INITIAL RESPONSE

TO REFERRAL OF

OFFICE OF INDEPENDENT COUNSEL

David E. Kendall
Nicole K. Seligman
Emmet T. Flood
Max Stier
Glen Donath
Alicia L. Marti
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, DC 20005

Charles F.C. Ruff
Cheryl Mills
Lanny A. Breuer
OFFICE OF THE WHITE HOUSE
COUNSEL
The White House
Washington, DC 20005

September 12, 1998

On May 31, 1998, the spokesman for Independent Counsel Kenneth W. Starr declared that the Office's Monica Lewinsky investigation "is not about sex. This case is about perjury, subornation of perjury, witness tampering, obstruction of justice. That is what this case is about."[1] Now that the 450-page Referral to the United States House of Representatives Pursuant to Title 28, United States Code § 595(c) (the "Referral") is public, it is plain that "sex" is precisely what this four-and-a-half year investigation has boiled down to. The Referral is so loaded with irrelevant and unnecessary graphic and salacious allegations that only one conclusion is possible: its principal purpose is to damage the President.

The President has acknowledged and apologized for an inappropriate sexual relationship with Ms. Lewinsky, so there is no need to describe that relationship in ugly detail. No one denies that the relationship was wrong or that the President was responsible. The Referral's pious defense of its pornographic specificity is that, in the Independent Counsel's view:

> "the details are crucial to an informed evaluation of the testimony, the credibility of witnesses, and the reliability of other evidence. Many of the details reveal highly personal information; many are sexually explicit. This is unfortunate, but it is essential."

Narrative at 20. This statement is patently false. Any fair reader of the Referral will easily discern that many of the lurid allegations, which need not be recounted

---

[1] CNN Late Edition with Wolf Blitzer (May 31, 1998). Other commentators and journalists have made similar assertions. See, e.g., The Washington Times (March 19, 1998); The New York Times (March 29, 1998); ABC Nightline (April 15, 1998); The Washington Times (July 29, 1998).

here, have no justification at all, even in terms of any OIC legal theory. They plainly do not relate, even arguably, to activities which may be within the definition of "sexual relations" in the President's Jones deposition, which is the excuse advanced by the OIC. They are simply part of a hit-and-run smear campaign, and their inclusion says volumes about the OIC's tactics and objectives.

Review of a prosecutor's case necessarily starts with an analysis of the charges, and that is what we offer here. This is necessarily a very preliminary response, offered on the basis of less than a day's analysis and without any access to the factual materials cited in the Referral.

Spectacularly absent from the Referral is any discussion of contradictory or exculpatory evidence or any evidence that would cast doubt on the credibility of the testimony the OIC cites (but does not explicitly quote). This is a failure of fundamental fairness which is highly prejudicial to the President and it is reason alone to withhold judgment on the Referral's allegations until all the prosecutors' evidence can be scrutinized -- and then challenged, as necessary, by evidence from the President.

The real critique can occur only with access to the materials on which the prosecutors have ostensibly relied. Only at that time can contradictory evidence be identified and the context and consistency (or lack thereof) of the cited evidence be ascertained. Since we have not been given access to the transcripts and other materials compiled by the OIC, our inquiry is therefore necessarily limited. But even with this limited access, our preliminary review reaffirms how little this highly intrusive and disruptive investigation has in fact yielded. In instance after

instance, the OIC's allegations fail to withstand scrutiny either as a factual matter, or a legal matter, or both. The Referral quickly emerges as a portrait of biased recounting, skewed analysis, and unconscionable overreaching.

In our Preliminary Memorandum, filed yesterday, at pages 3-12, we set forth at some length the various ways in which impeachable "high Crimes and Misdemeanors" have been defined. Nothing in the Referral even approximates such conduct. In the English practice from which the Framers borrowed the phrase, "High Crimes and Misdemeanors" denoted political offenses, the critical element of which was injury to the state. Impeachment was intended to redress public offenses committed by public officials in violation of the public trust and duties. Because presidential impeachment invalidates the will of the American people, it was designed to be justified for the gravest wrongs -- offenses against the Constitution itself. In short, only "serious assaults on the integrity of the processes of government,"[2] and "such crimes as would so stain a president as to make his continuance in office dangerous to the public order,"[3] constitute impeachable offenses. The eleven supposed "grounds for impeachment" set forth in the section of the Referral called "Acts That May Constitute Grounds for an Impeachment" ("Acts") fall far short of that high standard, and their very allegation demeans the constitutional process. The document is at bottom overreaching in an extravagant effort to find a case where there is none.

---

2 Charles L. Black, Jr. Impeachment: A Handbook- 38-39 (1974)

3 Ibid.

Allegation I -- Perjury in January 17, 1998, Deposition

We begin our response to the OIC's charge that the President committed perjury in his January 17 deposition in the Jones case with these simple facts: the President's relationship with Ms. Lewinsky was wrong; he admitted it was wrong; and he has asked for the forgiveness of his family and the American people. The perjury charges in the Referral in reality serve one principal purpose for the OIC -- to provide an opportunity to lay out in a public forum as much salacious, gratuitous detail as possible with the goal of damaging the President and the presidency.

The OIC begins its catalogue of "acts that may constitute grounds for impeachment" with the allegation that "[t]here is substantial and credible information that President Clinton lied under oath as a defendant in Jones v. Clinton regarding his sexual relationship with Monica Lewinsky." Acts at 5. The OIC contends that, for legal reasons, it must discuss its allegations of sexual activity in detail and then goes out of its way to supply lurid detail after lurid detail that are completely irrelevant to any legal claim, obviously hoping that the shock value of its footnotes will overcome the absence of legal foundation for the perjury allegation.

In reaching any fair judgment as to the merits of the OIC's claim that the President's testimony establishes a basis for impeachment, it is important to understand a few additional points. First, the OIC barely acknowledges the elements of perjury, including, in particular, the substantial burden that must be met to show that the alleged false statements were made "knowingly," Preliminary Memorandum at 52, or that they were material to the Jones proceeding.

