from the OIC in contempt. In fact, the Court of Appeals for the District of Columbia recently concluded that the OIC did not violate Rule 6(e). See *In Re Sealed Case*, 192 F.3d 995 (D.C. Cir. 1999). The charges were made, but the accusers have never succeeded in proving them. These charges are discussed in more detail below. See *infra* Part IV.B.

illegal leaking simply because they are constantly repeated.⁸

8. Consider this anecdote. In June 1998, an administrator at Pace University posted this message on an ethics listserve, an electronic bulletin board that was widely circulated to academics and practicing lawyers:

For those who are interested in a highly scholarly, balanced, more-in-sorrow-than-in-anger, presentation of a) evidence that significant leaking has occurred from Judge Starr's office; b) evidence that he has failed to adequately investigate and police this conduct; and c) an analysis of the ethical implications of a) and b), you might want to contact Prof. Ron Noble of NYU Law School (another colleague of Judge Starr) and ask for a copy of the paper he delivered recently at the Philip Blank Memorial Lecture on Professional Ethics at Pace Law School. Prof. Noble, former Chief of Staff in the Crim. Div. of DOJ and Undersecretary at Treasury for Enforcement, presented a cogent, quite compelling lecture that included a lot of information I have not heard elsewhere. The paper will be published this fall in the Pace Law Review.

Electronic Message from Vanessa Merton, Associate Dean for Clinical Education, Pace University School of Law, Pace University Ethics listserve (June 1998) (copy on file with the *Fordham Law Review*).

The paper was not published in the fall of 1998. Indeed, as of August 1999, a year later, it had not been published, and, an August 3, 1999 email from the Pace Associate Dean for Clinical Education confirms that the *Pace Law Review* has no plan to publish the article. See Electronic Message from Vanessa Merton, Associate Dean for Clinical Education, Pace University School of Law, to Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law 1 (Aug. 3, 1999) (copy on file with the *Fordham Law Review*). In early August, however, the school informed me that it was arranging to send me an audiotape of Professor Noble's lecture. Of course, the fact that the comments will never be published means that one will never be able to see the footnotes or other authority or any documentation that may support the serious allegations. As of November 29, 1999, I have received no audiotape.

On June 10, 1998, I mailed Professor Noble a letter that quoted this posted message and said:

I would like very much to have a copy of your paper. If Associate Dean Merton's summary of what you said is correct, you have made a very serious charge.

I happen to be a special consultant to the Office of Independent Counsel and I know that various people have claimed that our office has engaged in leaking but all of the judges who have examined the issue have found no leaking from our office. Of course, that does not stop people from making claims that are not based on fact.

Perhaps you know something that the judges supervising the grand juries do not know.

Thank you very much. I look forward to your reply.

Letter from Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law to Professor Ronald K. Noble, New York University School of Law (June 10, 1998) (copy on file with the *Fordham Law Review*). I sent this message yet again on August 4, 1999, over a year later. I finally received a curt reply, but I was not sent any supposed "evidence." It is easier to make these serious charges than to document them.

In contrast consider what FBI Director Louis J. Freeh, said. Mr. Freeh, a former federal judge and the man President Clinton appointed to head the FBI, said that he and his colleagues at the FBI "have been continuously impressed with your [Judge Starr's] integrity and professionalism. You have always respected the truth and have engaged in any misleading or evasive conduct or practice." Letter from Louis J. Freeh, Director of the FBI, to Kenneth W. Starr (Oct. 19, 1999) (on file with the *Fordham Law Review*).

In the future, we may see other defendants and prospective defendants turning to this strategy of lashing out at the prosecutor, because often the best defense is a good offense. In some instances, attacking the motives of the prosecutor may be the only defense. In fact, lawyers have reported that at continuing legal education seminars for criminal defense lawyers, it now has become routine to recommend this strategy.⁹ An old *bon mot* states that when the law is against you, argue the facts; when the facts are against you, argue the law; and when both are against you, impugn the integrity of your opponent. This Article is a case study that examines this strategy and its implementation. As T.S. Eliot noted in *The Dry Salvages*: "We had the experience but missed the meaning."¹⁰ This Article seeks to evaluate this strategy in an effort to determine its meaning.

I. THE PARAMETERS OF RULE 6(e)

The prohibitions of Rule 6(e)¹¹ are unlike the restrictions of a typical criminal statute. Normally, the illegality is a function of what is done, not who does it. I commit burglary if I break and enter into your house and steal your television. You commit burglary if you engage in the same activity involving my house. This is not so with Rule 6(e). It is a violation of law when the *prosecutor* reveals the contents of the grand jury of a witness. The Rule specifically does not cover defense lawyers or their client-witnesses:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, *an attorney for the government*, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. *No obligation of secrecy may be imposed on any person except in accordance with this rule.* A knowing violation of

9. For example, David Kendall, speaking at a meeting of the National Association of Criminal Defense Lawyers, which was broadcast on C-Span on July 22, 1999, spoke glowingly of how he was able to move to the "offensive" by constantly accusing the OIC of "leaking" or speaking off the record. See *Criminal Defense Lawyers*, *supra* note 1. Of course, it is simpler to make charges than it is to prove them, and Mr. Kendall never has succeeded in persuading any court that his frequently repeated charges of illegal leaking are true.

10. T.S. Eliot, *The Dry Salvages*, in *The Complete Poems and Plays 1909-1950*, at 130, 133 (1952).

11. There are other rules that regulate leaking. See, e.g., D.D.C. R. 57.7(c) (governing the release of information by attorneys in widely publicized or sensational cases); United States District Court for the District of Columbia Rules of Professional Conduct Rules 3.6 & 3.8 (1991) (relating to trial publicity and describing the special responsibilities of a prosecutor, respectively); U.S. Dep't of Justice, United States Attorney's Manual 1-7.000 (1993) (stating the Department of Justice policy on media relations). For simplicity's sake, this Article will generally refer only to Rule 6(e). Like Rule 6(e), none of these other rules bind the witness.

Rule 6 may be punished as a contempt of court.¹²

Though defense counsel are not permitted in the grand jury room while their client-witnesses testify, these client-witnesses have every right to disclose testimony to their lawyers. Indeed, to a certain extent, grand jury witnesses have a constitutional right to disclose their side of the story to the general public.¹³

It would violate Rule 6(e) if a prosecutor disclosed to the public that a witness appeared before the grand jury, because the fact that she was called as a witness and that she appeared before the grand jury is a matter "occurring before the grand jury." Similarly, a prosecutor would violate Rule 6(e) if she told the press the substance of a witness' testimony. For example, it would violate Rule 6(e) if the prosecutor told the press that Monica Lewinsky had confessed to the grand jurors that she knowingly had filed a perjurious affidavit that denied ever having been alone, or having any relationship, with President Clinton.¹⁴

12. Fed. R. Crim. P. 6(e)(2) (emphasis added). The reference to Rule 6(e)(3)(A)(ii) refers to government personnel "deemed necessary" to assist the government attorney in performance of his or her duties. See Fed. R. Crim. P. 6(e)(3)(A)(ii).

13. See 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 20.25 (3d ed. 1999). *Butterworth v. Smith*, 494 U.S. 624 (1990), invalidated a Florida law that prohibited, with certain limited exceptions, a grand jury witness from disclosing testimony that he had given to the grand jury. See *Butterworth*, 494 U.S. at 624. The law even prohibited disclosure after the grand jury term had ended. See *id.* at 628. In *Butterworth*, a Florida news reporter wanted to publish his experiences in dealing with the grand jury. See *id.* at 626. The Court unanimously held that the state's interest in preserving grand jury secrecy is either not served by prohibiting this truthful speech, or is insufficient to warrant prohibiting this truthful speech on matters of public concern. See *id.*

In his concurring opinion in *Butterworth*, Justice Scalia added:

[T]here is considerable doubt whether a witness can be prohibited, even while the grand jury is sitting, from making public what he knew before he entered the grand jury room. Quite a different question is presented, however, by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not "on his own" but only by virtue of being made a witness.

Id. at 636 (Scalia, J., concurring); see also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) (stating that state attempts "to punish the publication of truthful information seldom can satisfy constitutional standards"); cf. *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that a Florida statute cannot constitutionally make a newspaper civilly liable for publishing the name of a rape victim obtained from a publicly released police report).

