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# THE PUBLIC AND PRIVATE LIVES OF PRESIDENTS

Neal Kumar Katyal\*

*Focusing on a frequent theme in the executive privilege arguments advanced by the Clinton Administration, Neal Kumar Katyal explores the distinction drawn between the public and private lives of the President, particularly in the Paula Jones and Monica Lewinsky cases. He argues that the Administration's difficulties in asserting executive privilege claims following these cases demonstrate that the public/private distinction is not entirely valid. He asserts that, unlike members of Congress who have time when they are not in session, the President is unique in that he is office twenty-four hours a day. He argues that this special constitutional status puts pressure on the public and private distinction. Professor Katyal maintains that presidents have only a limited reservoir of secrecy from which to draw. Thus, the use of privilege on private matters such as the Lewinsky investigation not only weakens their ability to claim executive privilege on significant public matters but it also adversely affects their ability to achieve their political ends.*

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“It’s nobody’s business but ours. Even presidents have private lives. It is time to stop the pursuit of personal destruction and the prying into private lives and get on with our national life.”

President William Jefferson Clinton,  
Aug. 17, 1998<sup>1</sup>

## INTRODUCTION

A recursive feature of the Clinton cases has been an argument based on the distinction between the public and private life of the President of the United States. In the first of these cases, the sexual harassment suit brought by Paula Jones, the President contended that the distraction of suits arising from his private life would encumber the Presidency, and ultimately harm the people whom he represents. Unlike a lawsuit to stop a president’s arguably unconstitutional acts—such as seizing the

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<sup>1</sup> *Text of Clinton’s Address to Nation*, L.A. TIMES, Aug. 18, 1998, at A14 [hereinafter *Clinton’s Address*].

steel mills,<sup>2</sup> using the line-item veto,<sup>3</sup> or launching military operations in Kosovo<sup>4</sup>—Clinton argued that this type of lawsuit could wait. The Supreme Court, as we now know, rejected such a difference. Instead, it drew an analogy between the official act cases and cases for private damages, and held that the President must answer Jones' lawsuit like every other citizen.<sup>5</sup>

Then the world learned of Monica Lewinsky. The President invoked executive privilege to shield two of his aides from Independent Counsel Kenneth Starr's subpoenas to the grand jury.<sup>6</sup> Starr drew upon the personal/public distinction in contesting the President's assertions of privilege, arguing that the President could not use executive privilege in an investigation into his personal conduct.<sup>7</sup> The court found the testimony of the President's aides to concern official acts, but held that executive privilege was trumped by the need for the evidence.<sup>8</sup>

Following a referral from Mr. Starr, Congress began impeachment proceedings, and Clinton became the first duly elected President in our nation's history to be impeached. Using the familiar words that private activities should not be a basis on which to remove a President, Clinton argued that his liaisons with Ms. Lewinsky concerned only his private, not his public, life. Clinton's lawyers contended that an impeachable offense required an offense against the state, and a semi-sexual relationship with an intern did not constitute such an offense.

This Essay suggests that the public/private distinction was not nearly as strong an argument as many have assumed. The President is unique, for he is the only official in office twenty-four hours a day, seven days a week.<sup>9</sup> This special constitutional status puts pressure on the distinction between public and private, for unlike members of Congress (whom the Constitution presumes will be away from office at regular intervals) presidents are always "in session."<sup>10</sup> The President has, constitutionally speaking, virtually no personal life while in office. In particular, and in keeping with the theme of this Symposium, this Essay looks to executive privilege to demonstrate that a President's private acts can have public consequences. A brief glance at President Clinton's difficulty in asserting executive privilege in the wake of

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<sup>2</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>3</sup> See *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>4</sup> See *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999).

<sup>5</sup> See *Clinton v. Jones*, 520 U.S. 681, 703-04 (1997).

<sup>6</sup> See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 24-25 (D.D.C. 1998), *aff'd in part, rev'd in part sub nom, In re Lindsey*, 158 F.3d 1263 (D.C.Cir. Jul 27, 1998), *cert. denied*, 525 U.S. 996 (1998).