Second, the OIC ignores the careful standards that the courts have mandated to prevent the misuse of perjury allegations. As was set out in detail in our Preliminary Memorandum, pages 51-64, literally true statements cannot be the basis for a perjury prosecution, even if a witness intends to mislead the questioner. Likewise, answers to inherently ambiguous questions cannot constitute perjury. And, normally, a perjury prosecution may not rest on the testimony of a single witness.

Third, by selectively presenting the facts and failing to set out the full context of the answers that it claims may have been perjurious, the OIC has presented a wholly misleading picture. This tactic is most pronounced in the OIC's astonishing failure to set out the initial definition of "sexual relations" presented by the Jones lawyers at President Clinton's deposition, two parts of which were eliminated by Judge Wright as being "too broad."[4] The OIC also fails to mention

---

[4] The President was presented with the following definition, as he understood the court to have amended:

> Definition of Sexual Relations
>
> For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes -
>
> (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person;
>
> ~~(2) contact between any part of the person's body or an object and the genitals and anus of another person; or~~
>
> ~~(3) contact between the genitals or anus of the person and any part of another person's body.~~

that the Jones lawyers were fully able, and indeed were invited by President Clinton's counsel, to ask the President specific questions about his sexual encounters, but they chose not do so. See Preliminary Memorandum at 65.

These surprising and substantial gaps in the Referral, and the OIC's purposefully incomplete presentation reflect the extreme weakness of the OIC's contention that the President's deposition testimony about "sexual relations" may constitute perjury.

As any fair prosecutor would acknowledge, what the OIC dismisses as a mere "semantical defense" is, in fact, reflective of the great care the courts have taken to ensure that a witness is not charged with perjury except when the government can demonstrate a clear intent to provide false testimony. Thus, in any ordinary prosecutor's office, and surely in the chambers of the House Judiciary Committee, the definitions of such terms as "sexual affair," "sexual relations," and "sexual relationship" would be seen as vital to a determination whether some violation of law had occurred.[5] The burden that must be met by the OIC extends beyond showing that the President was wrong on the semantics, it must also show that, because perjury is a specific intent crime, he knew he was wrong and intended to lie

---

Continued ...

~~"Contact" means intentional touching, either directly or through clothing.~~

[5] For example, dictionary definitions of "sexual relations" expressly support the President's interpretation. See, e.g., Webster's Third International Dictionary (defining "sexual relations" as "coitus"). Yet, apparently, the OIC did not bother to check a dictionary before leveling its accusations.

-- something that the OIC could not begin to demonstrate. In fact, all the OIC has is a witness who gave narrow answers to ambiguous questions.

Lawyers' arguments, however well taken, should not obscure the President's admission that his relationship with Ms. Lewinsky was wrong and his acceptance of responsibility for his conduct. But one example will suffice to demonstrate the inherent weakness of the OIC's claim. The OIC argues that oral sex falls within the definition of sexual relations and that the President therefore lied when he said he denied having sexual relations. It is, however, the President's good faith and reasonable interpretation that oral sex was outside the special definition of sexual relations provided to him. The OIC simply asserts that it disagrees with the President's "linguistic parsing," and that reasonable people would not have agreed with him. Acts at 30. This simply is not the stuff of which criminal prosecutions -- and surely impeachment proceedings -- are made.

What is left, then is a disagreement about the very specific details of certain encounters that the President has acknowledged were improper -- the very "oath against oath" that the law and experience reject as a basis for a prosecution, because a perjury conviction cannot rest on simple inconsistencies and memory disparities between only two witnesses.

Instead of acknowledging the well-settled legal limits on perjury cases, or grappling with the important limitations on perjury prosecutions, the OIC has chosen to fill its report with unnecessary and salacious sex -- details that cause pain and damage for absolutely no legitimate reason.

Allegation II -- Perjury in August 17, 1998, Grand Jury Testimony

In its second allegation, the OIC contends that "[t[here is substantial and credible information that President Clinton lied under oath to the grand jury about his sexual relationship with Monica Lewinsky." Acts at 40. In particular, the OIC alleges that the President committed perjury three times: (1) when he testified that he believed oral sex was not covered by any of the terms and definitions for sexual activity used at the Jones deposition; (2) when he contradicted Ms. Lewinsky's grand jury testimony on the question whether the President touched Ms. Lewinsky's breasts or genitalia during their sexual activity, since "[t]here can be no contention that one of them has a lack of memory or is mistaken," id.; and (3) when he testified to a purportedly false date on which his relationship with Ms. Lewinsky commenced. None of these "allegations" makes out a prima facie case of perjury, and none can possibly constitute a "ground" for impeachment.

1. The OIC first claims that the President testified falsely that he did not believe oral sex to be covered by any of the terms and definitions for sexual activity used at the Jones deposition. As noted in response to the first allegation, supra, the terms "sexual affair" and "sexual relationship" are inherently ambiguous and, when used without definition, cannot possibly amount to perjury. The President testified to the grand jury about what he believed those terms mean. Not content to accept his explanation, the OIC makes the extraordinary (and factually unsupported) claim that the President committed perjury before the grand jury by lying not about some fact but about his belief about the meaning of certain words. The OIC then compounds this error by claiming as perjury the President's explanation of his

understanding of the contorted definition of "sexual relations" in the Jones suit, as modified by the court.

This claim is quite stunning. The OIC charges the President with perjury, saying it is "not credible" that the President believed oral sex fell outside the definition he was given, even though it plainly did, and even though many commentators and journalists have stated that they believe that the definition of sexual relations in the Jones deposition did not include oral sex (performed on the President). See, e.g., Internight, August 12, 1998 (Cynthia Alksne) ("when the definition finally was put before the president, it did not include the receipt of oral sex."); "DeLay Urges a Wait For Starr's Report," The Washington Times, August 31, 1998 ("The definition of sexual relations, used by lawyers for Paula Jones when they questioned the president, was loosely worded and may not have included oral sex."); "Legally Accurate," The National Law Journal, August 31, 1998 ("Given the narrowness of the court-approved definition in [the Jones] case, Mr. Clinton indeed may not have perjured himself back then if, say, he received oral sex but did not reciprocate sexually."). Despite the fact that several reasonable commentators agree with the President's interpretation, the OIC acts as though the President's interpretation of the definition in the Jones case is both unique and untenable. It is in fact the OIC's theory that is untenable.