14. Monica Lewinsky filed such an affidavit in an effort to avoid being a trial witness in a sexual harassment suit filed against the President. This affidavit was filed in the course of discovery, which followed after the remand in *Clinton v. Jones*, 117 S. Ct. 1636, 1639 (1997), the decision affirming the appellate court and denying President Clinton any presidential immunity (permanent or temporary) from the civil suit filed by Paula Jones. In this case, Ms. Jones claimed that then-Governor Clinton sexually harassed her, a state employee, by engaging in an unconsented touching and by asking her to engage in a sexual act. See Ronald D. Rotunda, *Give Paula Jones Her Day in Court Now*, *Legal Times*, May 30, 1994, at 24. The President and his lawyer

But it would not be a violation of Rule 6(e) for a witness—or the lawyer for any witness—to reveal to the press that the witness was called to testify before the grand jury. Nor would it violate the law if the witness—or his lawyer—revealed to the press the substance of her testimony and disclosed questions that were asked or what the witness said in the grand jury room.¹⁵ Even if the witness *lied* to the press about what questions were asked, the prosecutor cannot respond by disclosing what questions were really asked, because the questions that the prosecutor asked in front of the grand jury are “matters occurring before the grand jury.”¹⁶

This inconsistency between the secrecy rules that apply to prosecu-

relied on the Lewinsky affidavit in denying that there was any sexual relationship between the President and Lewinsky, who was a White House intern at the beginning of their relationship and who later became a Pentagon employee.

Subsequently, in *Jones v. Clinton*, 36 F. Supp. 2d 1118 (E.D. Ark. 1999), District Court Judge Susan Webber Wright held President Clinton in civil contempt of court for lying in his civil deposition. *See id.* at 1120. The court first found that various statements by the President were “intentionally false, notwithstanding tortured definitions and interpretations of the term ‘sexual relations.’” *Id.* at 1130. Judge Wright explained:

[T]he President’s attorney later notified this Court pursuant to his professional responsibility that portions of Ms. Lewinsky’s affidavit were reported to be “misleading and not true” and that this Court should not rely on Ms. Lewinsky’s affidavit or remarks of counsel characterizing that affidavit. The President’s testimony at his deposition that Ms. Lewinsky’s denial in her affidavit of a “sexual relationship” between them was “absolutely true” likewise was “misleading and not true.”

Id. at 1130 n.15 (citation omitted) (emphasis added).

The President’s own lawyers, speaking in his “defense,” “described his testimony as ‘evasive, incomplete, misleading, even maddening.’” Editorial, *Mr. Clinton and the ABA*, Wash. Post, Aug. 11, 1999, at A18. *See also* Ruth Marcus, *At Times, the Debate Returns to Matters of Fact*, Wash. Post, Dec. 9, 1998, at A16 (quoting White House special counsel Gregory B. Craig’s references to the President’s conduct as “‘sinful,’[and] ‘morally wrong’”). The *Washington Post* editorial quoted earlier comments by the President’s lawyer, in connection with a criticism of the American Bar Association for its invitation to the President to speak before it:

The American Bar Association picked an odd choice to deliver the keynote speech at its convention in Atlanta. It picked a lawyer who had only recently gotten himself in considerable trouble by lying in a civil deposition in the presence of a federal judge and then lying again before a federal grand jury investigating his previous behavior. . . . [T]his lawyer faced possible disbarment for his lies.

Editorial, *supra*. The President eventually settled the case by paying the plaintiff \$850,000. *See* Linda Satter, *Court Lies Cost Clinton \$90,686*, Ark. Democrat-Gazette, July 30, 1999, at A1. Later, he had to pay an additional \$90,686 (including \$1202 paid into the registry of the court) because of the civil contempt charge. *See id.*; Wall St. J., July 30, 1999, at A1. This amount is “about \$57,000 more than Clinton thought he could possibly be held accountable for . . .” Satter, *supra*. The President’s private lawyer handling this matter, William Bennett, “issued a terse, one-sentence statement: ‘We accept the judgment of the court and will comply with it.’” *Id.*

15. David Kendall, speaking at a meeting of the National Association of Criminal Defense Lawyers broadcast on C-Span on July 22, 1999, made this exact point: Rule 6(e) covers the prosecutors but not him. *See Criminal Defense Lawyers, supra* note 1.

16. Fed. R. Crim. P. 6(e)(2).

tors and the secrecy rules that apply to witnesses is crucial. Grand jury information that the prosecutor has about the content of a witness' testimony is not information that is uniquely in the possession of the prosecutor. The witness also has this information and she (or her counsel) may legally disclose it to third parties, such as friends, relatives, or the public media, without violating Rule 6(e). Even if the witness does not disclose the information to the media, her friends may do so without fear of violating Rule 6(e). And, if they disclose it, they may do so "off the record," for example, by "leaking."

II. THE AMBIGUITY OF STATEMENTS LIKE "SOURCES CLOSE TO THE OFFICE OF INDEPENDENT COUNSEL"

A witness like Monica Lewinsky or Linda Tripp may legally reveal what she knows to her own lawyer or to third parties. In Ms. Tripp's case, for example, long before the OIC even knew about Ms. Tripp's secret tape recordings that indicated that Ms. Lewinsky was planning to file, and did file, a perjurious affidavit; long before Ms. Tripp ever approached the OIC with her allegations; long before the OIC began its investigation after being instructed to do so by the Attorney General; Ms. Tripp already had confided in, and told her story to her friend, Lucianne Goldberg.

Ms. Tripp also told Ms. Goldberg that she wanted her story about Ms. Lewinsky to be published by *Newsweek*.¹⁷ The choice of *Newsweek* was not surprising, given that one of its most respected reporters, Michael Isikoff, had known of the Lewinsky matter and the Linda Tripp tapes for nearly a full year before they were ever disclosed to the OIC or the grand jury investigating the perjury.¹⁸

Ms. Goldberg eventually admitted that it was she who had leaked to the news media much of the information that Ms. Tripp had given her. Consider, for example, the rumors that Monica Lewinsky had kept a blue dress that had a stain that DNA testing later established belonged to President Clinton. As Ms. Goldberg conceded:

"The dress story?" asks Lucianne Goldberg, heaving out a big husky laugh. "I think I leaked that."

She means she gave out the story that Bill Clinton stained the

17. See H.R. Doc. No. 105-316, at 1229 (1998).

18. Mr. Isikoff later disclosed this information. See *Meet the Press* (NBC television broadcast, July 12, 1998) (transcript available in 1998 WL 8610265); see also Alicia C. Shepard, *The Isikoff Factor*, Am. Journalism Rev., Dec. 1, 1998, available in 1998 WL 12323737 (stating that Isikoff was aware of the relationship between President Clinton and Monica Lewinsky long before it was made public); Michael Isikoff, *The Paula Problem*, *Newsweek*, Jan. 26, 1998, at 24 (describing allegations against President Clinton before Linda Tripp revealed Monica Lewinsky's secrets to the public).

It was Ms. Tripp's more than 20 hours of telephone recordings that led Attorney General Reno to ask the Special Division to expand the jurisdiction of Independent Counsel Ken Starr to investigate President Clinton's relationship with Monica Lewinsky, a former White House intern.

dress of a White House intern during a sexual act and that the garment has been kept in a closet for three years as a souvenir.¹⁹

Ms. Goldberg said that "she stage-managed leaks to the press," because, in her own words: "I had to do something to get their [the media's] attention. . . . I've done it. And I'm not unproud of it."²⁰

Once a witness told something to anyone working in the OIC, if that witness also revealed the same information to a reporter, that reporter could honestly report that "the OIC" or "an OIC investigator," or "an OIC lawyer" has "learned that a witness (e.g., Linda Tripp) will testify before the grand jury and swear that [the following]." Or, the reporter can truthfully state that the "OIC has learned from grand jury testimony of a Secret Service Agent [the following]." The reader of the story might think that the OIC investigator was the source of the story, which accurately described what the OIC had learned from the witness, even though that is not what the reporter actually said. I recall that several years ago a reporter asked me to confirm a source. I said, "no comment," and she replied: "I'll take that as a confirmation."²¹

Similarly, the reporter could honestly state: "the OIC questioned a witness who told the grand jury in secret [the following]." If the witness wanted to make sure that he would not be identified as the source, the witness would simply speak "off the record." The reported statement would be quite true, even though the newsperson had not obtained that information from the OIC, but from the witness, who had every legal right to tell the reporter (either on or off the record) that the OIC served him with a grand jury subpoena, that an OIC lawyer then asked a question, and that he answered it. Similarly, if a witness pled Executive Privilege and refused to testify before the grand jury, and then relayed this story to the press (off the record), the reporter could truthfully report that a "source close to the Independent Counsel says that a witness pled Executive Privilege in the grand jury room." A witness, after all, is a "source close to the Independent Counsel."

Consider another example. Assume that an OIC investigator told a witness or her lawyer: "These charges are serious. Do you have any

19. Jim Dwyer, *The Unmaking of the President 1998*, N.Y. Daily News, Jan. 25, 1998, at 2, available in 1998 WL 5918934.

20. *Id.* (alteration in original).