<sup>7</sup> See *id.* at 25.

<sup>8</sup> See *id.*

<sup>9</sup> See Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges & Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995).

<sup>10</sup> See U.S. CONST. art. I, § 6 (providing immunity from arrest for members of Congress only while they are "at session").

his impeachment—and in particular in the FALN matter—demonstrates the point. The President's assertion of privilege during the Lewinsky investigation adversely affected his ability to assert privilege in subsequent cases. The connection occurs because there is a limited reservoir of secrecy from which the President may draw, and by squandering this resource during the Lewinsky investigation, President Clinton could not deploy it elsewhere in cases where the need for privilege may have been more significant. In making this point, I do not mean to suggest that the President should have been impeached (indeed, there were many reasons why he should not have been). I am simply saying that the reason not to impeach him cannot be that his activities were private and therefore had no impact on the state.<sup>11</sup>

Just as it should be presumed that the demands on the President's time are such that any private lawsuit will have public consequences, so too should it be assumed that negative public consequences may follow when the President engages in wrongful personal acts. Some consequences will be political, such as the President's inability to pass legislation he favors.<sup>12</sup> Other consequences will be legal, such as the natural impetus to stretch the law of privilege to protect oneself. In either case, however, the personal acts of the President have a dramatic effect on the public life of the nation.

#### I. THE PAULA JONES CASE

In one of the rare instances of a private civil suit being brought against a sitting President, Paula Jones alleged that President Clinton, while Governor of Arkansas, violated her constitutional rights by making improper sexual advances toward her.<sup>13</sup> Upon receipt of the Complaint, the President's lawyers filed a motion seeking temporary immunity, arguing that his weighty duties as Head of State precluded him from defending himself in court while in office.<sup>14</sup> According to the President's lawyers, "Even if a President ultimately prevails, protracted personal damages litigation would make it impossible for him to devote his undivided energies to one of the most demanding jobs in the world. . . . The President's litigation . . . like the President's illness, becomes the nation's problem."<sup>15</sup> The President's lawyers

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<sup>11</sup> This Essay puts to one side the argument, advanced by the House Managers, that President Clinton committed a crime, or a series of crimes, and that such acts are, by definition, not private. This Essay does so not only to simplify discussion, but also because many technical elements necessary for a crime—such as perjury's requirement of materiality—appear to be lacking in the case.

<sup>12</sup> The Tobacco Bill is one example. See Susan Page, *A Year into Scandal, Damage is Done*, USA TODAY, Jan. 15, 1999, at 1A, available in 1999 WL 6831607.

<sup>13</sup> See *Clinton v. Jones*, 520 U.S. 681, 685 (1997).

<sup>14</sup> See *id.* at 686.

<sup>15</sup> Brief of Petitioner William Jefferson Clinton at 8, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853).

dismissed analogies to official acts in which the President was held to be a proper defendant.<sup>16</sup>

The Supreme Court disagreed. It found that the historical support cited by both the President and Jones was weak and that quotes from the founding era “largely cancel each other.”<sup>17</sup> The Court reasoned that, just as the President was not immune from suits brought in his official capacity, such as when President Truman tried to seize the steel mills, he should not be immune from suit brought in his private capacity either:

The fact that a federal court’s exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills in order to avert a national catastrophe. Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. . . .

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. . . .

If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President’s official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct.<sup>18</sup>

This congruence between public and private conduct provided precedent for the Court to say that Clinton must answer the lawsuit like any other litigant.<sup>19</sup> This precedent also led the Court to reject the notion that the President’s personal business would

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<sup>16</sup> *See id.* at 19.

<sup>17</sup> *Jones*, 520 U.S. at 697 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring)).

<sup>18</sup> *Id.* at 703, 705 (citations omitted).

