

Nixon's Shadow

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Like old generals, American lawyers and judges have spent the last quarter-century fighting the last big war. The war, of course, was Vietnam and its constitutional counterpart was Watergate. The enemy was the Imperial President, Bad King Richard; and victory came when Nixon unconditionally surrendered after his smashing defeat in the Tapes Case. The King was dead! Long live . . . the Court.

But the Tapes Case opinion reflected a troubling imperialism of its own—judicial imperialism—and featured remarkably sloppy reasoning. The Justices reached the right result but for the wrong reasons. Ever since, Americans have refracted everything through the twisted prism of this great case, and so the law of the Presidency today is badly distorted. There may still be time to set the law straight—doubtless too late for this President, but perhaps in time for the next. The first step is to see where the law of the Presidency began to go wrong—in the landmark Tapes Case.

Begin with the caption, *United States v. Nixon*.¹ Criminal prosecution is an executive branch function, and the dramatic opening words of Article II of the Constitution vest all executive power in the President.² How, then, could special prosecutor Leon Jaworski—an “inferior” officer within the executive branch—claim to represent “the United States” against the

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1. 418 U.S. 683 (1974).

2. U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

clear pronouncements of its *Chief Executive*? In 1974, this was no pedantic quibble—it implicated whether courts could even hear the case, and how they would be obliged to rule if they reached the merits. Separation of powers militated against judicial intervention into an essentially intra-executive dispute, and the Court's more general precedents cast doubt on whether a person could sue himself. Given that Jaworski was nothing more than Nixon's subordinate, wasn't the case, in essence, *Nixon (inferior) v. Nixon (real)*? If Jaworski wanted the tapes disclosed for good executive-branch reasons (the need to prosecute criminals) and Nixon wanted the tapes kept secret for good executive-branch reasons (the need for Oval Office confidentiality), shouldn't the President ordinarily and obviously have the last word on this dispute about executive-branch policy?

The Justices' solution to this puzzle was strained. Chief Justice Warren Burger's unanimous opinion began by inaptly analogizing the dispute to one "between two congressional committees."³ Two committees are presumptively coordinate authorities; Nixon and Jaworski were not. Constitutionally, Nixon was President and Jaworski was his inferior. Democratically, Nixon had been elected by the nation, and Jaworski had not even been confirmed by the Senate. Their dispute was more like one between the Senate and a staffer, or the Court and a law clerk.

Next, Burger invoked a Nixon Administration regulation in which Nixon promised Jaworski a free hand in his investigation, and further promised not to fire Jaworski without the concurrence of various Congressional barons (to avoid another Saturday Night Massacre). This regulation, said Burger, had "the force of law,"⁴ empowering executive inferior Jaworski to contest Chief Executive Nixon. Because of this "law," Burger declared his Court free to decide who was right and ignore who was boss.

But this regulation-as-law gambit was hard to maintain with a straight face: any truly *legally* binding regulation would have been flatly unconstitutional. As President Washington and Congressman Madison established at the Founding, the President alone decides whom to fire within the executive branch; Congress members can jawbone, but cannot legally ob-

3. *Nixon*, 418 U.S. at 693.

4. *Id.* at 695.

struct any purely executive-branch removal. Although later political disputes muddied the waters, the Court emphatically endorsed Washington's view in the 1926 case, *Myers v. United States*,⁵ which stood as a towering precedent in 1974, and stands even taller today. If the Nixon regulation had *legally* given congressional barons a legislative veto over Jaworski's removal, the regulation was obviously invalid under both *Myers* and more general principles that the Court would later reaffirm in its celebrated 1983 *Chadha* opinion.⁶ Thus, the Nixon regulation could not properly count as law in a courtroom;⁷ it had to be understood merely as a read-my-lips political promise designed for public consumption, not judicial doctrine.