It is beyond debate that false testimony provided as a result of confusion or mistake cannot as a matter of law constitute perjury. See United States v. Dunnigan, 507 U.S. 87, 94 (1993); Department of Justice Manual, 1997 Supplement, at 9-69.214. Moreover, if there is any doubt as to the falsity of

testimony, the issue must be resolved in favor of the accused. See United States v. Chaplin, 25 F.3d 1373, 1380 (7th Cir. 1994) (the government must prove falsity by direct evidence, and not inferences). The definitions on which the President relied are shared both by dictionaries, see discussion of Allegation I, supra, and by commentators. The OIC's very allegation that the President committed perjury by re-explaining his belief and interpretation to the grand jury is yet another indication of the extent of the OIC's overreaching in this Referral.[6]

2. The OIC's next charge – that the President testified falsely when he contradicted Ms. Lewinsky's grand jury testimony on the question whether he touched Ms. Lewinsky's breasts or genitalia during their sexual activity -- is substantially identical to the allegation contained in Allegation I, supra, and cannot constitute perjury for the same reason. The critical issue here is not whether the testimony of the President and Ms. Lewinsky differ but whether there is any evidence that the President knowingly and intentionally gave false testimony. It is worthwhile to note, however, the inaccuracy of the OIC's assertion that "[t]here can be no contention that one of them has a lack of memory or is mistaken" about the details of their physical relationship. Acts at 40.

3. The OIC's final allegation here is that the President made a false statement to the grand jury regarding the timing of the beginning of his

---

[6] This overreaching is compounded by the complete lack of legal citation and analysis in the Referral. Perjury is a specific intent crime, and is an area of the law in which stringent safeguards have been erected to make perjury prosecutions exceedingly difficult. Rather than explain how, notwithstanding these safeguards, it has made out a valid perjury charge, the OIC has elected simply to forego discussing the law entirely.

relationship with Ms. Lewinsky. Whereas the Referral indicates that the President remembers the improper relationship beginning early in 1996, Ms. Lewinsky has apparently testified that it began November 15, 1995. As a legal allegation this claim is frivolous, because the statement by the President regarding the timing of the relationship (mid-November 1995 as opposed to January 1996) was utterly immaterial to the grand jury's investigation. The Supreme Court has held that "there is no doubt that materiality is an element of perjury." Johnson v. United States, ___ U.S. ___, 117 S. Ct. 1544, 1548 (1997). The test for materiality is whether the statement in question had "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." United States v. Gaudin, 515 U.S. 506, 509 (1995). There is no conceivable way in which any statement by the President with regard to the date (within a few weeks) of the commencement of his relationship with Ms. Lewinsky could possibly have influenced the grand jury, and the OIC has of course not identified how the grand jury was "influenced" by this testimony. The President acknowledged to the grand jury his improper relationship, beginning early in 1996, with Ms. Lewinsky , and his testimony regarding the date that the relationship began cannot possibly have influenced the grand jury in any decision-making function. The mere fact that the OIC would allege perjury as a result of an utterly immaterial statement speaks volumes about the overreaching in the Referral.

Allegation III – Meetings and Exchanging Gifts with Ms. Lewinsky

In its third allegation, the OIC makes various claims of perjury based on President Clinton's statements in the Jones deposition regarding whether he had been alone with Ms. Lewinsky in the Oval Office and in an adjacent hallway and whether he and Ms. Lewinsky had exchanged gifts. Like the other perjury allegations, the OIC fails to offer a credible case.

First and foremost, President Clinton did not deny meeting alone with Ms. Lewinsky at the White House nor deny that they exchanged gifts. In essence, the OIC's complaint is that President Clinton was not more forthcoming, which is plainly not a ground for perjury, rather than that he knowingly lied under oath. This is perhaps most clearly seen in the OIC's heading for this allegation, which sets forth the accusation that President Clinton "minimized the number of gifts they had exchanged," Acts at 45, which of course concedes that he acknowledged that gifts were exchanged. There is not much that is safe from a perjury prosecution if mere "minimization" qualifies for the offense. The transcript makes it clear that, when asked about particular gifts, the President honestly stated his recollection of the particular item.

Nor can President Clinton's testimony regarding whether he was alone with Ms. Lewinsky at various times and places constitute perjury. The Jones lawyers often failed to follow up on incomplete or unresponsive answers. Read as a whole, the deposition makes clear that the President acknowledged being alone with Ms. Lewinsky on some occasions. The Referral unfortunately mischaracterizes the testimony to suggest an absolute denial, for example, transforming a question

about being alone with Ms. Lewinsky in the Oval Office (where the President did not recall engaging in improper contact) into being alone at all ("The President lied when he said "I don't recall" in response to the question whether he had ever been alone with Ms. Lewinsky." Acts at 51.) And, surprisingly since the Jones lawyers had been briefed by Ms. Tripp, the Jones lawyers never asked the President whether he was alone with Ms. Lewinsky in the study, where some of the alleged activity took place. They were free to ask specific follow-up questions about the nature and locale of any physical contact, and they did not do so. The OIC cannot now hold the President to blame for their failure.