<sup>19</sup> *See id.* at 695.

become the nation's business.<sup>20</sup> Instead, the Court professed faith in the ability of federal courts to wield summary judgment as a weapon to dismiss frivolous lawsuits.<sup>21</sup>

In short, the Supreme Court rejected the President's claim that lawsuits based on his pre-office personal conduct should be postponed until he leaves office. The Court stated that it was "unlikely that a deluge of such litigation will ever engulf the Presidency."<sup>22</sup>

## II. IMPEACHMENT

### A. *The Relationship to the Paula Jones Privacy Principle*

The world was about to learn just how much the President's personal business could consume the nation. When Monica Lewinsky's name began to hit the airwaves, commentators thought the President would simply resign.<sup>23</sup> Instead, Clinton mounted an aggressive legal and political defense. Part of Clinton's defense was based on the notion that his conduct with Ms. Lewinsky was purely private behavior, and that it had no consequences upon his ability to govern.<sup>24</sup> Pundits have criticized the Supreme Court's opinion in the *Jones* case, and I, for one, agree with these criticisms.<sup>25</sup> Yet, it must be said that the President's claim in *Jones*, that defending against a private sexual harassment lawsuit will take time away from doing the nation's business,<sup>26</sup> applied *a fortiori* to his activities in the wake of the Lewinsky matter. If we are supposed to fear the time a simple lawsuit takes away from the President and its ability to undo the entire executive branch, why should we not fear at least as much a President whose conduct risks massive public disapproval and embarrassment and whose attention is consumed for an entire year by the publicity and proceedings against him? One must ask whether that, at the very least, is equally destructive to our system of government—in terms of taking away the President's time, attention, and good reputation.

A response to concerns about the impact of the President's private acts on his public duties might go something like this: The issue the President feared in the Paula Jones case was his amenability to be sued by any actor, at any time or place. If any

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<sup>20</sup> See *id.* at 694.

<sup>21</sup> See *id.* at 708-09.

<sup>22</sup> *Id.* at 702.

<sup>23</sup> See, e.g., *This Week* (ABC television broadcast, Jan. 25, 1998), available in 1998 WL 6392249 (Sam Donaldson stating "[I]f [the president is] not telling the truth and the evidence shows that, [he] will resign, perhaps this week.")

<sup>24</sup> See *Jones*, 520 U.S. at 692-93.

<sup>25</sup> See Amar & Katyal, *supra* note 9; Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1754-57 (1998).

<sup>26</sup> See *Jones v. Clinton*, 72 F.3d 1354, 1361 (1996).

plaintiff could command the President's attention and resources, the nation's business would be stymied. Furthermore, because Paula Jones and other private plaintiffs are not elected officials, there is no accountability for their actions. The public cannot vote them out of office. Yet in the Lewinsky matter, accountability at all points rests on the President. The President decided to engage in the conduct. The President also decided to devote attention and resources to fighting the accusations. He gets to call the shots in this political, as opposed to legal, proceeding. And he can be held accountable for the choices he has made.

The problem with such a defense is that the President often did not get to control the proceedings. The most obvious example of this is impeachment, when he and much of his senior staff devoted their time and energy to fighting the accusation and charges. Even if the Congress could be held accountable for its impeachment decisions, the criminal investigation into the President's possible wrongdoing, and the testimony he gave to Ken Starr, was time spent in ways beyond his control. Even the press reports, and much else, demanded the President's time and attention in ways that he could not contain.<sup>27</sup> All of this is foreseeable, and inevitable, when we are talking about potential wrongdoing by the President of the United States.

Perhaps a separate answer could be that the proceedings and publicity against him were *themselves* unfair and unreasonable because they invaded his privacy. Were there an effective privacy defense, then the President would not have had to spend the time fending off the charges. Do not blame the President, the argument continues, for a zealous prosecution and publicity barrage that ignored his rights. If only the President had a zone of privacy, he would never have been subjected to this grizzly attack on his character and time.