Even if the regulation somehow counted as law, the Court also conceded that the Nixon Administration was free simply to rescind the regulation unilaterally⁸—and *then*, Nixon could tell Jaworski what to do or where to go. But this concession by the Court raised obvious questions: Why were the Justices insisting that Nixon first rescind, and only then countermand Jaworski? Why wasn't it enough that in their very courtroom, the President was clearly saying that he disagreed with his inferior about the proper discharge of executive-branch business?

The best answer is one the Court never stated forthrightly: Richard Nixon was a crook, using the Oval Office as the hub of a massive ongoing criminal conspiracy to obstruct justice, and the Court already had evidence under seal that proved this.⁹ If Nixon wanted to fire or countermand Jaworski, he would not get a finger of support from the Justices; he would have to do it himself (twice) at high noon on main street, for all to see.

Only the fact of Nixon's plain guilt, evidenced by material under seal in the Court's hands, can explain the otherwise

5. 272 U.S. 52 (1926).

6. *INS v. Chadha*, 462 U.S. 919 (1983).

7. *But see Nixon*, 418 U.S. at 696 (squarely relying on unconstitutional legislative veto provision of regulation). *Compare id.* at 704 (properly affirming nondelegation and separation of powers principles wholly inconsistent with this reliance).

8. *See id.* at 696.

9. *Cf. id.* at 691, 697 (delicately referring to the "unique setting" and "unique facts of this case"); *id.* at 700 (stressing material under seal as basis for Court's conclusion); *id.* at 687-88, 701 (subtly relying on Richard Nixon's status as an unindicted co-conspirator). For another reading of *Nixon* that stresses the crooked facts, see Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999).

screwy things that Burger's opinion went on to say. In *United States v. Burr*,¹⁰ an 1807 lower court case decided by John Marshall riding circuit, Marshall had subpoenaed various documents from President Jefferson—and Burger repeatedly insisted that Marshall's subpoena was indistinguishable from the one sought by Jaworski. But the distinction was obvious: in *Burr*, a criminal defendant sought to subpoena evidence to prove his innocence, whereas in *Nixon*, the "government" (i.e., Jaworski) sought to subpoena evidence to prove the guilt of various criminal defendants (Mitchell, Haldeman, Erlichman, Colson, and three others). Fundamental issues of due process and fairness were at stake in *Burr*: the government cannot prosecute a man while suppressing evidence of his innocence.¹¹ Had Jefferson resisted the subpoena—on the perfectly legitimate ground that the evidence sought was too confidential to be disclosed—Marshall would never have tried to coerce the President to surrender the stuff. Instead, the great judge would simply have dismissed the prosecution, and released the defendant. The Constitution and laws nowhere demanded that Burr *must* be prosecuted; they merely required that *if* prosecuted, he be given exculpatory evidence. *Burr* thus respected the President's right to decide the executive-branch policy question at hand: it was left wholly up to Jefferson to choose which was more important to him—getting Burr convicted, or keeping confidential communications secret.

But Burger turned *Burr* upside down, insisting that due process demanded that all possible evidence of the criminal defendants' guilt *must* be produced, even if both the defendants and the President preferred otherwise.¹² This odd view finds no support in the text of the Due Process Clause, which protects a "person" from unfair government prosecution (as in *Burr*), but says nothing about any government right or duty to prosecute every possible defendant using every possible scrap of evidence. Indeed, Burger's views here reflected a reading of due process never seen before nor since in *U.S. Reports*. He also oddly invoked the Sixth Amendment,¹³ which pointedly

10. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). For a rich and delightful general discussion of *Burr*, see John C. Yoo, *The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435 (1999).

11. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) (discussing general duty of prosecutor to disclose exculpatory evidence upon request).

12. See *Nixon*, 418 U.S. at 711-12.

13. See *id.*

speaks of the rights of “the accused” to produce exculpatory evidence but, once again, says nothing about any government right or duty to produce all inculpatory evidence. Indeed, Burger seemed to imply that any rule limiting prosecutors’ ability to procure “all relevant and admissible evidence”¹⁴ was constitutionally suspect. This was absurd, casting doubt on a great range of traditional evidentiary privileges—attorney-client, priest-penitent, doctor-patient, husband-wife, and so on.