Allegation IV -- Discussions with Ms. Lewinsky About Potential Testimony

The Referral claims that in the following exchange in President Clinton's January 17 deposition in the Jones case he committed perjury:

> Q: Have you ever talked to Ms. Lewinsky about the possibility that she might be asked to testify in this lawsuit?
>
> A: I'm not sure and let me tell you why I'm not sure. It seems to me the . . . I want to be as accurate as I can here. Seems to me the last time she was there to see Betty before Christmas we were joking about how you-all, with the help of the Rutherford Institute, were going to call every woman I'd ever talked to and . . . ask them that, and so I said you would qualify, or something like that. I don't, I don't think we ever had more of a conversation than that about it, because when I saw how long the witness list was, or I heard about it, before I saw, but actually by the time I saw her name was on it, but I think that was after all this happened. I might have said something like that, so I don't want to say for sure I didn't because I might have said something like that.
>
> Q: What, if anything, did Monica Lewinsky say in response?
>
> A: Nothing, that I remember. Whatever she said, I don't remember. Probably just some predictable thing.

This answer was literally accurate. The President described a joking conversation that he had with many women about the possibility that they might be subpoenaed by the Jones lawyers. He made clear that the recollection of the conversation with Ms. Lewinsky preceded the appearance of Ms. Lewinsky's name on the witness list (on December 5), saying: "by the time I saw [the witness list on December 6] her name was on it, but I think that was after all this had happened." The President also stated three different times in that one answer that he was not certain as to his recollection, saying, "I'm not sure," "I don't think," and "I might have said something like that." In his grand jury testimony, additional details of a December

28 conversation with Ms. Lewinsky were provided by the President. The testimony that the Referral cites is not inconsistent – his first answer indicating he was referring to a conversation that occurred before she had been named a witness, and his August 17 testimony describing a conversation after she had been subpoenaed in mid-December. The fact that Ms. Lewinsky recalls additional conversations on the subject, all occurring after she had been named on the witness list, does not establish that the President's answer was inaccurate. This answer cannot possibly support a perjury charge.

Allegation V -- Concealing Gifts and an Intimate Note

In its fifth allegation, the OIC contends that President Clinton obstructed justice by concealing gifts he had given to Ms. Lewinsky. This claim is wholly unfounded and simply absurd. On her December 28, 1998 visit, the President gave Ms. Lewinsky several holiday and going-away gifts. Ms. Lewinsky apparently testified that, during the visit, she raised a question about the Jones subpoena and suggested "put[ting] the gifts away outside of my house or somewhere or giv[ing] them to someone, maybe Betty." Acts at 74-75. To this suggestion, the President, according to Ms. Lewinsky's reported testimony, responded with something like, "I don't know" or "Hmmm" or "there really was no response."[7] President Clinton contradicts this testimony. But even if one accepts Ms. Lewinsky's testimony, "I don't know, "Hmmm" and silence do not constitute obstruction of justice.

Moreover, Ms. Lewinsky's testimony is contradicted by Ms. Currie who testified that it was Ms. Lewinsky, not the President, who asked her to come get the gifts and keep them. The OIC tries to impugn Ms. Currie's memory in the quoted passage, yet her recollection is consistent with the testimony of one of the two other parties to the events. Indeed, the OIC's effort to shore up its case by trying to discount Ms. Currie's testimony on this point is a prime example of the dangers of relying on the OIC's development and presentation of the evidence. When confronted with testimony not to its liking from Ms. Currie, the OIC responded by

---

[7] The ambiguity and indeterminacy of Ms. Lewinsky's testimony here, as quoted by the OIC, dramatically illustrates the need to review carefully all the materials which the OIC cryptically cites in the Referral.

questioning her in a manner clearly designed to encourage Ms. Currie to restate her recollection in a manner consistent with the OIC's theory of the case. Acts at 77.[8]

The OIC's theory of concealment also is belied by Ms. Lewinsky's decision to turn over some, but not all, of the gifts she had received from the President to Ms. Currie; if the purpose of the exercise was to avoid having gifts in her possession at the time of the deposition (which of course would not have been proper), retaining some gifts made no sense. But the OIC is forced to acknowledge that only one of the several gifts the President gave to Ms. Lewinsky on December 28, 1998 was included in the box she gave to Ms. Currie for safekeeping. The theory makes no sense.

Ultimately, the only theory that does make sense is the truth, as testified to by the President and Ms. Currie and as supported by the fact that the President acknowledged giving Ms. Lewinsky gifts as early as his January 17, 1998 deposition. The President was unconcerned about the gifts he had given to Ms. Lewinsky because he frequently exchanges gifts with friends. That is why he gave her additional gifts on December 28 even though, according to her testimony, he knew the Jones lawyers were interested in them. Thus, when she raised a question, he told Ms. Lewinsky she had to turn over what she had; they were of no concern to

---

[8] The lengths to which the OIC is willing to go to force evidence into the picture it wants to draw is further revealed by its citation to the fact that Ms. Currie drove to Ms. Lewinsky's apartment to pick up the gifts as evidence that Ms. Lewinsky's story, rather than Ms. Currie's, is the correct one. According to the OIC, "the person making the extra effort (in this case, Ms. Currie) is ordinarily the person requesting the favor." Acts at 83. There is no basis in logic or experience for this position.

him. Nonetheless, in response to Ms. Lewinsky's subsequent request, Ms. Currie drove to Ms. Lewinsky's apartment and picked up a box of gifts from Ms. Lewinsky and held them for safekeeping. The President did not direct or encourage Ms. Currie's activities regarding the gifts. He likewise did not obstruct justice by concealing their existence.

The OIC also argues that the President obstructed justice in the Jones case by destroying an intimate note that Ms. Lewinsky included in a book she left for him on January 4, 1998.[9] The OIC states in its Referral that the President was served with a document request from the Jones lawyers on December 16, 1997, that required him to produce this note to the Jones lawyers. The disingenuousness of this allegation is apparent on several levels.

As a preliminary matter, the President testified that he recalled receiving a book from Ms. Lewinsky, that he believed he had received it in December, and that he did not recall receiving an accompanying note. Deposition of the President, August 17, 1998. Contrary to the one-sided presentation of the purported facts in the OIC's referral, the President may not even have received that note.