This kind of argument is surely weak. Any modern-day President, and certainly this President, had to expect that the zone of privacy from the press and opposing party is minimal at best.<sup>28</sup> Even more importantly, we should recognize the tones of similarity between this argument and one we heard earlier, namely one that the President rejected in *Jones*. You will recall that Paula Jones claimed that temporary immunity was not necessary because district courts had the ability to dismiss frivolous lawsuits, and that the President would have the full range of rights and privileges, including summary dismissal.<sup>29</sup> The President, however, was not

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<sup>27</sup> It could be said that the fault here rests with those who stretched the impeachment proceedings out for a year and that the public could vote out the members of Congress responsible for this delay. Leaving aside the fact that lengthy proceedings were a reasonable and foreseeable consequence of an investigation that suggested wrongdoing by our nation's highest official, accountability in the particular case was skewed because the members of Congress who impeached the President were themselves members of a lame-duck Congress.

<sup>28</sup> See, e.g., Robert Goldberg, *MTV's Answer to Barbara Walters*, WALL ST. J., Dec. 4, 1995, at A10 (discussing President Clinton's answer to the question of whether he wears boxers or briefs).

<sup>29</sup> See Brief of Respondent Paula Corbin Jones, *Clinton v. Jones*, 520 U.S. 681 (1997)

persuaded and argued that the potential for any given suit to go beyond the summary judgment stage was far too damning.<sup>30</sup> One should wonder why faith in paper defenses should be vested in one arena, and not the other. Why is the *potential* for those in charge—whether the media or the Congress—to ignore the President’s privacy defense not enough to say that the President knowingly risked undermining his ability to govern? Indeed, the President at one point seems to acknowledge the inconsistency. As the epigraph to this Essay shows, in his address to the nation on August 17, 1998, he claimed that the matter was entirely private.<sup>31</sup> Yet, his next words are telling: “Our country has been distracted by this matter for too long, and I take my responsibility for my part in all of this. That is all I can do.”<sup>32</sup>

It could also be said, in the wake of a strong economy and other indicia, that the President never lost his ability to govern. This statement may ultimately be right. If so, whether the President is able to govern is the question impeachment should turn on, and not whether the President’s activities were private. The privacy defense was a canard—one that at best meant simply that the matter should depend on whether the President was still capable of being our nation’s leader. Just as a murder of a private enemy, or a President’s horrendous engagement in child abuse, might justify impeachment, so too might other personal conduct. The question turns on whether or not the President has undermined his trust and confidence in the American people. One other point follows: If you think that the President should not have been impeached because his activities did not undermine his ability to govern, then I urge you to think about whether or not the Court may have actually been right in *Jones*. If one year of almost full distraction did not undermine the President’s ability to do the nation’s business, one must question whether a single meager lawsuit could do so.<sup>33</sup>

#### B. *Executive Privilege and Personal Conduct*

In the recent impeachment hearings and trial, the President stood accused of perjury and obstruction of justice. The House Managers claimed they were not impeaching the President based on his personal misconduct, but instead on the basis of what he did to interfere with the Paula Jones lawsuit and resulting criminal

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(No. 95-1853).

<sup>30</sup> See Brief of Petitioner William Jefferson Clinton at 8, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853).

<sup>31</sup> See *supra* text accompanying note 1.

<sup>32</sup> *Clinton’s Address*, *supra* note 1, at A14.

<sup>33</sup> There are, however, institutional reasons to think that *Jones* is wrong, even if this particular President may have a unique ability to compartmentalize. Moreover, because such suits can be expected to multiply, the issue in *Jones* was broader than Paula Jones’ lawsuit. See Amar & Katyal, *supra* note 9, at 714 n.52.

investigation.<sup>34</sup> The President's defenders, for their part, characterized the accusations as improper because they were based on his personal conduct in having an affair with Monica Lewinsky.<sup>35</sup> Hence, both sides assumed that impeachment for personal wrongdoing was inappropriate. This assumption was made even though the President went before not only his Cabinet, but the American people, and denied having a sexual relationship "with that woman, Monica Lewinsky."<sup>36</sup> At that point, what exactly was private?