The Court did purport to recognize a limited privilege for confidential Oval Office conversations, but said this executive privilege had to be balanced against the judicial need for evidence. In this “balance”—with no clear weights and judges holding the scales—the need for confidentiality was, said Burger, ordinarily outweighed (absent national security concerns) if the evidence sought for a judicial proceeding was specific, admissible, and relevant.¹⁵ This was really no privilege at all—*anyone* can resist a subpoena that is overbroad or irrelevant. Thus, on Burger’s logic, essential and wholly proper (but politically sensitive) conversations in the Oval Office were entitled to less legal protection than conversations between spouses or between attorneys and clients.

For example, suppose the President is considering whether to appoint Jane Doe to some high post. This is a key part of his job, as specified by the Constitution’s Article II Appointments Clause. Aides brief the President on possible dirt on Doe, her friends, and family, reporting both facts and rumors. This information might bear on Doe’s fitness and also might come up in the press or in a Senate confirmation. For the President to do the job the Constitution assigns him, it is necessary and proper—indeed imperative—that he receive this confidential information. But the Tapes Case, if we take its logic seriously, suggests that any county prosecutor in a state criminal case, or any plaintiff in a civil case, could subpoena this conversation in a lawsuit designed to embarrass Doe and/or the President. If so, aides will hesitate to tell the President what he needs to know to do his job.

Admittedly, the Constitution does not create executive privilege in so many words. But it does create a system of federalism and separation of powers. As a matter of federalism, state and local prosecutors cannot be allowed to disrupt the

14. *Id.*

15. *See id.* at 710-15.

proper performance of national executive functions.¹⁶ As a matter of separation of powers, each branch must have some internal space—a separate house, if you will—to ponder its delicate business free from the intermeddling of other branches. Senators must be free to talk candidly and confidentially amongst themselves and with staff in cloakrooms; judges must enjoy comparable freedom in superconfidential judicial conferences, and in conversations with law clerks; jurors in the jury room ordinarily deliberate together with absolute secrecy to promote candor; and the same basic principle holds true for the Presidency and the Oval Office. This principle was explicitly affirmed by the Supreme Court in no less a case than *Marbury v. Madison*. When Attorney General Levi Lincoln hesitated to answer certain questions about what President Jefferson had confided to him, feeling “himself bound to maintain the rights of the executive,” the *Marbury* Court reassured him that “if he thought that any thing was communicated to him in confidence he was not bound to disclose it.”¹⁷ Burger mentioned none of this.

Here is what Burger should have said: “The executive power vested in the President by the sweeping words of Article II includes the general right to decide who shall be criminally prosecuted, and how, and also the right to keep confidential good-faith conversations with executive-branch aides about proper executive-branch policy. But, like other privileges in our law, executive privilege has limits and exceptions. Under the well-established crime-fraud exception, attorneys cannot invoke lawyer-client privilege when independent evidence confirms that they are trying to shield from view ongoing criminal misconduct and obstruction of justice. Likewise, the presumptive privilege shielding conversations among jurors yields when there is independent evidence that a juror has been bribed and is using the jury room itself to obstruct justice.¹⁸ Similarly, conversations by executive officials planning ongoing crimes are not protected by Article II. The conversations sought by Jaworski are conversations among persons desig-

16. See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

17. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143-44 (1803).

18. Cf. *Nixon*, 418 U.S. at 712 n.20 (invoking just such a case, *Clark v. United States*, 289 U.S. 1 (1933)).

nated by the grand jury as co-conspirators¹⁹—including Nixon himself, though the President was not indicted (and perhaps could not be constitutionally indicted). The evidence under seal already in the Court's possession provides strong and independent confirmation of this conspiracy.²⁰ And the conversations sought by Jaworski are not merely evidence of the conspiracy—they are the conspiracy itself. (The essence of a "conspiracy," of course, is an agreement among persons effected by words.) Under these unusual circumstances, executive privilege yields."