Second, the OIC asserts, without basis, that the President purposefully destroyed Ms. Lewinsky's note because he did not want to have to turn it over to the Jones lawyers. The OIC has absolutely no basis for assuming that the President was aware of the document request at the time he received the book. Thus, even

---

[9] The United States Secret Service WAVES records do not reflect a clearance request or an entry into the White House complex by Ms. Lewinsky on this date (or any other date in 1998).

assuming the President had received and discarded the note, his acts would not constitute obstruction of justice.

Finally, setting aside whether the President actually received Ms. Lewinsky's note, or knew whether it was subject to a document request, at bottom the OIC is transforming a civil discovery issue into yet another flimsy criminal charge, accusing the President with obstruction of justice on the basis of his alleged failure to produce this note to the Jones lawyers. As the OIC clearly knows, the obstruction of justice statute does not apply to a party's concealing or withholding of discoverable documents in civil litigation. See, e.g., Richmark v. Timber Falling Consultants, 730 F. Supp. 1525, 1532 (D. Or. 1990) ("[t]he parties have not cited and the court has not found any case in which a person was charged with obstruction of justice for concealing or withholding discovery in a civil case"). Demonstrable non-compliance with the rules is sanctioned civilly as an abuse of the discovery process. See Rule 37, Fed. R. Civ. P. ("Failure to Make Disclosure or Cooperate in Discovery: Sanctions"). Therefore, even if, as the OIC alleges, the President received and discarded the note in the wake of an outstanding request -- which the President testified he did not --those actions would not constitute obstruction of justice. The OIC's allegation is missing both the facts and the law.

Allegation VI -- Concealment of the Relationship

In the sixth allegation, the OIC contends that there is substantial and credible information that:

(i) President Clinton and Ms. Lewinsky had an understanding that they would lie under oath in the Jones case about their relationship; and

(ii) President Clinton endeavored to obstruct justice by suggesting that Ms. Lewinsky file an affidavit so that she would not be deposed, she would not contradict his testimony, and he could attempt to avoid questions about Ms. Lewinsky at his deposition.

The essence of the OIC's argument is that, because the President and Ms. Lewinsky attempted to conceal the improper nature of their relationship while it was going on and because the President failed affirmatively to assure that each statement contained in the affidavit filed by Ms. Lewinsky was true, he therefore obstructed justice. The Referral fails even to allege facts that, if true, would constitute obstruction of justice under the law as set out in our Preliminary Memorandum at pp. 21-25.

First, the Referral alleges that during the course of their admittedly improper relationship, the President and Ms. Lewinsky concealed the nature of their relationship from others. This is hardly a remarkable proposition. The use of "cover stories" to conceal such a relationship, apart from any proceeding, is not unusual and not an obstruction of justice.

The Referral alleges only one specific statement that Ms. Lewinsky claims the President made to her regarding the substance of her testimony. Ms. Lewinsky testified that the President told her, "You know, you can always say you were coming to see Betty or that you were bringing me letters." Act at 98. As an initial

matter, the President testified that he did not recall saying anything like that in connection with Ms. Lewinsky's testimony in the Jones case. But even if he did, neither of those two ambiguous statements would be false. And most importantly, as even the OIC concedes, Narrative at 29, the President never instructed her to lie.

The Referral also alleges that the President somehow obstructed justice by suggesting to Ms. Lewinsky that she could sign an affidavit in the Jones case. But the Referral again fails to establish how this might constitute obstruction. The OIC makes no contention that the President ever told Ms. Lewinsky to file a false affidavit. A suggestion to submit written testimony under oath in a judicial proceeding, if he made it, is hardly improper – let alone an obstruction of justice. The President was aware that other potential deponents in the Jones case had filed affidavits in an attempt to avoid the expense, burden, and humiliation of testifying in the Jones case, and that there was a chance that doing so might enable Ms. Lewinsky to avoid testifying. Even if the affidavit did not "disclose the true nature of their relationship," as the OIC asserts, since the Jones case concerned allegations of nonconsensual sexual solicitation, a truthful albeit limited affidavit might have allowed her to have avoided giving a Jones deposition. But the President never told Ms. Lewinsky what to say in the affidavit, knew that Ms. Lewinsky had her own lawyer to protect her interests, and expressly declined the opportunity to review the content of the affidavit, according to Ms. Lewinsky. Narrative at 203. The OIC's position appears to be that this is somehow obstruction of justice -- that the President had an affirmative duty to ensure that Ms. Lewinsky volunteered in her affidavit all information in which the Jones lawyers might possibly have an

interest. There simply is no such duty under the law, nor does the OIC cite any basis for such a duty. Civil litigation is based upon an adversarial process of determining truth, and a party is under no affirmative obligation to assist an opponent in every way it can.

Finally, the OIC suggests that the President was "knowingly responsible" for a misstatement of fact to a federal judge because he failed to correct a statement made by his lawyer to the court in the Jones deposition. The President testified to the grand jury that the lawyers' argument at the start of the deposition "passed [him] by;" he also remarked that the statement of his law might be literally true. The OIC distorts this response to suggest the President testified that he did not correct the statement at the January deposition because it might have been true. We do not believe the testimony would support that claim.

There is of course no legal obligation imposed on a client to listen to every word his attorney says, and the OIC has no evidence that the President even focused on or absorbed his attorney's remark. Without any evidence whatsoever, the OIC asserts that the President knew what was said, knew he was somehow responsible for it, knew it was incorrect and ignored a duty to correct it. Yet, again, the OIC has made a wholly unsupportable allegation of obstruction of justice.

Allegation VII -- Job Search for Ms. Lewinsky

In its seventh allegation, the Referral contends that certain actions taken on behalf of Ms. Lewinsky in her job efforts amounted to obstruction of justice. The Referral acknowledges that the case for obstruction based on the job search is wholly circumstantial and that there is absolutely "no evidence" of any "arrangement . . . explicitly spelled out." Acts at 113 n.361. Noting that the critical issue centers on the intent of the party providing the assistance, the Referral asks that "inferences be drawn" from the circumstantial evidence set forth in the Referral chronology. Id. at 113.