The President's privacy defense appears more attenuated when we examine his invocation of executive privilege. This President has not been shy in invoking the privilege at various points to block disclosure of material, including material relating to the Travel Office Investigation,<sup>37</sup> the inquiry into wrongdoing by former Agriculture Secretary Mike Espy,<sup>38</sup> a memorandum by the FBI Director that was critical of the Clinton Administration's drug control efforts,<sup>39</sup> and information on U.S. policy towards Haiti.<sup>40</sup> President Clinton's decision to invoke it in the Lewinsky

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<sup>34</sup> See 145 CONG. REC. E238 (daily ed. Feb. 12, 1999) (Closing Argument of Rep. Henry J. Hyde, Impeachment Trial).

Of course it's useful for the defense to misdirect our focus toward what everyone concedes are private acts and none of our business, but if you care to read the articles of impeachment, you won't find any complaints about private, sexual misconduct. You will find charges of perjury and obstruction of justice which are public acts and federal crimes, especially when committed by the one person duty bound to faithfully execute the laws. Infidelity is private and non-criminal.

*Id.*; see also 145 CONG. REC. S1362 (daily ed. Feb. 7, 1999) (Closing Argument of Rep. Lindsey Graham) ("I would never want my President or your President removed because of private sins.").

<sup>35</sup> See 145 CONG. REC. S1704 (daily ed. Feb. 22, 1999) (statement of Sen. Nickles): The President's defenders have argued that his errors were "private acts" which are irrelevant to the constitutional standards of public behavior. But this was not about adultery. These charges would be just as valid even if he were never married. Let's also consider a few other facts. . . . The President asserted one of his most precious powers, that of executive privilege, to keep government employees from cooperating with a federal grand jury.

<sup>36</sup> See *State of the Presidency: People are More Curious About the Sex Scandal than the State of the Union*, NEWSDAY, Jan. 27, 1998, available in 1998 WL 2656057.

<sup>37</sup> See COMM. ON GOVERNMENT REFORM AND OVERSIGHT, 104TH CONG., CORRESPONDENCE BETWEEN THE WHITE HOUSE AND CONGRESS IN THE PROCEEDINGS AGAINST JOHN M. QUINN, DAVID WATKINS, AND MATTHEW MOORE AS PART OF THE COMMITTEE INVESTIGATION INTO THE WHITE HOUSE TRAVEL OFFICE MATTER (Comm. Print 1996).

<sup>38</sup> See *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

<sup>39</sup> See Letter from Janet Reno, United States Attorney General, to President Bill Clinton (Sept. 30, 1996).

<sup>40</sup> See Letter from Janet Reno, United States Attorney General, to President Bill Clinton (Sept. 20, 1996).

matter, however, was unprecedented. In response to an Office of Independent Counsel (OIC) subpoena of two of the President's advisers, Sydney Blumenthal and Bruce Lindsey, the President claimed executive privilege to shield them.<sup>41</sup>

Pointedly, unlike many of the claims he advanced at other stages in the litigation, the President grounded his assertion of executive privilege for Blumenthal and Lindsey not in the fact that the matters were personal, but in the fact that they were official.<sup>42</sup> Ironically, it was the OIC that claimed that the matters concerned the President in his personal affairs, and that executive privilege could not apply.<sup>43</sup> Federal district court judge Norma Holloway Johnson resolved this dispute in two steps. First, the court bowed to the OIC's notion that entirely private matters cannot be protected by privilege, stating, "Purely private conversations that did not touch on any aspect of the President's official duties or relate in some manner to presidential decision-making would not properly fall within the executive privilege."<sup>44</sup> Having stated the distinction, the court then proceeded to erase it, noting that "the President does need to address personal matters in the context of his official decisions" and labeling as "oversimplified" "the position that nothing the President or his advisors could say to each other regarding the grand jury investigation or the Jones litigation would relate to the President's official duties."<sup>45</sup>

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<sup>41</sup> See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 24-25 (D.D.C. 1998), *aff'd in part, rev'd in part sub nom., In Re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

<sup>42</sup> See *id.*

<sup>43</sup> See *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 25.