Burger instead wrote a sweeping opinion that had the virtue of not attacking Richard Nixon personally, and the vice of making no sense when honestly applied to honest Presidents. Moreover, the Tapes Case not only trivialized the Presidency; it also imperialized the judiciary and marginalized the legislature. The Justices doubtless feared that Nixon might defy their orders—this explains why all eight participating Justices signed onto a single statement, however ill-reasoned.²¹ Fear of defiance also helps explain the opinion's overblown rhetoric proclaiming the Court the "ultimate interpreter of the Constitution"²² (language not found in *Marbury*, and never appearing in *U.S. Reports* before the 1960s).²³ But this high rhetoric, combined with the immediate effect of the case, shoved Congress off stage. Nixon surrendered the tapes, the smoking gun came out, and soon Nixon was gone. The Court had spared the country the agony of a long and painful impeachment—or so it seemed at the time. But the result of this quick judicial fix—with the Court using several procedural tricks to intervene with lightning speed—was to short-circuit an impressive effort by Congress to take seriously its own role under the

19. *See id.* at 701 (relying on co-conspirator exception to hearsay rule, and pointedly noting that exception applies to nondefendant conspirators—i.e., Nixon).

20. *See id.* at 700 (emphasizing that "[o]ur conclusion is based on the record before us, much of which is under seal").

21. This aspect of the case is nicely discussed in Paulsen, *supra* note 9.

22. *Nixon*, 418 U.S. at 704 (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

23. A Lexis search reveals that the first appearance of the phrase was in 1962, in the *Baker v. Carr* case. My own views on constitutional decision-making outside the Supreme Court are set out elsewhere in much of my work. They are much closer to those expressed by Professor Calabresi, *see* Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999), than those put forth by my more provocative friend, Professor Paulsen, *see* Paulsen, *supra* note 9; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

Congress to take seriously its own role under the Constitution, with the result that later Congresses would lack a modern model of how to do presidential impeachments right.

The framers, knowing that Presidents might occasionally be wicked, made Congress the main watchdog, via oversight and impeachment. Unlike a lone prosecutor or plaintiff trying to take down a President with the aid of judges, Congress would be democratically accountable. This accountability would restrain the urge to witch-hunt; after all the President might be an innocent man, and so accusations against him needed to be carefully screened. By giving the primary screening function to Congress, the Framers created a structurally superior system to one placing heavy reliance on unaccountable prosecutors or plaintiffs and unelected judges. But the structural lesson taught by *Nixon* was different: trust the Court, distrust the President, and ignore the Congress.

The independent counsel statute passed in *Nixon's* shadow reflected and magnified its pathologies. For starters, the statute dramatically inflated the role of judges. In Watergate, Nixon's White House itself had picked Cox and Jaworski, and retained formal power to remove these inferior executive officers at will (though in two steps in Jaworski's case). Politics, not law, framed whether an outside prosecutor would be named, who he would be, how he would operate, and when (if ever) he would be removed. In making these decisions, the White House had to listen to its Congressional critics, or risk handing its opponents a big political stick. *And the system worked beautifully*—in a way that would have made the Framers proud. Though picked by Nixon's own Administration, Cox and Jaworski were lawyers of great credibility. Yes, Nixon retained the legal right to pull the plug anytime, but only at a price, as the Massacre proved.

Rushing to claim credit for "reform," post-Watergate lawmakers scurried to fix the Founders' unbroken system, and created a constitutional Frankenstein. Under the independent counsel statute, *judges* would pick special prosecutors, and nominally supervise their operations. And *judges* would ultimately decide whether any attempted removal of a prosecutor was warranted. But this system was—and remains—flatly unconstitutional. Under a proper vision of separation of powers, judges should appoint only inferior officers within the judiciary—magistrates, clerks, masters—not prosecutors within the

executive branch.²⁴ And surely judges should not be in the business of monitoring the prosecutors' ongoing investigation; this, too, is an executive not judicial function. But the statute naturally followed from *Nixon*—turning its weird regulation-as-law gambit into a literal law limiting Presidential removal in violation of *Myers*, and injecting judges (as had *Nixon*) into fundamentally intra-executive decisions about whom and how to prosecute.