21. This example comes from the time when I was assistant majority counsel of the Senate Watergate Committee. Of course, a reporter might take a "no comment" as a confirmation and not bother to inform the source that she was interpreting "no comment" in that way. I believed that I could not then give her "negative guidance," because she would then learn that a "no comment" really is a confirmation, because the speaker will follow up the "no comment" by negative guidance when the story cannot be confirmed. During the Watergate investigation, prosecutors in fact gave such "negative guidance" to reporters, while speaking "off the record." See Ben-Veniste & Frampton, *supra* note 2, at 40.

corroboration? We cannot offer immunity unless we have corroboration." Later, the OIC might tell the witness or his lawyer, "We will grant the witness immunity because his story checks out; it has been corroborated." The witness or his lawyer could legally relay that information to a reporter, who could then truthfully say, "Investigators within the OIC believe that they need to find corroboration before they offer immunity," or "OIC investigators believe that witness John Doe is telling the truth." The source sounds as if it came from someone within the OIC. It even refers to what investigators within the OIC "believe." But the OIC is not in the unique possession of this information because it must communicate it to the witness and his lawyer, neither of whom are covered by Rule 6(e).

Similarly, if Linda Tripp allowed a third party to listen to one of her surreptitious tape recordings, that person could then disclose to the media the contents of the tape.²² Once that tape was given to the OIC, a reporter could truthfully report that "OIC lawyers, listening to one of Linda Tripp's tape recordings, learned [the following]."²³ While the information would not have come from the OIC, it might appear otherwise, even though the lawyers, FBI investigators, and staff of the OIC would not be the only people who have possession of the relevant information. In fact, it would be unusual if any of the information that the OIC submitted to the grand jury was known *only* by the OIC, because the information would also be known by the witnesses giving the relevant testimony.

III. THE WHITE HOUSE STRATEGY

While a President might be reluctant to attack his own Justice Department, headed by an Attorney General who serves at his pleasure,

22. Mr. Jonah Goldberg, the son of Lucianne Goldberg, first started listening to the tapes in September 1997, more than a year before the OIC learned of their existence:

MR. GOLDBERG: I first heard the tapes sometime last—September a year ago.

RIVERA: September a year ago.

MR. GOLDBERG: Yeah, I only heard two of the tapes.

RIVERA: So it was 13 months ago.

MR. GOLDBERG: Yeah.

Rivera Live (CNBC television broadcast, Oct. 20, 1998) (transcript available in LEXIS).

23. It is clear that Linda Tripp's tape recordings were disclosed to third parties. See Howard Kurtz, *The Blonde Flinging Bombshells at Clinton; Pundit is Conservative in Politics Only*, Wash. Post, Oct. 16, 1998, at D1. Howard Kurtz of the Washington Post noted:

On a recent edition of "Crossfire" [an interview program aired on CNN], [Ann] Coulter was briefly speechless when asked if she had heard any of Tripp's tapes before the story became public. She now admits she heard one of the tapes, saying that an unidentified friend needed her recording equipment to copy it.

Id.

this reluctance would not extend to an office that is outside of the Justice Department. One of the unintended results of the statute creating the Office of Independent Counsel is that, by creating an organization outside the Justice Department, it offers a convenient target for the President or his allies to attack. It appears that part of the White House strategy during the course of the OIC's various investigations was to assail and impugn the OIC.²⁴

24. The OIC has had other difficulties. While the OIC has never lost a case in the federal courts of appeals, it has found its investigation delayed by lower court rulings that were subsequently reversed on appeal. We now know that Chief Judge Norma Holloway Johnson of the U.S. District Court for the District of Columbia, "bypassed the traditional random assignment system to send criminal cases against Presidential friends Webster Hubbell and Charlie Trie to judges appointed by President Clinton, according to court officials." Associated Press, *Clinton Appointees Got Hubbell and Trie Cases*, News Gazette, Aug. 1, 1999, at A5. Judge Johnson passed over more experienced judges to assign the cases to Judge Paul L. Fried and Judge James Robertson, both Clinton appointees. *See id.*

One of Judge Johnson's colleagues complained that her actions raised "an appearance [of impropriety] problem at least," and also the question "whether there has been impartial administration of justice." *Id.* Both judges (Robertson and Friedman) "were friendly with key players," made "rulings that handicapped prosecutors," and refused requests for interviews. *Id.* Judge Robertson is a former colleague of Lloyd Cutler, the former Counsel to President Clinton. *See id.* In addition, Judge Robertson donated money to President Clinton's 1992 presidential bid and worked on that campaign. *See id.* Judge Johnson "'told us what happened, but she never said why,' said one judge who attended an emergency meeting of judges she called this week to discuss the matter." Jerry Seper, *Judge Defends Action in Hubbell, Trie Cases*, Wash. Times, Aug. 4, 1999, at A1 (emphasis added). Judge Robertson was the trial judge in the Hubbell criminal tax fraud prosecution. *See United States v. Hubbell*, 11 F. Supp. 2d 25 (D.D.C. 1998), *rev'd*, 167 F.3d 552 (D.C. Cir. 1999). He ruled that he could ignore the ruling of the three-judge panel ("Special Division") and hold that the OIC did not have jurisdiction to prosecute Hubbell and the other defendants, and that the OIC could not use tax documents that it had obtained from Hubbell pursuant to a "Doe Subpoena." *See id.* at 30-37. The D.C. Circuit reversed. *See Hubbell*, 167 F.3d at 585.

"Judge Johnson was also instrumental in the [State of Maryland] Linda Tripp indictment," by intervening and sending to the Maryland prosecutors the tapes even though the OIC had "granted her immunity that would have protected them from both federal and state prosecutors." Editorial, *The Counterattack Continues*, Wall St. J., Aug. 4, 1999, at A22.

Judge Friedman also threw out several campaign finance violations charges against Charles Yah Lin Trie, who pled guilty after the D.C. Circuit overruled the trial judge. *See Seper, supra.*

Judge Robertson's ruling is also interesting given his earlier comments. At a hearing on May 8, 1998, the OIC counsel asked Judge Robertson to set a trial date, which is standard operating procedure. *See Transcript of Arraignment Before the Honorable James Robertson United States District Judge at 23-24*, May 8, 1998, *United States v. Hubbell*, 11 F. Supp. 2d 25 (D.D.C. 1998) (No. CR 98-151-01-04). The judge responded that he normally does so, but that it would be "arbitrary" to do so here, "when we're looking at the kinds of motions that I'm sure are coming . . ." *Id.* at 23. No motions had yet been filed, yet the judge refused to set a trial date until he saw the motions, which is not standard operating procedure. The OIC attorney responded that he already had spoken to the defense counsel and they were prepared to find a mutually agreeable date, to which Judge Robertson responded, apparently in surprise, "Oh?" *Id.* at 24. The judge still refused to set a date.

A. *The White House Joint Defense Agreement*

We now know that the White House Counsel became part of a joint defense agreement, uniting with the President's personal attorneys and other persons who were targets of, and subjects of, the grand jury. One should reread the preceding sentence. Joint defense agreements have been described as "a legitimate means by which multiple clients can form a common strategy against a shared enemy."²⁵ The "Office of the President" considers that a "shared enemy," or a common foe, is a federal grand jury investigating alleged criminal conduct at the specific request of the Attorney General of the United States. The President is often considered to be the chief law enforcement official of the land, the person who appoints the Attorney General. So it should be amazing that the White House Counsel thinks that "the White House" or "the Office of President" is an adversary of a federal grand jury and that its interests are more aligned with the interests of grand jury targets.

Remember, the "Office of the President" is a federal office, and the Counsel to the President is a federal government employee. The Office of the President cannot itself be indicted or become a target of the grand jury. It cannot even be a witness before the grand jury any more than the Department of Justice can become a witness or target. That is why the Eighth Circuit²⁶ and the District of Columbia Circuit²⁷

On June 2, 1998, there was another hearing. Again the judge questioned whether "it makes sense for use to set a trial date," and then volunteered that any date would be written "in sand here if there are, heaven forbid, interlocutory appeals . . ." See Transcript of Status Hearing Before the Honorable James Robertson United States District Judge at 7, June 2, 1998, *United States v. Hubbell*, 11 F. Supp. 2d 25 (D.D.C. 1998) (No. CR 98-151-01-04). The defendants are not entitled to interlocutory appeals, but the prosecution is, so again it appears as if the judge was suggesting that the defense would win their motions.

On June 26, 1998 there was another hearing. This time the judge said that the legal position of the OIC was "really scary." See Transcript of Motions Hearing Before the Honorable James Robertson United States District Judge at 29, June 26, 1998, *United States v. Hubbell*, 11 F. Supp. 2d 25 (D.D.C. 1998) (No. CR 98-151-01-04). Note that this "scary" position is the position of other federal courts, the Department of Justice, and even the position of the District of Columbia Circuit, which reversed Robertson. Judge Robertson issued his lengthy written opinion on July 1st, just days after he heard oral argument. See *Hubbell*, 11 F. Supp. 2d at 25.