The White House argues that the communications of Lindsey and Blumenthal are presumptively privileged because President Clinton has invoked executive privilege. The OIC counters that the communications are not privileged because the executive privilege applies only to communications regarding official presidential matters and the federal grand jury investigation regarding Monica Lewinsky and the Paula Jones litigation are private matters.

*Id.*

In his Testimony before the Judiciary Committee of the House of Representatives, Mr. Starr repeated the theme that the President misused executive privilege by invoking the privilege for a personal matter:

May I say very briefly on executive privilege, I do think that it is an abuse of a very important constitutional principle for such a special principle, executive privilege, which I strongly believe in—and I defend the concept of executive privilege—to be invoked with respect to the nonofficial activities of the president of the United States. I think it's improper.

*Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 51 (Nov. 19, 1998), available in 1998 WL 801037 (prepared testimony of Kenneth Starr).

<sup>44</sup> *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 26.

<sup>45</sup> *Id.*

Having found that the Lindsey and Blumenthal material was presumptively covered by executive privilege, the court then demolished the President's claim of executive privilege. After reviewing the evidence *ex parte*, Judge Johnson concluded that the privilege should be pierced because the material was "directly relevant to the issues that are expected to be central to the trial."<sup>46</sup> Judge Johnson concluded, "In sum, the OIC has provided a substantial factual showing to demonstrate its 'specific need' for the testimony."<sup>47</sup> The President's claim of privilege here was weak and had the appearance of stonewalling. To quote another participant in this Symposium, Professor Rozell:

All evidence to date suggests that Clinton used executive privilege to frustrate and delay the investigation. . . . White House efforts to obstruct and delay for the sake of some perceived political advantage cynically undermined both the privilege and the principle. Regarding executive privilege, Clinton's legacy appears not to be that of a President who reestablished this necessary power, but rather, like Nixon before him, as one who gave executive privilege a bad name.<sup>48</sup>

Perhaps it was to be expected, then, that the OIC's impeachment referral articulated, as one of the eleven charges against him, that the President misused executive privilege. As Mr. Starr told the House:

In asserting Executive Privilege, the President was plowing headlong into the Supreme Court's unanimous decision 24 years ago in *United States v. Nixon*. There, the Supreme Court ruled that Executive Privilege was overcome by the need for relevant evidence in criminal proceedings. And thus, it came as no surprise that Chief Judge Norma Holloway Johnson rejected President Clinton's effort to use Executive Privilege to prevent disclosure of relevant evidence. . . . When the President and the Administration assert privileges in a context involving the President's *personal* issues . . . there is substantial and credible evidence that the President has misused the privileges available to his Office."<sup>49</sup>

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<sup>46</sup> *Id.* at 28.

<sup>47</sup> *Id.* at 29.

<sup>48</sup> Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1124-25 (1999).

<sup>49</sup> *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the House Comm. on the Judiciary, 105th Cong.* 51 (Nov. 19, 1998), available in 1998 WL 801037 (prepared testimony of Kenneth Starr) (emphasis added). Starr continued:

This point bears emphasis: The administration justified its many privilege claims by claiming an interest in protecting the presidency, not the president

Furthermore, Starr argued to the House, the misuse of privilege was not a private matter, but a public one.<sup>50</sup>

In sum, the President's defenders asserted that the matters were personal at one time, and claimed them to be official at another. They also asserted at one point that the personal activities of the President, if they became the subject of litigation in the courts, could be damaging to the President's ability to conduct the nation's business. Yet, at another point, they asserted that the President's personal wrongdoing did not impact his ability to govern. Whether his activities did have such an impact is best decided by our elected officials in the House and Senate. Yet, before putting the matter to rest by looking at the Senate's acquittal of President Clinton in February of 1999, perhaps we may be guided in future impeachments by examining what happened after the acquittal of the President. There are those who contend that the President lost his ability to recommend legislation or get his agenda through Congress. Instead of focusing on such claims, this Essay turns to one of the less visible areas of governance: executive privilege.