The proper job of judges is to decide cases under law in open court after hearing public arguments. But no law can tell judges which one of the millions of Americans they should choose to be the special prosecutor in a given case. This is a question of personnel and policy, not law, and it must be decided with confidential *ex parte* communications rather than public briefs. To do this job well, judges will need to talk privately to leading politicians to decide which names will fly. But judges should shun this business as altogether too political, partisan, and secretive. Judges may be tempted to pick a fellow judge with no prosecutorial experience, and that judge-prosecutor will predictably make rookie mistakes. And will judges in fact monitor their creature? If so, judges must themselves become superprosecutors considering all sorts of secret material in closed chambers in violation of deep judicial norms. If not, independent counsels answer to no one. It then becomes impossible to say that they are "inferior" to someone—which they must be in order to be constitutional under the Article II Appointments Clause.

The judiciary's gain under the statute came in part from Congress's loss. Instead of acting as a watchdog itself, Congress surrenders the job to an independent counsel picked by judges. This surrender blurs the lines of democratic accountability. If the counsel pushes too hard and comes up short, Congress says, blame him (or the court), not us. Whereas the Founders carefully kept judges out of the impeachment process, the statute sucks them in. Essentially, the *judicial* branch picks an *executive* officer who serves as formal impeachment advisor to the *legislature*! If this is not an obvious distortion of the Founders' model, nothing is. In the last year, we have repeatedly seen judges involved in the presidential impeachment process—for example, authorizing the transfer of grand jury

24. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 802-12 (1999).

material to Congress and even obliging a potential impeachment witness to meet (behind closed doors) with House managers in the middle of an ongoing impeachment trial. Federal judges would never involve themselves in procedural issues arising in an ongoing state prosecution—abstention doctrines require judicial restraint.²⁵ Yet little judicial restraint has been shown under the independent counsel statute—once again, following the lead of *Nixon*, where the Court breathlessly rushed into the middle of a presidential impeachment to save the country.

The statute also trivializes the executive branch—and here, too, it tracks and extends *Nixon*. Its hair trigger evinces pathological distrust of the Attorney General, the Justice Department, and the entire executive branch. Somehow, an independent counsel never elected by anyone, never named by a President, never confirmed by the Senate, represents the “United States,” but the President elected by millions does not. If Kenneth Starr has visions of grandeur—thinking that he is “the United States”²⁶—these visions are nurtured by a statute nurtured by *Nixon*. If Starr has pushed too hard to uncover every possible crime of every possible defendant by relentlessly pursuing every possible scrap of evidence—subpoenaing book stores, pressuring a mother to reveal her daughter’s most intimate secrets, piercing presidential privacy, shredding executive privilege, and shrinking attorney-client privilege—this, too, follows rather directly from the anti-defendant, anti-privilege, anti-prosecutorial discretion script of *Nixon* itself.

When the independent counsel statute first came before the Court, in the 1988 *Morrison v. Olson*²⁷ case, seven Justices voted to uphold it. *Morrison* winked at the word “inferior,” slighted the fact that Article II vests all executive power in the President, and disregarded the objection that judges were performing plainly executive tasks. In each of these respects, *Morrison* followed *Nixon*. Only Justice Scalia dissented, in a

25. See generally *Younger v. Harris*, 401 U.S. 37 (1971); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

26. For an interesting general discussion (whose conclusions I do not endorse), see John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519 (1998).

27. 487 U.S. 654 (1988).

brilliant and prescient opinion that also gave *Nixon* a more narrow reading than was then fashionable.²⁸

Then came the Paula Jones case of 1997, and here the Presidency didn't even get Scalia's vote. In the three landmark cases of *Nixon*, *Morrison*, and *Jones*, the combined vote was 24 to 1 against the Presidency. The imperial presidency was surely dead.