In late 1999, it was discovered that "Clinton-appointed judges on the federal district court in Washington, D.C., hold monthly caucuses from which other federal judges are excluded. Other judges on the court reportedly told the Times these private meetings raise serious questions about the political independence of the district court." *Tainted Justice*, The Detroit News, Aug. 8, 1999, at B6. It is unheard of for Article III judges to hold partisan judicial meetings.

25. Glenn R. Simpson, *Clinton Lawyers Force Alliance with Witnesses*, Wall St. J., Feb. 12, 1998, at A24 (quoting Professor Steven Gillers).

26. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997). First, the Eighth Circuit made clear that there is no "common interest" between the "Office of President" and the particular occupant of that office or his wife:

both ruled that attorneys paid by the government cannot plead attorney client privilege before the grand jury. The Government lawyer represents the Government, not the particular office holder who can be indicted in his personal capacity.²⁸ Similarly, the general counsel of a corporation represents the corporation, not the particular CEO in his individual capacity.²⁹

The federal government has an attorney client privilege, which it can plead to keep information from third parties, but it cannot plead this privilege against itself. The privilege belongs to the federal government (not to the individual who happens to occupy a federal office), and the federal employees cannot plead the privilege in order to keep relevant information from a federal grand jury.³⁰

[T]here is lacking in this situation the requisite common interest between the clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest.

Id. at 922.

Then, the court emphasized:

The OIC is actually investigating the actions of individuals, some of whom hold positions in the White House. The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution. Certainly action by the OIC may occupy the time of White House staff members, may vacate positions in the White House if any of its personnel are indicted, and may harm the President and Mrs. Clinton politically. But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake.

The White House argues that it must be permitted to invoke the attorney-client privilege "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. Administrator of Gen. Serv. Admin.*, 433 U.S. 425, 449 (1977) (quoting the Solicitor General's brief filed in that case). Because, however, the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests, the attempt must fail.

Id. at 923.

27. See *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998). The attorney-client privilege for Deputy White House Counsel, the court said, belonged to the government. The government, in turn, has no legitimate interest in covering up criminal conduct, and government lawyers are not hired "to protect wrongdoers from public exposure." *Id.* at 1272. Corporate officials, the court noted, talk to corporate counsel knowing that the communications may not be confidential if they reveal conduct inconsistent with the interests of the corporation. See *id.* at 1276. Even the possibility that the lawyer's testimony might be used against the President in impeachment proceedings was not enough to grant it privilege, the court said. See *id.* at 1277.

28. See *id.* at 1270.

29. See, e.g., *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1508 (9th Cir. 1993); Model Rule of Professional Conduct Rule 1.13 (1998); see also Thomas D. Morgan & Ronald D. Rotunda, *Problems and Materials on Professional Responsibility* 239-50 (6th ed. 1995) (discussing the role of a lawyer in advising corporate clients).

30. See Ronald D. Rotunda, *Lips Unlocked: Attorney-Client Privilege and the*

Just as the general counsel of a corporation works for the incorporeal entity, not the particular person who happens to be the President of the corporation at the moment, the Office of White House Counsel is supposed to work for the Government as an entity, not for the particular individual who happens to be President at that moment. The White House Counsel, a federal government official paid with federal funds, is supposed to be the lawyer for the White House, not the personal attorney for President Clinton. That, however, is apparently not the position of White House Counsel.³¹ Thus, the White House Counsel became party to a "joint defense agreement" with others who are witnesses before the grand jury or subjects of the grand jury investigation or targets of the grand jury.³²

The Counsel to the President not only became party to this joint defense agreement, but expanded it to include both subjects of a criminal investigation and also many witnesses who simply appeared before the grand jury. White House officials have acknowledged that David Kendall, one of President Clinton's personal lawyers, and White House Counsel Charles F.C. Ruff, recommended attorneys to potential grand jury witnesses, including Betty Currie, Clinton's personal secretary, and White House stewards.³³ When these persons testified before the grand jury, President Clinton's lawyers "debriefed" the lawyers for these witnesses about their grand jury appearances.³⁴ In effect, they created a shadow grand jury.

Witnesses told their lawyers what questions they were asked in the grand jury room. Their lawyers—often hired at the specific recommendation of President Clinton's lawyers³⁵—then told the White

Government Lawyer, Legal Times, June 30, 1997, at 21.

31. See Ruth Marcus, *Ruff's Style: The Silent Treatment; White House Counsel Exasperates Some Political Aides*, Wash. Post, July 28, 1998, at A1 (pointing out that White House Counsel Charles Ruff "unfailingly refers" to President Clinton as "my client" (emphasis added)). In addition, "[w]hen Clinton first took office, Ruff was in line for the number two position at the Justice Department. But Ruff withdrew from consideration when officials learned that he had failed to pay Social Security taxes for his housekeeper." *Id.* The lawyer for an entity is supposed to represent the "entity," and not any of its officers, employers, etc. unless the entity consents. See Model Rules of Professional Conduct Rule 1.13(e) (1997); see also Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 Notre Dame L. Rev. 655, 678 (1997) (discussing the implications of Model Rule 1.13).

32. See Glenn R. Simpson, *Clinton Lawyers Forge Alliance with Witnesses*, Wall St. J., Feb. 12, 1998, at A24 ("Lawyers for the president are using a 'joint defense agreement' to communicate . . . information about Mr. Clinton's relationship with Monica Lewinsky.").

33. See Charles R. Babcock & Ruth Marcus, *Public and Private Wars: President's Lawyers Battle Starr in News Media and Behind the Scenes*, Wash. Post, Feb. 11, 1998, at A14.

34. See *id.*; Simpson, *supra* note 32.

35. See, e.g., Judy Keen & Kevin Johnson, *Clinton to Testify with Few Surprises*, USA Today, Aug. 14, 1998, at 1A ("Through this pooling of resources [via the joint defense agreement], Kendall manages a stream of information funneled to him by witnesses and their lawyers, many of them long-standing allies and friends drawn from

House counsel what their clients told them, pursuant to the joint defense agreement. In fact, "[t]hrough that [joint defense] network . . . Kendall . . . learned some of the *most sensitive information amassed by independent counsel Ken Starr*."³⁶ Thus, President Clinton's lawyers, both his private lawyers and the lawyers in the Office of White House Counsel (who acted as if they were representing the President personally), were able to monitor the activities of the grand jury and the evidence presented to it. And these lawyers, both the private attorneys and the White House attorneys, were not covered by Rule 6(e). Even in the case of Monica Lewinsky, who was not part of the White House Joint Defense Agreement, her first lawyer, William Ginsburg, conceded that he did talk to the President's lawyers.³⁷

We now know that White House Counsel and the President's personal lawyers acquired knowledge of some of the "most sensitive information" amassed by the Independent Counsel. Armed with this information, what should these lawyers do to protect their client? How should they make use of this information, given that Rule 6(e) does not restrain them? If it suits their purposes to "leak" this information, and it violates no law to do so, would they leak it?³⁸

Even before the OIC investigation, it had been standard operating procedure for White House officials to implement a policy of leaking damaging material "early," so that it was a "one-day, one-paper event." When other media thought of running the same story with more details, the White House would then dismiss the story as "old news."³⁹

Once the leaks were out there—leaks that did not identify White House officials as the source of the leaks—one could blame the OIC as the source:

[T]he White House unrolled a new strategy. Its best hope was to

Washington's insular legal community." The President "has relied on both his private and public lawyers . . . to carry out details of the joint defense strategy." David Willman, *Disputed Tactic Bolsters Defense Behind Clinton*, L.A. Times, Feb. 17, 1998, at A1.