### III. EXECUTIVE PRIVILEGE AFTER IMPEACHMENT: FALN<sup>51</sup>

In September of 1999, following his acquittal by the Senate, President Clinton

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personally. But that justification is dubious for two reasons. First, Presidents Carter and Reagan waived all government privileges at the outset of criminal investigations in which they were involved. The examples set by those two presidents demonstrate that such privilege claims in criminal investigations are manifestly unnecessary to protect the presidency. Second, these novel privilege claims were quite weak as a matter of law.

And that raises a question: What was it about the Monica Lewinsky matter that generated the administration's particularly aggressive approach to privileges? The circumstantial evidence suggests an answer: delay. Indeed, when this Office sought to have the Supreme Court decide all three privilege claims at once this past June, the Administration opposed expedited consideration.

*Id.*

<sup>50</sup> *See id.* at 44-45:

Indeed, the evidence suggests that the President repeatedly tried to thwart the legal process in the *Jones* case and the grand jury investigation. That is not a private matter. The evidence further suggests that the President, in the course of these efforts, misused his authority and power as President and contravened his duty to faithfully execute the laws. That, too, is not a private matter. . . . The President and his Administration asserted three different governmental privileges to conceal relevant information from the federal grand jury.

*Id.*

<sup>51</sup> FALN is the Spanish acronym for Fuerzas Armada de Liberacion Nacional, the Armed Forces of National Liberation.

invoked executive privilege once again in shielding information regarding his decision to grant executive clemency to several Puerto Rican terrorists.<sup>53</sup> Many commentators feared that the President's clemency decision was influenced by the First Lady's U.S. Senate campaign, and her desire to appeal to the Puerto Rican vote.<sup>54</sup> The House and Senate sought information on the clemency decision, and the White House refused to turn it over, citing privilege concerns.<sup>55</sup>

There are often valid and strong reasons for a president to invoke executive privilege. Executive privilege, which has a pedigree as far back as George Washington,<sup>56</sup> serves several important functions. It prevents disclosure of information that can subvert crucial military or strategic objectives. It bestows a modicum of privacy onto executive branch officials. Most importantly, it ensures that the advice the President receives is candid and frank. As the Supreme Court said in a case regarding President Nixon's invocation of privilege, "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."<sup>57</sup>

All of these functions might be implicated by the FALN case. Important material relating to the situation in Puerto Rico may be at issue. Privacy concerns could exist. Additionally, opening up the pardon process to public inspection could make officials much more reluctant to give free and frank advice to the President. There are also other concerns in the pardon context that weigh in favor of privilege. People are sometimes reluctant to provide exculpatory information to the Pardon Attorney if they believe that this information will be made public. Reputations may be ruined and, sometimes literally, lives may be lost. As any good prosecutor (or journalist) will understand, there is an important need for the President to be able to promise confidentiality of sources. What is more, providing information in the FALN matter will open the door to congressional interference in other pardon matters. Just imagine the Senate opening up the files on Jonathan Pollard.<sup>58</sup>

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<sup>53</sup> See Neal Kumar Katyal, *Executive Privilege, Confidentiality, Trust; The Road to a Compromise Between the White House and Congress*, WASH. POST, Sept. 24, 1999, at A31, available in 1999 WL 23305248.

<sup>54</sup> See Kevin Galvin, *Clinton Won't Give Congress Data about Clemency: He Invokes Executive Privilege; Critics Say to Aid Wife*, DET. NEWS, Sept. 17, 1999, at A3, available in 1999 WL 3938601; Dick Morris, *Hillary's Self-Inflicted Wounds—Keeping Secrets Keeps the Home-Loan and FALN Scandals Alive*, N.Y. POST, Sept. 21, 1999, at 43, available in 1999 WL 27650490.