But perhaps presidential imperialism was a red herring—a product of last-war thinking. The word “imperial” conjures up images of kings ruling by divine right. Presidents are elected by the people. When they are unable to do the people's business because of unilateral decisions of unelected folk—Paula Jones, or Lawrence Walsh, or Ken Starr, or Susan Webber Wright—which way does “imperialism” cut? Kings rule for life. Presidents are limited to two terms, and so even if lawsuits are (absent exigent circumstances) generally barred against sitting Presidents, plaintiffs will typically have their day in court afterwards, at a time when the people's business will not thereby be prejudiced.

The *Jones* opinion was authored by Justice Stevens, whose very appointment to the Court (by Gerald Ford) was in effect triggered by *Nixon* (which in effect made Ford President). In many ways his opinion in *Jones* followed the opinion in *Nixon*. If *Nixon* could be obliged to answer Jaworski's call for tapes, shouldn't Clinton be obliged to answer Jones's civil complaint? The overreading of *Burr* in *Nixon* was also key in *Jones*—Stevens leaned heavily on *Burr* but never paused to consider how Jefferson in *Burr* had remained free to disregard Marshall's subpoena simply by dropping the case.²⁹ By contrast, Clinton could disregard the *Jones* ruling only by suffering a default judgment, at considerable personal expense. Thus, *Jones* took a big step beyond *Burr*—and beyond *Nixon* too, given the Court's concession that, as a formal matter, *Nixon* could in two steps fire Jaworski and keep the tapes. This does not prove that *Jones* was wrong, but it does prove that *Jones* was sloppy, making new law without even realizing it—and rather badly misreading the historical evidence to boot.³⁰ (Another link to *Nixon*.)

28. See *id.* at 721.

29. *Clinton v. Jones*, 117 S. Ct. 1636, 1649 (1997).

30. Compare *id.* at 1645 n.23 (dismissive and inaccurate treatment of contrary historical evidence) with *id.* at 1654-56 (Breyer, J., concurring in the judgment) (offering a far more careful discussion of this evidence). For my

And like *Nixon*, *Jones* reflected a remarkably self-satisfied view of federal judges. Trust us federal judges, said *Jones*, to sensitively manage lawsuits against the President. Against this institutional smugness, is it impolite to note that the entire national agenda of the last year has been derailed because of a legal error of Judge Wright's? Under a proper view of Fourth Amendment privacy and Federal Rules of Civil Procedure 26(c) and 45(c), Monica Lewinsky should never have been asked about her purely consensual sexual activity. Nor should Clinton have been forced to answer, given that his answer could implicate serious privacy interests of a non-party to this civil suit (Lewinsky) in the absence of a compelling need. But on this key issue Judge Wright was Judge Wrong when it counted (at the deposition), and had it not been for this error, the relevant "crimes" that hijacked the Clinton presidency would never have occurred. (My point here is very different from the exclusionary rule, which asks whether a crime was discovered only because a judge or cop erred.) In wrongly requiring disclosure of intimate and confidential relations, however, Judge Wright was in a way merely following the logic of *Nixon*, and its insistence on evidence over privacy.

Judge Wright is not alone. Most federal judges have internalized a master narrative in which *Nixon* was a heroic decision where heroic judges upheld the rule of law and saved the country. Judges are presumptively good, and presidents—and presidential privileges—are presumptively bad. This is the theme of a trio of Clinton-era privilege cases decided by circuit courts involving secret service privilege and government-attorney privilege.

In the secret service case, a D.C. Circuit panel dismissed the suggestion that agents should not be obliged to divulge what they may have seen, unless they actually saw the President commit a felony before their eyes. Although the panel thought this balance "strange,"³¹ it rather nicely tracks the crime-fraud exception to attorney-client privilege, and fits well with what *Nixon* should have said. Quoting *Nixon's* admonition that privileges "are not lightly created nor expansively

own views of the history, see Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 710-21 (1995).