36. Keen & Johnson, *supra* note 35 (emphasis added).

37. See David Willman, *Lewinsky Allegedly Told Others*, L.A. Times, Feb. 3, 1998, at A13 ("Ginsburg said that he has been 'just touching fingers' with Kendall"). Earlier, on a Fox News program, Mr. Ginsburg admitted, that he shared an important goal with the White House lawyers: "I certainly would like to see the grand jury proceedings shut down, you can bet on that." *Fox News Sunday* (Fox News Network television broadcast, Feb. 1, 1998) (transcript available in LEXIS). Referring again to the White House lawyers, he said: "I am interested in what they're doing, and I am following what they're doing, and we do have a cordial relationship. *Lawyers do talk, but amongst themselves*." *Id.* (emphasis added). He also said: "Oh, I think the president will survive." *Id.*

38. Several reporters have confided to me that they believed the White House was the source of certain leaks.

39. See William Powers, *The Spinster: Lanny Davis, Clinton's Minister of Scandal*, New Republic, Sept. 1, 1997, at 19, 20.

make a story out of The Story, implicitly strike at the press for trafficking in confidential material while attacking Starr's prosecutors for leaking it—whether they actually had or not. Though the reports may have come from many directions, it served Clinton's purpose to focus his fire on his most powerful, least popular enemy, Ken Starr.⁴⁰

The press elaborated on this plan, implemented with the precision of a military campaign:

Clinton knows this. In fact the President had so much to gain by sliming Starr that there were even some who privately wondered whether the White House might have staged a particularly cynical scenario: knowing that evidence of obstruction of justice was going to be disclosed anyway, *why not leak some of it, finger Starr for the disclosure and at least profit from his loss?* Either way, the lead story on the news Friday night was of David Kendall, the President's normally invisible personal lawyer, brandishing a 15-page letter charging Starr with an "appalling disregard" for the law and rules of confidentiality. Kendall plans to file a motion in federal court asking for contempt sanctions against Starr.⁴¹

Mr. Kendall filed this motion followed by others. Approximately two years after his first motion, Kendall still has been unable to prove his charges, although the trial judge armed him with subpoena power.⁴²

The White House and David Kendall, President Clinton's private lawyer, together publicized their claims that the OIC illegally was leaking grand jury information. Kendall, meanwhile, appeared to avoid the media. When *The Washington Post* wanted a photograph of him, Kendall did not invite the photographer into his law office. That would appear as if he were cooperating with the press. Instead, he let it be known that "he would be walking by a certain street corner in a trench coat at a preordained moment."⁴³ As such, the photograph appeared candid and taken without his permission—how clever.

B. *False Attributions Designating the OIC as a Source*

As discussed above, a reporter may correctly state that the "OIC lawyers believe that" even though the source is a witness or the witness' lawyer, or another third party, not someone within the OIC.

40. Nancy Gibbs, *Drip Drip Drip: Leaks Swamp the White House, Which Fights Back by Blaming the Flood on (That's Right) Ken Starr*, Time, Feb. 16, 1998, at 37-38; see generally Howard Kurtz, *Spin Cycle: Inside the Clinton Propaganda Machine* (1998) (discussing "spin" as a political strategy in the Clinton White House). The word "spin," as used in Mr. Kurtz's book, is not really related to washing machines and their spin cycle. As used here, "spin" is related to the phrase, "spin a yarn," meaning "tell a story," in the sense of "spin a tall tale," or "tell a fantasy or folk tale."

41. Gibbs, *supra* note 40, at 39.

42. The Court of Appeals found no Rule 6(e) violation in *In Re Sealed Case*, No. 99-3077, 1999 WL 709977 (D.C. Cir. Sept. 7, 1999) (per curiam). See *infra* note 69.

43. Kurtz, *supra* note 40, at 216.

The attribution may appear, at first, to be someone within the OIC but that is not what the reporter is actually saying. On other occasions, a reporter may use language that has attributed the source to "a lawyer with the OIC" or other similar, specific designation. Yet, even here the attribution has proved to be less significant than one might at first imagine.

Consider a news story that NBC reporter Tim Russert broadcast July 15, 1998 on the *Today Show*. Mr. Russert, a respected reporter, is the NBC Washington Bureau Chief and the moderator of *Meet The Press*. Russert, in reporting on the Independent Counsel's supposed questioning of some Secret Service Agents, stated: "There are lots of suggestions coming out of people close to Ken Starr that perhaps the Secret Service facilitated for President Clinton. Remember that code word, it was used by the state troopers in Little Rock."⁴⁴

The phrase, "coming out of people close to Ken Starr," may suggest that someone in the Office of Independent Counsel is the source. Certainly the White House claimed that is what Mr. Russert was saying when Press Secretary Mike McCurry devoted two press briefings to the story, objecting to the supposedly illegal leaks and claiming that the Secret Service agents "should not be slimed by Ken Starr and his operatives."⁴⁵

Shortly after Russert aired the story and identified his sources as "people close to Ken Starr," the Information Officer for the Office of Independent Counsel, Charles Bakaly, telephoned Russert. Bakaly said:

I called Mr. Russert and shared my concern with him that his sourcing, as I understood it, improperly gave the impression that this office had been the source of that information—which was untrue He agreed, represented to me that *the Office of the Independent Counsel* was not his source, but rather, it was congressional sources, and he said he would modify his report on the noon broadcast on MSNBC. I thanked him.⁴⁶

Russert did change the identification of his source when he later appeared on MSNBC, a cable network with a much smaller audience than the *Today Show*. Mr. Russert, however, did not explain that he was correcting his prior error. He said: "This morning I *reported that congressional sources had told NBC News* that Ken Starr is very inter-

44. *Today Show* (NBC television broadcast, July 15, 1998) (transcript available in LEXIS).

45. Lloyd Grove, *The Scoop That Slowly Melted: Russert Tones Down Story on Ken Starr and Secret Service*, Wash. Post, July 17, 1998, at B1 (quoting Press Secretary Mike McCurry).

46. *Id.* (quoting Charles Bakaly) (emphasis added). "Bakaly added that Russert hadn't called him before going on the air for his response to the story—common journalistic practice. Russert yesterday didn't return a phone call seeking comment on his role." *Id.*

ested in finding out what the Secret Service agents may have done as 'accomplices' in a 'coverup.'"⁴⁷

Recall that earlier he did not identify his sources as "congressional." Instead, he referred to them as "people close to Ken Starr." After this correction was made public, White House Press Secretary Mike McCurry (who once described his job as "getting the truth out slowly") never apologized for his accusation that lawyers in the OIC had been the source of the Russert story.

Tim Russert did acknowledge that his sources were not in the OIC. Later, he more clearly explained that that his sources were from Congress, and that these congressional sources were not "close to Ken Starr" and were not relaying anything from the OIC. Russert made a mistake. As reporter Lloyd Grove later noted:

Russert, appearing live from the White House, provided yet another description of his sources: "Members of Congress have been talking to investigators, people, lawyers associated with the grand jury, *people who are free to talk*, and they are coming to some conclusions that perhaps Secret Service agents may have been, quote, 'facilitating.'" He also sounded less confident in the story itself: "We don't know whether that's Republican spin, partisan spin, ideological spin, or there's a germ of evidence."⁴⁸

So, the sources are now people "who are free to talk," and none of them are described as "close to Ken Starr." But the people who did not follow the story closely, the people who relied on Press Secretary Mike McCurry, did not learn that.

Consider another example. In August of 1998, *Time* featured a story about the immunity agreement between the OIC and Monica Lewinsky. The story, in the course of describing a meeting that included OIC lawyers, Ms. Lewinsky, and her lawyers, stated: "Starr's three lawyers took turns asking questions. 'It was a real dance,' *a Starr official said*. 'We were very concerned how she viewed us.'"⁴⁹ One would think, to put it mildly, that at least one source of this story was an unnamed Starr official. That, after all, is what the story said. But that conclusion would be incorrect. *Time*, to its credit, later apologized for the "mistaken attribution," which occurred because of "an editorial mistake."⁵⁰

47. *Id.* (quoting Tim Russert's remarks on MSNBC) (emphasis added).

48. *Id.* (emphasis added). Later, Tom Brokaw of NBC News backtracked even further, stating: "I think Tim [Russert] was saying that there were congressional sources who believed that Starr's got evidence, *but we don't have a hard line on that*." Brokaw justified publishing the earlier claim that the source was someone "close to Starr" by saying: "It [the story] had already been in play in [Mike] McCurry's briefing." But, he was then asked, was it not Russert who put it in play. Brokaw's answer: "Talk to Tim [Russert]." *Id.*

49. Nancy Gibbs, *Tick, Tock, Tick, Talk*, *Time*, Aug. 10, 1998, at 34, 39 (emphasis added).

50. Letter from Michael Weisskopf, reporter, *Time*, to Charles Bakaly, Informa-

Perhaps the most extravagant claim of leaking has come from Steven Brill, in an article he wrote for the inaugural issue of his new magazine, *Brill's Content*.⁵¹ In this article, Mr. Brill claimed that Independent Counsel Ken Starr admitted to leaking information. To buttress his claim, Brill purported to quote from various reporters as well as Ken Starr himself. Starr, of course, denied having ever leaked secret grand jury information or having claimed that he had.⁵² Moreover, other relevant sources whom Brill purported to quote in his article also denied making the statements attributed to them. Tim Russert, hosting *Meet the Press*, summarized the alleged sources' reaction to Brill's claims:

Susan Schmidt of *The Washington Post* said you manufactured quotes. Michael Isikoff said you doctored transcripts a la Dan Burton. Walter Isaacson of *Time* said you mischaracterize his conversation. David Bloom of NBC said you just got your facts wrong. *The Wall Street Journal* said you violated ground rules and misquoted and you have apologized.⁵³

Brill insisted that he remained proud of his story. The publicity surrounding this story may have served to hype and help sell his magazine, even when many of his supposed attributions and sources appeared to have vanished. Although the trial judge supervising the grand jury ordered an extensive investigation,⁵⁴ that investigation has

tion Officer, Office of the Independent Counsel 1 (Aug. 8, 1998) (copy on file with the *Fordham Law Review*). This letter is not grand jury information, nor is it secret. Mr. Weisskopf also said, in this same letter: "You may advise anyone necessary that nobody from Mr. Starr's office provided us with any information regarding the substance or specifics of your immunity meetings with Ms. Lewinsky." *Id.*

51. Steven Brill, *Pressgate*, *Brill's Content*, Aug. 1998, at 123-51.

52. See Office of Independent Counsel, Press Release, June 16, 1998, at 1 (stating that Brill's article "rests on a fundamental misunderstanding of the law and a misrepresentation of the facts"); see also Howard Kurtz, *Lewinsky Coverage Critic Says Gift Needed Mention*, *Wash. Post*, June 16, 1998, at A8 (quoting Starr's claim that his comments were "taken out of context").

53. *Meet the Press* (NBC television broadcast, June 21, 1998) (transcript available in LEXIS).

54. See Peter Baker, *Judge Orders Starr to Prove His Staff Did Not Leak Testimony*, *Wash. Post*, Aug. 8, 1998, at A1. Baker also noted:

Clinton advisers gleefully seized on the documents yesterday, calling Starr the first independent counsel investigated by a court for possible criminal wrongdoing in the course of his investigation [because of the alleged leaking]. "The endemic and casual disclosures of grand jury information which have characterized the past seven months of the OIC's investigation are highly unprofessional and utterly indefensible," said Clinton attorney David E. Kendall.

Id.

Over a year and a half has passed since the investigation of alleged illegal leaking began. I cannot comment on what is sealed, but we do know that criminal prosecutions are public events, and there have been no public reports of any criminal wrongdoing or illegal leaking by the OIC.

discovered no evidence to support Brill's claims.⁵⁵ This conclusion is not surprising given that a half dozen people denied giving Brill the information or the quotations that Brill had attributed to them. Brill later admitted that he should have disclosed his possible bias, given that he had contributed financially to the Clinton-Gore presidential campaign and to several Democratic congressional candidates.⁵⁶

In short, these stories, which directly claimed that the OIC was the source of illegal leaking, do not stand up to careful scrutiny.

C. *The Leaks That Did Not Occur*

If one actually believed the charges that the OIC was engaged in the wholesale leaking of newsworthy or salacious information, one would have thought other information would have been leaked. For example, the entire staff of the OIC knew the results of the President's DNA test long before it was publicly disclosed by the House of Representatives in the *Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 595(c) ("Referral")*.⁵⁷

If one wished to leak information that had substantial publicity value, one would have leaked the DNA results. The results, however, were not leaked and were not publicly known until after the House of Representatives released the *Referral* and the President's grand jury testimony.⁵⁸ While both the President and his lawyer, David Kendall, knew of the DNA test *prior* to the President's grand jury testimony, it would not have been in their interest to leak this information to the press.

Another example involves the President's use of a cigar as a sex aid.

55. I am, of course, relying entirely on the public record. I am not referring to any sealed proceedings because they are sealed. However, because it is a crime to violate Rule 6(e), it is a matter of simple logic that criminal prosecutions are public. If there were any prosecutions growing out of Brill's accusations, we would have heard about them.

56. See Kurtz, *supra* note 52 ("Steven Brill, publisher of a new magazine on the media, said yesterday that he should have disclosed in an article criticizing the coverage of the Monica S. Lewinsky scandal that he made campaign contributions to President Clinton and other Democratic candidates.") Kurtz's article went on to state that "Newsweek reporter Michael Isikoff, who was interviewed by Brill, called the article 'utterly garbage,' 'fundamentally dishonest' and 'slimy.'" *Id.* Kurtz also mentioned that "[Ken Starr and] five other people have disputed information attributed to them in the article" *Id.*

57. See H.R. Doc. No. 105-310, at 11-12 (1998) (submitted on Sept. 9, 1998, and referred to the House Committee on the Judiciary pursuant to H.R. Con. Res. 525, 105th Cong. (1998)) [hereinafter *Referral*].

58. Ms. Lewinsky turned over the blue dress with the stain shortly after she reached an immunity agreement with OIC on July 28, 1998. See *id.* The OIC asked the President for a blood sample on July 31, 1998, and on August 6, 1998, the FBI determined that the DNA was a match. See *id.* Later, on August 17, 1998, the more sensitive test showed that the odds that the stain was President Clinton's were 7.87 trillion to one. See *id.* at 11-12 & nn.6-7.

In February 1998, long before Ms. Lewinsky's August 1998 grand jury testimony about this incident, and long before the President was asked about it in his grand jury deposition of August 17, 1998,⁵⁹ the OIC knew of this Rule 6(e) information, because Ms. Lewinsky had related it to a friend who testified before the grand jury.⁶⁰ If the OIC was leaking information they certainly could not have passed up such a sensational story.

Let us turn to the incident involving White House aide Sidney Blumenthal, who has been called "Bill's dirt devil," "Clinton's hatchet man," and "grassy knoll" by a White House colleague "because of his wacky conspiracy theories."⁶¹ Mr. Blumenthal also has been referred to as "Sid Vicious"⁶² and "a sneak [who is] out to destroy people's careers."⁶³ On February 26, 1998, Mr. Blumenthal appeared to seek another sobriquet, martyr for the First Amendment. Consider this report from Dan Rather, anchor for CBS Evening News:

On another political front, a close adviser to President Clinton was *forced to testify* today before the Ken Starr grand jury. The witness, Sidney Blumenthal, said he was asked to name names and *recite conversations he had with journalists* not about Monica Lewinsky, but about press criticism of Starr's tactics.⁶⁴

Later in that broadcast, the CBS reporter said: "In court today prosecutors crossed a controversial line asking one of Mr. Clinton's top imagemakers about conversations he had with reporters."⁶⁵ The news then played videotape of Mr. Blumenthal, claiming that: "Kenneth Starr's prosecutors demanded to know what I had told reporters and what reporters had told me about Kenneth Starr's prosecutors. If they think they have intimidated me, they have failed."⁶⁶

59. In the grand jury, the President did not deny the cigar incident but simply declined to answer the question. *See id.* at 40 & n.273 (citing Clinton's August 17, 1998 grand jury testimony at 110-11).

60. *See id.* at 18 & n.42 (referring to grand jury testimony of Feb. 12, 1998); *id.* at 138-40 & n.63.

61. *See* James Bennet, *Managers Pursue Adviser's Talks with Clinton*, N.Y. Times, Feb. 3, 1999, at A17; Dana Milbank, *Sid's Id.*, New Republic, Oct. 12, 1998, at 8.

62. *See* Paul A. Gigot, *Bill Loses His Two Right Hands*, Wall St. J., Oct. 9, 1998, at A12, available in 1998 WL 18987481.

63. Howard Kurtz, *Hyde Story Stirs Hostilities*, Wash. Post, Sept. 18, 1998, at A1 (quoting Congressman Ray LaHood).

64. *CBS Evening News* (CBS television broadcast, Feb. 26, 1998) (transcript available in LEXIS) (emphasis added).

65. *Id.*

66. *Id.* David Shuster, of *Fox News*, later read from the grand jury transcripts and compared what was asked to what Mr. Blumenthal claims was asked:

"They're summaries of published reports, and obviously, they express the view of the research department of the DNC." Question: "And you received this from the DNC?" "Yes." "Did you distribute it to anyone outside the White House?" "If reporters called me, or I spoke with the reporters, I would tell them to call the DNC to get those 'talking points,' and those included news organizations ranging from CNN, CBS, ABC, 'New York

The print media, as well as other broadcast media, widely reported this charge, quoting both Blumenthal and his lawyer, and criticizing the OIC for its abusive tactics.⁶⁷ For example, consider the typical opening paragraph to a newspaper story concerning Blumenthal's appearance:

Capping a week of outcry over the tactics of independent counsel Kenneth Starr, a White House critic of the prosecutor testified before a grand jury on Thursday and vowed afterward not to back off. "Ken Starr's prosecutors demanded to know what I had told reporters and what reporters had told me about Ken Starr's prosecutors," said the White House aide, Sidney Blumenthal. "If they think they have intimidated me, they have failed."⁶⁸

The OIC could not respond to these serious charges. The questions asked in the grand jury room and the answers given are something that the supervising judge considers to be within Rule 6(e). In fact, given the trial judge's strict interpretation of Rule 6(e), the OIC could not even confirm that Sidney Blumenthal was a witness before the grand jury, although Mr. Blumenthal made no secret that he had been called.⁶⁹ What, in fact, was he asked in that room?