But that chronology presents precious little in the way of Presidential involvement and nothing that supports an inference of any intent to obstruct justice by helping Ms. Lewinsky (to the limited extent he did) in her job efforts. It may be the OIC's view that the President should have cast Ms. Lewinsky off and refused to assist her in any way, simply because the Jones case was filed. Fortunately the law requires no such callous absurdity.

The Referral states that the President agreed to help Ms. Lewinsky look for a job, Acts at 105; that he said he would take care of finding her a reference from someone in the White House, Id. at 105; and that after Ms. Lewinsky obtained a job, the President asked Erskine Bowles "could we see if [John Hilley] could recommend her, if asked," Id. at 111-12. There is no suggestion that he ever ordered or directed anyone to assist Ms. Lewinsky or asked anyone to give her special advantages or disadvantages because of their relationship or that he ever linked his relatively insubstantial assistance to a requirement that she act -- or

testify -- in a certain way. The kinds of actions that are alleged simply do not constitute obstruction of justice.

Indeed, upon close reading, the Referral itself acknowledges the following facts, which, if taken as true, are all at odds with the notion that the President acted with corrupt intent:

- that it was Ms. Lewinsky who initiated discussions about a job in New York; Acts at 104, Narrative at 117;

- that the subject of a job in New York was raised on July 3, 1997 – more than three months before the President was served with interrogatories in the Jones case, and more than five months before Ms. Lewinsky's name appeared on a witness list; Acts at 104;

- that it was Ms. Lewinsky who broached the subject of receiving the President's help in obtaining a job in New York; Acts at 104-05;

- that Ms. Lewinsky presented the President with a list of jobs in which she was interested; Acts at 105;

- that Ms. Lewinsky suggested that a White House job reference would be useful; Acts at 105;

- that Ms. Lewinsky suggested that Vernon Jordan might be able to help her; Acts at 105; and

- that, notwithstanding the Referral's insinuations to the contrary, the President and Ambassador Bill Richardson testified that they never discussed Ms. Lewinsky with each other; Narrative at 145.

This account fails to allege facts supporting a case of obstruction of justice under the only statute that could conceivably apply here, 18 U.S.C. § 1503. Under that provision, the government must prove obstruction of justice by establishing that there was a pending judicial proceeding, that the defendant knew of the proceeding, and that the defendant acted "corruptly" with the specific intent to

obstruct or interfere with the proceeding or due administration of justice. See, e.g., United States v. Buicey, 876 F.2d 1297, 1314 (7th Cir. 1989); United States v. Smith, 729 F. Supp. 1380 (D.C.C. 1990). Four federal courts of appeals have held that the "act corruptly" element of the crime requires that the defendant have acted with the specific intent to obstruct justice. See, e.g., United States v. Moon, 718 F.2d 1219, 1236 (2d Cir.1983); United States v. Bashaw, 982 F.2d 168, 170 (6th Cir. 1992); United States v. Rasheed, 663 F.2d 843, 847 (9th Cir. 1981). It is simply not enough that the effects of a person's actions may have had the effect of somehow impeding justice if that was not the intent of the person accused. And here it is not even clear how the President's limited assistance was meant to or did obstruct anything.

Allegation VIII -- Conversations with Mr. Jordan

The OIC asserts in its eighth allegation that the President was "asked during his civil deposition whether he had talked to Mr. Jordan about Ms. Lewinsky's involvement in the Jones case" and that he "stated that he did not recall whether Mr. Jordan had talked to Ms. Lewinsky about her involvement in the Jones case." Acts at 115. This account of the question and answer is simply false. The President was not asked that question, and he did not give that answer.

To bolster this extraordinary claim, the OIC misrepresents certain of the President's deposition responses. First, the OIC quotes one question and answer --

> Q. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?
>
> A. I don't think so. (emphasis added in Referral)

-- but omits the next question and answer, even though it is apparent from the text, and the OIC was told by the President, that the next question and answer were a continuation:

> Q. Did you ever talk with Monica Lewinsky about the possibility that she might be asked to testify in this case?
>
> A. Bruce Lindsey, I think Bruce Lindsey told me that she was, I think maybe that's the first person told me she was. I want to be as accurate as I can.

This unresponsive answer reflects the President's effort to recall, in response to the prior question, where he had first learned about the subpoena, but the word "first" implies there were other people (perhaps Mr. Jordan) who told him. The Jones lawyers simply did not pursue this by asking the logical follow-up questions.

Nor do the remaining two passages state what the OIC claims. The next passage asked whether, in the past two weeks (before January 17) anyone had reported to the President that they had had a conversation with Ms. Lewinsky about the lawsuit, to which the President replied he did not believe so. This response of course does not rule out all conversations with Mr. Jordan about Ms. Lewinsky's involvement in the case, as the OIC would suggest, but only in the two-week period and only accounts of conversations with Ms. Lewinsky, not conversations simply about her involvement in the case. Moreover, the OIC's 252-page Narrative does not identify reports to the President about conversations that Mr. Jordan had with Ms. Lewinsky in that time period -- instead, it recounts only that, 10 days before the deposition, Mr. Jordan left word for the President that the affidavit was signed. The last passage on which the OIC relies simply asked whether the President had heard that Mr. Jordan and Ms. Lewinsky met to discuss the case; the President recounted his belief that the two had met to discuss the job search -- about which the President readily acknowledged an awareness. The OIC's assertion that the President "did not recall whether Mr. Jordan had talked to Ms. Lewinsky about her involvement in the Jones case," is simply not supported by the testimony. This allegation is a fabrication by the OIC.

Allegation IX -- "Witness Tampering"

In its ninth allegation the OIC charges that President Clinton obstructed justice and improperly influenced a witness when he spoke with Ms. Currie the day after his deposition in the Jones case. The OIC's claims are wrong and, again, the product of extraordinary overreaching and pejorative conjecture -- a transparent attempt to draw the most negative inference possible about lawful conduct.