31. *In re Sealed Case*, 148 F.3d 1073, 1077 (D.C. Cir.), *reh'g en banc denied*, 146 F.3d 1031 (D.C. Cir.), *stay denied*, 148 F.3d 1079 (D.C. Cir.), and *cert. denied*, 119 S. Ct. 461 (1998).

construed,” the court dismissed as “speculative” national security concerns that Presidents would keep agents at bay if they couldn’t trust secret servicemen to keep their service, well, secret.³² The court’s best argument was that national security concerns were strongest when the President was in public, but the proposed privilege would have its greatest bite in shielding information about private meetings.³³ The best response to this is to admit that the privilege should be rooted in privacy as well as national security concerns. The language and legacy of the Tapes Case forced the President’s lawyers to push national security while softpedalling privacy. Yet the privacy concern is very strong. Imagine how intrusive it must be to have cameras everywhere in your own house, to be shadowed everywhere—and to know that those who wish to humiliate you may subpoena material of wholly lawful and even proper but nevertheless embarrassing activity. Imagine, in short, how the vision of *Nixon* is wholly inadequate to shield you if you are an honest President. If we think about the interaction of the Fourth Amendment and Article II, surely there is a need to protect a zone of presidential privacy. Judges are sensitive to this concern as it bears on their own branch—cameras are not allowed in the Supreme Court, and Justices would not take kindly to any effort by the President to force their law clerks to answer questions under oath about the Justices’ personal lives. More generally, if the Chief Executive thinks that the secret service should remain secret, and an inferior officer disagrees, why do judges heed the inferior rather than the Chief?

And this question is the thread that, when pulled, unravels two circuit court opinions claiming that the President and other White House personnel may not invoke attorney-client privilege when they speak to government attorneys.³⁴ The attorneys represent “the government,” and somehow inferior Starr embodies “the government,” thereby displacing a duly-elected President. In their own branch, judges think otherwise. Law clerks are paid by the government, but many judges have told their clerks that they owe an absolute duty of confidentiality to the judge under attorney-client privilege. The circuit courts worry about attorney-client privilege shielding evi-

32. *Id.* at 1076, 1078.

33. *See id.* at 1078.

34. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998).

dence of wrongdoing—but the answer to this is that the crime-fraud exception should apply to government attorneys, too.

But not any broader exception. Imagine an honest President who gets wind of a problem in his White House. He instructs his aides to cooperate fully with his White House (government) counsel. He assures them that what they say will be privileged, so that they will tell the truth, and he can fix the problem—and if necessary, remove the bad apples from his administration. But the circuit court opinions prevent the President from making this assurance stick—and the result is that judges are impermissibly interfering with an honest President's ability to run his own separate branch of government. This, too, is the wages of *Nixon*, which crafted rules that failed to distinguish between White House conversations confessing past crimes on the one hand and conspiracies plotting new crimes on the other.

Modern presidential law is misshapen, and all three branches of government are to blame. Blame Congress for abdicating its proper oversight responsibilities and for crafting such an abominable independent counsel statute. Blame presidents for having been at times crooked, and for opting to litigate key issues of presidential privilege on smelly facts. Blame judges for smelling the facts while missing the big picture, and also for their institutional hubris.

The good news is that now could be the perfect time to begin to undo the damage. The independent counsel statute is due to sunset this year; and the opponents of the current president seem to have overplayed their hand, creating a pro-presidential backlash of sympathy. Now that post-Watergate Presidents of both parties have been badly bloodied, pro-presidential reforms need not be seen as a triumph of one party over the other. Today we stand at a truly rare and historic moment: in the next election, the House, the Senate, and the Presidency are all genuinely up for grabs. We are thus blessed by a kind of Rawlsian veil of ignorance about 2000 and beyond. Before we know which party will win which institution, we should decide how the institutions should sensibly operate.

Let's start by letting the current independent counsel statute die. Any successor statute must exclude judges altogether from the process of picking, monitoring, and firing prosecutors. Provision could be made to enable the White House to pick independent counsels on its own (the Cox/Jaworski model) or instead the President could nominate

ICs subject to Senate confirmation (as happened in Teapot Dome). On either approach, ICs could be selected ad hoc, as need arises, or a more permanent set of watchdog posts could be created, to be filled before any given scandal heats up.