Times,' 'New York Daily News,' 'Chicago Tribune,' 'New York Observer,' 'L.A. Times.'"

Fox Special Report with Brit Hume (Fox News Network television broadcast, Oct. 6, 1998) (transcript available in LEXIS) (emphasis added). "Even though *Blumenthal had mentioned the organizations on his own*, here's how he described the session to the press: *I was forced to answer questions about my conversations, as part of my job, with—and I wrote this down—The New York Times,' 'CNN. . .'*" *Id.* (emphasis added).

67. Consider the extensive publicity on just one day, February 17, 1998: "Rivera Live Analysis: Ken Starr using taxpayer funds for investigation into alleged leaks from independent counsel's office; latest in Clinton-Lewinsky sex scandal." *Rivera Live* (CNBC television broadcast, Feb. 17, 1998) (transcript available in LEXIS); see also Angie Cannon, *Aide Asked About Media Contacts; Democrats Call on Attorney General to Restrain Starr*, Milwaukee J. & Sentinel, Feb. 27, 1998, at 5, available in 1998 WL 6303349; Angie Cannon, *Witness Blasts Starr's Tactics; Clinton Aide Queried Over Media Contacts*, San Diego Union & Trib., Feb. 27, 1998, at A2, available in 1998 WL 3994915; Thomas Galvin & K.C. Baker, *Starr Called Intimidator; Feds Eye Calls for His Ouster as Clinton Aide Raps Prober*, N.Y. Daily News, Feb. 27, 1998, available in 1998 WL 5923248; *Grand Jury Queries Clinton Aide in Suspected Disinformation Campaign Action Brings Further Outcry From Starr's Foes*, St. Louis Post-Dispatch, Feb. 27, 1998, at A4, available in 1998 WL 3322600; David Willman & Cecilia Balli, *Clinton Aide Assails Special Prosecutor*, Sun-Sentinel (Ft. Lauderdale Fla.), Feb. 27, 1998, at 10A, available in 1998 WL 3250056.

68. Willman & Balli, *supra* note 67. David Kendall joined in the chorus, criticizing the OIC based on what Mr. Blumenthal was supposed to have been asked in the grand jury room. See, e.g., Letter from David E. Kendall to Robert J. Bittman, Esq., Deputy Independent Counsel (Mar. 4, 1998), reprinted in Referral, *supra* note 57, apps., pt. 2, at 2302 ("No more reassuring is your recent interrogation of Mr. Sidney Blumenthal, who works at the White House, to inquire into criticisms of your office in the press.").

69. The Court of Appeals reversed Judge Norma Holloway Johnson twice, when she claimed that the OIC had violated Rule 6(e). The first time was a mandamus action. See *In re Sealed Case*, No. 98-3077, 151 F.3d 1059 (D.C. Cir. 1998). The second

Let us now fast forward to the fall of 1998, after the House of Representatives released the relevant grand jury transcripts.⁷⁰ This Article relies only on public sources. While there was substantially less publicity greeting the disclosures of what really happened in the grand jury room, what the press discovered after examining the grand jury transcripts was quite interesting.

On October 4, 1998, ABC's *Nightline* replayed some of the statements that both Mr. Blumenthal and his lawyer, Mr. McDaniel, made on the courthouse steps.⁷¹ Then, David Marash, the reporter, noted:

A look at the grand jury transcript shows prosecutors pressing Blumenthal not about his contacts with the media, but with the President, the First Lady and other top White House politicians and about the messages that they wanted Blumenthal to spin into the media.⁷²

was an interlocutory appeal. *See In Re Sealed Case*, 192 F.3d 995 (D.C. Cir. 1999) (per curiam). This case was decided on September 7, 1999; the redacted version was issued on September 13, 1999. Both cases were unanimously and summarily reversed by the D.C. Circuit.

The second case, *In re Sealed Cases*, No. 99-3091, is particularly interesting. Judge Johnson wanted to hold the OIC in contempt of court because someone in that office told a reporter, sometime in January 1999, that a "grand jury is 'hearing the case against Mr. Clinton' . . ." *In Re Sealed Case*, 1999 WL 709977, at *9. As the D.C. Circuit stated, however, this statement "did not reveal any secret, for it was already common knowledge well before January 31, 1999, that a grand jury was investigating alleged perjury and obstruction of justice by the President. Once again, the President's appearance on national television [in August 1998] confirmed as much." *Id.* (emphasis added). As for old news, in February 1998, Professor Sam Dash publicly announced that the Independent Counsel was investigating whether one could indict a sitting president. *See Cynthia Cotts, Clinton Crisis: Where's the Ethics Watchdog?*, Nat'l L.J., Feb. 16, 1998, at A4. Long before January 1999, the world knew that the grand jury was investigating President Clinton, because he lobbied for the reenactment of the Independent Counsel law so that a new Independent Counsel would be appointed to investigate allegations surrounding him and an Arkansas land deal. *See S. Rep. No. 103-10*, at 8-9 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 753. In January 1998, Attorney Janet Reno asked the Special Division of the D.C. Circuit to expand the jurisdiction of the OIC so that it would cover the Lewinsky allegations. All this was public long before January 1999.

If the statement in January 1999, that the grand jury was investigating President Clinton's alleged perjury-months after the House of Representatives released the grand jury transcripts-violated Rule 6(e), then Judge Sirica, during the Watergate investigation, should have placed Special Prosecutor Archibald Cox and Leon Jaworski in contempt, for both of them made no secret that the grand jury was investigating President Nixon.

70. *See, e.g.*, Editorial, *Sidney Blumenthal Exposed*, N.Y. Post, Oct. 6, 1998, at 28 (referring to the "final batch of grand-jury transcripts released by the House last weekend").

71. *See Nightline* (ABC television broadcast, Oct. 4, 1998) (transcript available in 1998 WL 5373147).

72. *Id.* Mr. Marash read from the grand jury transcripts:

QUESTION: Has the White House produced any document like a talking points document relating or referring to the Monica Lewinsky matter?

ANSWER: I've seen talking points from the Democratic National Committee.

QUESTION: And you received this from the DNC?

The grand jury must have been concerned about Mr. Blumenthal's claims, for on June 25, the grand jury forewoman said to Mr. Blumenthal:

"We are very concerned about the fact that during your last visit, that *an inaccurate representation of the events that happened were retold on the steps of the courthouse*. We would hope that you will understand the seriousness of our work and that you would really represent us the way that event happened in this room."⁷³

Other reporters came to a similar conclusion. As one news report under the heading *Blumenthal's Whopper* succinctly stated: "Presidential aide Sidney Blumenthal failed to tell the truth—to put it politely—when he spoke to the press earlier this year after an appearance before the sex-and-lies grand jury."⁷⁴

Another commentator reviewed the grand jury transcripts and concluded:

Sid Vicious is so loyal to the Clintons he was willing to lie for them in public. He walked out of the grand jury room last February and declared he'd been "forced to answer questions" about his media contacts. This fed the Clinton spin that Mr. Starr was "out of control." But the transcript of his testimony shows he himself had brought up those contacts. A jury forewoman was upset enough to rebuke him at a later appearance for the "inaccurate representation" he made "on the steps of the courthouse." No wonder the Clintons admire him so.⁷⁵

Why would Mr. Blumenthal make representations (or what the grand jury forewoman called an "inaccurate representation") in Feb-

ANSWER: Yes.

QUESTION: Did you distribute it to anyone outside the White House?

ANSWER: If reporters called me or I spoke with reporters, I would tell them to call the DNC to get those talking points. And those included news organizations ranging from CNN, CBS, ABC, New York Times, New York Daily News, Chicago Tribune, New York Observer, Los Angeles Times.

DAVID MARASH: So if Blumenthal was telling the truth on the courthouse steps, he is, indeed, a remarkable man, capable of 'writing down' notes on his own testimony even as he gave it.

Id.

73. *Fox Special Report with Brit Hume*, *supra* note 66 (quoting David Shuster reciting a portion of the grand jury transcript of June 25, 1998) (emphasis added).

74. Greg Pierce, *Blumenthal's Whopper*, Wash. Times, Oct. 6, 1998, at A6, available in 1998 WL 3460273; see also James Bennet, *The President's Trial: the Aide; Managers Pursue Adviser's Talks with Clintons*, N.Y. Times, Feb. 3, 1999, at A17.