The President's actions could not as a matter of law give rise to either charge because Ms. Currie was not a witness in any proceeding at the time he spoke with her: her name had not appeared on any of the Jones witness lists; she had not been named as a witness in the Jones case; there were just two weeks of discovery left in the case; and there was no reason to suspect she would play any role in that case. The President had no reason to suspect that the OIC had embarked on a wholly new phase of its four-year investigation, one in which Ms. Currie would later be called by the OIC as a witness. To obstruct a proceeding or tamper with a witness, there must be both a witness and a proceeding. Here, there was neither. Despite the OIC's far-fetched suggestion to the contrary, there was no reason the President should not have spoken with Ms. Currie about Ms. Lewinsky.

Indeed, it is hardly surprising that the President would have reached out to Ms. Currie after the deposition. Ms. Currie was Ms. Lewinsky's friend. The President had just faced unexpected and hostile questioning by his fierce political opponents in the Jones case about Ms. Lewinsky. He was obviously puzzled at being asked such detailed (and in some cases such bizarrely inaccurate) questions about a past secret relationship. He had no one to whom he could talk freely about

the relationship, but he nonetheless had a desire to find out what might have transpired with Ms. Lewinsky and to test his recall, since he had not anticipated such detailed questions or prepared for them. It was his belief that Ms. Currie was unaware that he had engaged in improper activity with Ms. Lewinsky. He wanted to reassure himself that that was so. He also recalled that in 1997, after the improper relationship ended, he had asked Ms. Currie to try always to be present when Ms. Lewinsky visited. He wanted to inquire whether that was also Ms. Currie's recollection. The President's actions were hardly surprising since he had just undergone hostile and unexpected questioning in a bitterly contested civil suit.

Whatever his reasons, however, one simple fact remains. At the time he discussed Ms. Lewinsky with Ms. Currie, Ms. Currie was not expected to be, nor was she, a witness. Again, the OIC has wholly overreached to make baseless allegations of criminal conduct.

Allegation X -- Refusal to Testify

The tenth allegation is premised on the OIC's misrepresentation of the facts. The assertion that "[the President] simultaneously lied to potential grand jury witnesses," "[w]hile refusing to testify for seven months" is a gross distortion of the Referral's own citations.

The statements to Presidential aides cited by the Referral were made either on the day the Lewinsky story broke (January 21, 1998) or within a few days of that date. Those statements were concurrent in time with the President's repeated public statements to the country denying sexual relations with Ms. Lewinsky. And they were virtually identical in substance. Having announced to the whole country on live television that he was not having sexual relations with Ms. Lewinsky, it is simply absurd to believe that he was somehow attempting to corruptly influence the testimony of aides when he told them virtually the same thing at the same time.

And in any event, the mere repetition of a public denial to these aides could not have affected the grand jury process. The elicited testimony was hearsay. The aides were not witnesses to any sexual activity, and they had no first-hand knowledge pertinent to the denials. Their testimony as to what they heard from the President was truthful -- the President in no conceivable way sought to alter any other perceptions or information they might have had. Their testimony thus was merely cumulative of the President's own nationally broadcast statements. The suggestion that the President violated section 1503's prohibition on "influenc[ing], obstruct[ing], or imped[ing] the due administration of justice" is groundless. There

is and could be no evidence that the President had a specific intent to obstruct justice by his aides' repetition of his own denials.

Nor is there evidence that the President's statements constituted "witness tampering" in violation of section 1512. To make out such a violation, the government must show that the behavior knowingly occurred through one of the specific means set forth in the statute: -- intimidation, physical force, threats, misleading conduct or corrupt persuasion -- with intent to influence testimony in a legal proceeding. A defendant must be aware of the legal proceeding's existence, and his efforts must be aimed specifically at obstructing that proceeding. See United States v. Wilson, 565 F. Supp. 1416, 1431 (S.D.N.Y. 1983). In fact, the President simply repeated to aides substantially the same statement he made to the whole country. There was no action here intended specifically to influence the grand jury through the testimony of Presidential aides. Under the OIC's theory, it could have subpoenaed to the grand jury any citizen who heard the President's denial and thus have created a new violation of law.

In sum, the President's statements to his aides could not have obstructed justice as a matter of law. Their legal duty was to answer the prosecutor's questions and to tell the truth honestly as they knew it, and the President's comments in no conceivable way affected that duty.

The OIC suggests that the President's delay in acknowledging a relationship with Ms. Lewinsky somehow contributed to an obstruction of justice because it affected how the prosecutors would conduct the investigation. This claim is unfounded, as a matter of law. The President had no legal obligation to appear

before the grand jury absent compulsion and every reason not to do so, given the OIC's tactics, illegal leaking, and manifest intent to cause him damage.

Allegation XI -- Abuse of Power

As the Office of Independent Counsel itself acknowledges, Acts at 148, from the very beginning, its investigation was focused on the prospect that the information it was gathering would be transmitted to the Congress. It is in this context, with the threat of impeachment on the horizon, that the OIC's last allegation of an abuse of power must be judged.

The OIC begins with the charge that the President's false denial that he had an improper relationship with Ms. Lewinsky -- something that he has now admitted and apologized for -- was itself an abuse of power because it served to deceive the American people. Implicit in this charge is the notion that any official, in any branch of the government, who makes a public statement about his own conduct, or indeed any other matter, that is not true may be removed from office. It would follow, therefore, that no official could mount a defense to impeachment, or to ethics charges, or to a criminal investigation while remaining in office, for anything other than an immediate admission of guilt will necessarily be misleading.

In the Federalist Papers, Alexander Hamilton described abuse of power as the "corrupt use of the office for personal gain or some other improper purpose." Twenty-four years ago, President Nixon's false statements to the public and to the courts, which were part of a scheme to obstruct justice through the perjury of his senior staff, through payoffs to criminal defendants, and through use of the Central Intelligence Agency (CIA) to thwart an FBI investigation into crimes in which he was involved, fit squarely within that definition. Merely to describe that conduct

makes clear how different it is from that of President Clinton and how far the OIC has been willing to go to synthesize its charges of impeachable conduct.