Congress should also craft an omnibus presidential privilege bill—fashioning rules for when (if ever) a sitting President can be sued in civil cases brought in state or federal court; providing for tolling of statutes of limitation in the event of temporary Presidential immunity; and delineating sensible boundaries for various executive, government-attorney, and secret service privileges. The statute should also reaffirm the historically sound and structurally sensible rule that a sitting President may not be forced to stand trial against his will in an ordinary criminal court.³⁵ The *Jones* case did not decide otherwise; the President had the legal option simply to default the case and pay money, whereas in an ordinary criminal prosecution defendants may be physically obliged—with leg irons, if need be—to stand trial.³⁶ (Indeed, Stevens in *Jones* pointedly distinguished the case at hand from “the question whether a court may compel the attendance of the President at any specific time or place.”)³⁷ Also, unlike a mere civil suit, a criminal conviction and imprisonment could effect a de facto removal from office.³⁸ As a matter of both federalism and sepa-

35. For a more general discussion of this issue, see Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997); Testimony of Akhil Reed Amar Before the Senate Judiciary Subcommittee on the Constitution, Federalism, and Property Rights, On the Indictability of Sitting Presidents (Sept. 9, 1998), available in 1998 WL 18089607.

36. Criminal trials in absentia, default judgments entered against criminal defendants, and directed verdicts against criminal defendants are generally impermissible under our Constitution, rendering criminal adjudication importantly different from civil adjudication.

37. *Clinton v. Jones*, 117 S. Ct. 1636, 1643 (1997).

38. If a President were to be incarcerated upon conviction, and later won on appeal, how could we give back to him (and those that voted for him) the lost days of his Presidency? This special problem does not arise with civil suits. We should also note that although the *Jones* Court thought that very little historical evidence supported Presidential immunity from civil suit in federal court, there is a great deal of historical evidence supporting the notion that a sitting President may not be forced to stand trial in an ordinary criminal court against his will. See sources cited *supra* note 35. Note also that in a civil case, there is never a “plaintiff-standing” problem. *Anyone* can bring a civil suit. But who can bring a criminal suit, and in whose name? As a matter of federalism, can a state bring a criminal suit against a sitting President? (Imagine what would have happened had some clever South Carolina prosecutor been vested with the legal right to prosecute Lincoln in early 1861.) As a matter of separation of powers, how can an “inferior” officer like Kenneth

ration of powers, judges and local juries lack this power over the nation's Chief Executive. The President is elected by the nation, and only the nation's representatives, via impeachment, can properly undo this election.

These pro-presidential reforms cut against the spirit of the Tapes Case, but by now it should be clear that the case is the root of many of our problems. Instead of writing an honest opinion impeding a crooked President, the Court wrote a crooked opinion impeding honest Presidents. Crooked Presidents need to be straightened out, of course. So do crooked precedents.

Starr criminally prosecute the chief executive and do so in the name of "the United States"? How can Starr have this awesome power and still be in any real sense a mere "inferior" officer—with powers so modest that he need not even be confirmed by the Senate? The holding of the Tapes Case does not give Starr this power—remember Nixon's unilateral power to make Jaworski go away. For reasons I set out in more detail elsewhere, *Morrison v. Olson* is also cleanly distinguishable; the Pardon Clause allowed the President to trump the independent counsel on the facts of *Morrison* by simply giving Ted Olson a Weinberger-like pardon, but this reason for upholding the independent counsel as truly "inferior" and not "unduly" intrusive upon the President fails if the President himself could somehow be made a criminal defendant, given that the President may not properly pardon himself. For more discussion, see Amar, *supra* note 24, at 802-04; Akhil Reed Amar, *A Constitutional Nightmare*, WASH. POST, Sept. 20, 1998, Outlook Section; Akhil Reed Amar, *In Praise of Impeachment*, THE AMERICAN LAWYER, Sept. 1998, at 92.