It is perhaps characteristic of Mr. Blumenthal—and of the murkiness of truth in this scandal, in which words and memory have often seemed clouded by politics—that even his testimony has become a source of controversy. After he testified under oath to the grand jury, *Mr. Blumenthal gave accounts of his appearances to reporters that varied from a transcript made public later*.

Bennet, *supra* (emphasis added).

75. Gigot, *supra* note 62.

ruary that were so at odds with what happened?⁷⁶ Why would he tell what one story called a "[w]hopper"?⁷⁷ If White House aide and Presidential confidant, Mr. Blumenthal, really believed that the OIC would leak information from the grand jury, would he have made the claims that he made? It does not take a rocket scientist to conclude that he must have felt confident that his grand jury testimony would not be leaked and there would be no one to contradict him. A witness could act dishonorably if he trusted the OIC to act honorably and not leak the testimony. In fact, no one ever leaked the testimony and it did not become public until after the House of Representatives released the information.

David Shuster, a reporter for Fox News, underscored the difficulty that the prosecutors have in responding to charges by the White House and its supporters:

Prosecutors, restricted by grand jury rules of secrecy, could do nothing to counter the public perception. The *grand jurors were infuriated*, and even four months later, when Blumenthal returned,

76. Even an editorial in the *New York Post*, which was especially scathing, did not ask why Mr. Blumenthal thought that he could get away with his rendition of the events:

Poor Sidney Blumenthal. Having put his trust in the sanctity of the grand-jury system, the White House's premier sleazemeister now stands exposed before the entire nation as an unmitigated liar.

Remember Blumenthal's appearance before Independent Counsel Kenneth Starr's grand jury last summer? Following his testimony, Blumenthal denounced prosecutors for having the nerve to grill him about his contacts with reporters.

Blumenthal also phoned *New York Times* columnist Anthony Lewis and told him he'd been asked a series of intrusive questions about Bill Clinton's religion and his sex life. That led Lewis to denounce the "dangerous . . . degradation of the legal process"

One problem: Neither allegation turns out to be true.

We know this thanks to the final batch of grand-jury transcripts released by the House last weekend.

Publicly, Blumenthal declared that he'd been "forced to answer questions about my conversations, as part of my job," with a laundry list of news-media organizations, adding that "Starr's prosecutors demanded to know what I had told reporters and what reporters had told me . . ."

Liar. In fact, Blumenthal was asked whether he knew anything about any "talking points" related to the Lewinsky matter. . . .

....

Members of the grand jury had watched Blumenthal's turn in front of the TV cameras—and *they* were outraged by his deception. "We had some serious concerns," the forewoman told Blumenthal. . . . "We are very concerned about the fact that, during your last visit, that an inaccurate representation of the events that happened were retold on the steps of the courthouse."

Said Sid Vicious: "I appreciate your statement."

No wonder the Clintons love Blumenthal. Who else but a liar can so appreciate another liar?

Editorial, *supra* note 70.

77. Pierce, *supra* note 74.

they took the unusual step of admonishing him in person. [Then he read from the grand jury transcript,⁷⁸ and continued.] . . .

Still, the entire episode underscores the huge advantage the White House had in shaping public debate because *even when misleading statements were spinning through the press, there was nothing the grand jury or the prosecutors could do about them.*⁷⁹

Consider another incident, when the OIC called Marcia Lewis, the mother of Monica Lewinsky, to testify before the grand jury. The press widely reported that the general public objected to calling the mother. This incident, "elicited enormous outrage over the inconceivable cruelties the independent counsel had perpetrated by calling a mother to testify against her daughter."⁸⁰ What information could Ms. Lewis possibly give? In fact, she pled the Fifth Amendment and refused to testify. When Ms. Lewinsky sought and eventually received immunity, she sought and received it for herself, her mother, and her father.⁸¹ When Ms. Lewis was immunized she was questioned again, but the grand jury transcripts now released do not show any offensive questioning.

The television pictures at the time showed a "haggard Ms. Lewis leaving the courthouse after she had broken down, sobbing, under questioning," because, it appeared, a relentless prosecutor had forced the mother "to answer questions about the most intimate sexual details of her daughter's encounters [with the President of the United States]."⁸² Even a month after her testimony, newspapers reminded people that "Marcia K. Lewis, Lewinsky's mother, appeared for two days last month before suffering what associates called *severe* emotional distress that caused a halt to her testimony."⁸³ Anyone could conjure up "images—and they did, in opinion columns across the land—of the torture inflicted on a mother being pressed for details about, say, her daughter's performance of oral sex, and whether and where the President had touched Monica, and perhaps vice-versa."⁸⁴

That, however, is not what went on inside the grand jury room:

Torture indeed, *if it had happened*. What the transcript shows is that *Ms. Lewis endured no such thing*, that the references to sex ran to questions about whether she knew if her daughter had "a sexual relation of some kind" with the president. To which questions Ms.

78. See *Nightline*, *supra* note 71.

79. *Fox Special Report With Brit Hume* (Fox News Network television broadcast, Oct. 6, 1998) (transcript available in LEXIS Tr.# 100601cb.254) (emphasis added).

80. Dorothy Rabinowitz, *True and False*, Wall St. J., Oct. 30, 1998, at A18.

81. See Immunity Agreement between Monica Lewinsky and the United States, July 28, 1998, para. 2, reprinted in Referral, *supra* note 57, apps., pt. I, at 378-79.

82. Rabinowitz, *supra* note 80.

83. John F. Harris, *Clinton Finds There's No Escape; In Africa, President Sidesteps Executive Privilege Questions*, Wash. Post, Mar. 25, 1998, at A2 (emphasis added).

84. Rabinowitz, *supra* note 80.

Lewis responded with evasive answers. She raced from the room in tears not because of intrusive sexual queries. She left after the prosecutor asked about certain names she and her daughter used when they talked about the first lady—after, that is, she revealed that their name for Mrs. Clinton was “Babba,” a name members of Ms. Lewis’s family had used for their grandmothers.⁸⁵

One would think that if the OIC engaged in leaking, it would have leaked the truth, in order to respond to the false accusations regarding Ms. Lewis’s testimony. Other people also knew the information, and they were not precluded from leaking it by Rule 6(e) because they were not part of the OIC. But they also had no incentive to these disclosures.

CONCLUSION

We should expect that future high profile cases will include attacks on the bona fides of the prosecutor and charges of illegal leaking of grand jury testimony, whether the charges are true or not. Nothing succeeds like success, and the false charges of leaking have been successful in shifting attention from the crimes to the people charged with investigating the crimes.

At the end of the famous movie, *The Wizard of Oz*, Dorothy is told to click her magic ruby slippers three times and say, “There’s no place like home.” The repetition worked, and she finally returned home. In the real world, we may not expect people to believe a denunciation or insinuation simply because someone repeats the accusation more frequently than a devout Hindu recites a mantra. But, in the world of politics, when charges of illegal leaking are made often enough, many people believe that they must be true.⁸⁶ Federal prosecutors are hobbled in answering these charges, and they will continue to be hobbled because of the restrictions imposed by federal law.⁸⁷

85. *Id.* (emphasis added).

86. Besides charges of illegal leaking, there have been other charges that people have made against the OIC. A frequent one is that there has been some sort of “prosecutorial abuse.” These charges are made to newspapers more often than they are made to judges who can rule on them. *See, e.g.,* Anthony Lewis, *Abroad at Home; Is This America?*, N.Y. Times, Nov. 3, 1998, at A27 (reporting charges by a grand jury witness that she was abused, not allowed to see her lawyer, and so forth). Mr. Lewis even argued that “Mr. Starr has tried to destroy [the attorney-client] privilege in case after case.” *Id.* One would think that if a witness has such serious claims she would file a complaint in court instead of filing a complaint with a news columnist. Judges do not allow prosecutors, or any lawyer, for example, to “destroy” the attorney-client privilege,” or abuse a witness. Of course, judges do rule that the attorney-client privilege may be unavailable for various reasons, such as the crime-fraud exception. And the witness can only be forced to answer if the judge rules that the privilege is inapplicable.

87. When people receive the information, their views change. Consider, for example, the chart of e-mails that the House Judiciary Committee received during the course of Judge Starr’s marathon testimony (about 12 hours long) on November 19,

1998. Initially, the viewers were antagonistic towards Judge Starr and what he represented. At about 1:30 p.m., the mood started to shift, with the public moving away from an anger-based reaction to Judge Starr. By 11:59 p.m., the anti-Starr/anti-impeachment reaction was about 30% and the pro-Starr/pro-impeachment reaction was about 70%. *See* Memorandum from Representative Henry Hyde to the Republican Members of the Committee on the Judiciary 1 (Nov. 20, 1998) (copy on file with the *Fordham Law Review*).

Notes & Observations