The manifest desire to create improprieties where none exist and to transform personal misconduct into impeachable official malfeasance is evident also in the OIC's claim that the President's assertion of executive privilege was somehow unlawful. Oddly enough, the OIC finds abuse of power both in the assertion of the privilege and its withdrawal -- surely evidence of an overwrought imagination or of a conceit that any legal position other than the OIC's is presumptively obstructive. In truth, the OIC's decision to invade the confidential relationship between the President and his most senior advisors and lawyers was unprecedented. It reflects a patent abuse of authority by the OIC and a wholesale abandonment of any prosecutorial judgment in a campaign to prevent the President from consulting meaningfully with his advisors. At bottom, the Independent Counsel seems to believe that, merely because he chooses to seek confidential information from the Office of the President, the President may not contest that demand without risking a charge that he is abusing his power.

Reading the OIC's Referral, one would never know which party to the executive privilege litigation was right and which was wrong on the basic question whether the privilege applied to the communications the OIC was seeking to obtain. In the District Court, the OIC took the position that executive privilege was simply inapplicable in the face of its grand jury subpoena because the communications at issue related to the President's private conduct, but Chief Judge Johnson rejected that claim out of hand. In re Grand Jury Proceedings, 1998 U.S. Dist. Lexis 7736

(D.D.C. 1998). Astoundingly, however, the OIC simply repeats that claim in the Referral, Acts at 155, with no acknowledgement that the court agreed with the White House that the privilege had been properly asserted.[10]

More importantly, the OIC's abuse-of-power allegation must necessarily rest on the assumption that the President initiated the executive privilege claim with intent to impede the OIC's investigation. Yet, the record is clear that it was only after extensive negotiations in which the White House offered to make available to the OIC factual information concerning the President's conduct and had its offer rejected out of hand, that the White House Counsel notified the President of the OIC's demands, explained the failed accommodation effort, and recommended that he invoke the privilege. Counsel gave that advice because he believed it important to protect the constitutional interests of the presidency. Thus, the President's decision to claim privilege was not the result of his own initiative, much less of any intent to obstruct the grand jury investigation, but rather was the result of his Counsel's advice.[11]

---

[10] Judge Johnson then asked the OIC to make a showing of its need for the information and found that that showing was sufficient to overcome the privilege. At that point, the White House elected not to pursue the issue as to the non-lawyer advisors, and they testified at length before the grand jury.

[11] Similarly, the OIC misleads the Congress and the public by blaming the President for pursuing an appeal from rulings of the District Court involving executive privilege claims by lawyers in the White House Counsel's Office. It does so without acknowledging the fact that White House Counsel had informed Independent Counsel Starr, in a letter dated September 4, that those appeals had been taken only to preserve an issue raised for the first time by the Court of Appeals in a recent opinion dealing with the attorney-client privilege.

Even more egregiously misleading is the claim that the President abused his power by "acquiescing" in the efforts of the Secret Service to assert a protective function privilege. First, the OIC characterizes that assertion as frivolous even though it reflected the judgment of the law enforcement professionals charged with protecting this and future presidents and was supported by President Bush.[12] Further, the OIC charges the President with abusing his power despite the fact that the OIC knew that he had nothing to do with the decision to assert the privilege or to pursue the appeal from Judge Johnson's decision. Indeed, the OIC itself had argued (in contesting the claim of the Secret Service in the district court) that the failure of the President to involve himself in the matter was itself a reason for the court to reject the Service's claim. The OIC cannot have it both ways.

Last, the OIC charges that it was an abuse of power for the President, at a time when both his personal and official interests were in the balance, not to testify before the grand jury until August -- surely a claim that must astound lawyers and laymen alike. Could the OIC truly be taking the position that any government official who is the subject of a criminal investigation must immediately come forward and testify at a prosecutor's whim or risk impeachment? To state the question is to answer it.

CONCLUSION

[12] The OIC also argues that Chief Justice Rehnquist's decision to deny a stay reflects a judgment that the Service's claim was frivolous, but fails to disclose that the Chief Justice specifically left open the prospect that the Court would decide to hear an appeal on the merits.

It has come down to this.

After four years, scores of FBI agents, hundreds of subpoenas, thousands of documents, and tens of millions of dollars. After hiring lawyers, accountants, IRS agents, outside consultants, law professors, personal counsel, ethics advisers, and a professional public relations expert. After impaneling grand juries and leasing office space in three jurisdictions, and investigating virtually every aspect of the President's business, financial, political, official and, ultimately, personal life, the Office of Independent Counsel has presented to the House a Referral that no prosecutor would present to any jury.

The President has admitted he had an improper relationship with Ms. Lewinsky. He has apologized. The wrongfulness of that relationship is not in dispute. And yet that relationship is the relentless focus of virtually every page of the OIC's Referral.

In 445 pages, the Referral mentions Whitewater, the failed land deal which originated its investigation, twice. It never once mentions other issues it has been investigating for years -- matters concerning the firing of employees of the White House travel office and the controversy surrounding the FBI files. By contrast, the issue of sex is mentioned more than 500 times, in the most graphic, salacious and gratuitous manner.

The Office of Independent Counsel is asking the House of Representatives to undertake its most solemn and consequential process short of declaring war; to remove a duly, freely and fairly elected President of the United States because he had -- as he has admitted -- an improper, illicit relationship outside of his marriage.

Having such a relationship is wrong. Trying to keep such a relationship private, while understandable, is wrong. But such acts do not even approach the Constitutional test of impeachment -- "treason, bribery, or other high crimes and misdemeanors."

The founders were wise to set such a high standard, and were wise to vest this awesome authority in the hands of the most democratic and accountable branch of our Government, and not in the hands of unaccountable prosecutors.

We have sought in this Initial Response to begin the process of rebutting the OIC's charges against the President -- charges legal experts have said would not even be brought against a private citizen. The President did not commit perjury. He did not obstruct justice. He did not tamper with witnesses. And he did not abuse the power of the office of the Presidency.