<sup>55</sup> See *Clinton Won't Reveal All FALN Papers*, CHI. SUN-TIMES, Sept. 16, 1999, at 3, available in 1999 WL 6557053; Jerry Seper, *Reno Opposed to Granting Clemency to 16 Puerto Rican Terrorists: Clinton Sought Release Despite Warning that They Were a Threat*, WASH. TIMES, Oct. 21, 1999, at A1, available in 1999 WL 3096700.

<sup>56</sup> See Rozell, *supra* note 48, at 1069-70.

<sup>57</sup> *United States v. Nixon*, 418 U.S. 683, 705 (1974).

<sup>58</sup> Jonathan Pollard was a former Navy analyst who was convicted of treason and

Nevertheless, the President's credibility when it comes to privilege has been put in doubt by his earlier invocation of the doctrine. Given what he said in the Lewinsky matter, it should come as no surprise that the public worries about a coverup. As *U.S. News and World Report* put it:

President Clinton may have played the executive privilege card one time too often. He invoked legal privileges so many times during l'affaire Lewinsky that the public and lawmakers don't buy it anymore—even when he may have a valid legal reason. That's just what happened last week when he claimed executive privilege to avoid turning over documents . . . about Clinton's controversial decision to grant clemency to 16 members of FALN, a terrorist Puerto Rican nationalist group.

The problem is that Clinton routinely claimed legal privileges last year in trying to shield secrets about his affair with Monica Lewinsky from Kenneth Starr's grand jury. Consequently, he appears suspect now. "Another president making this claim would be given it because technically it is right," says Cal Jillson, political science chairman at Southern Methodist University. "But the immediate public reaction to this is, 'There he goes again, trying to use executive privilege to cover personal wrongdoing or something politically embarrassing.'"<sup>59</sup>

These concerns were voiced by several other commentators. The *Atlanta Journal and Constitution* said:

We agree that he's not constitutionally obliged to provide the details of his conversations on the clemency issue to Congress. We'll go along with that despite his tarnished record on asserting executive privilege. In federal courts in Arkansas and Washington he's tried to withhold information regarding Whitewater and Monica Lewinsky. Both courts rejected his assertions, and Clinton's claim was dropped on appeal.

But we are not Congress. We are the American people. And we say again: The president owes us an explanation. We're entitled to know what merited their release, this slap in the face to law enforcement and the nation's victims and survivors of terrorism. . . .

Clinton has denied that his decision to weaken the administration policy against negotiating with terrorists had anything to do with Hillary Clinton's

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sentenced to life imprisonment for spying on behalf of Israel. See *American Husband, Wife Plead Guilty to Spying for Israel*, CHI. TRIB., June 5, 1986, available in 1986 WL 2674200.

<sup>59</sup> Angie Cannon, *Clinton Tries on the Privilege Cloak Again: This Time, Maybe It Will Hold up Legally*, U.S. NEWS & WORLD REP., Sept. 27, 1999, at 25.

imminent bid for the U.S. Senate representing New York, home to 1.3 million Puerto Ricans. Pardon our skepticism.<sup>60</sup>

Many in Congress made similar arguments. Representative Dan Burton, one of the President's persistent foes, declared: "I hope the President won't try to hide behind executive privilege again. The American people have a right to know why President Clinton thinks he is justified in opening the jailhouse door for convicted terrorists."<sup>61</sup>

The FALN matter, therefore, is an excellent demonstration of the bridge between the President's official and unofficial lives. Just as Judge Johnson realized that what begins as personal in the White House eventually becomes public—and involves the use of the President's staff<sup>62</sup>—so too what begins as a defensive tactic in a supposedly personal investigation eventually has public ramifications. The President's ability to invoke executive privilege in future situations has been compromised by his use of it in the Lewinsky matter.

All presidents begin with a certain limited capital of trust. They can chose to use that capital as they wish, but once the public begins to fear that the capital is being

<sup>60</sup> *Clinton Should State Case for Releasing Terrorists*, ATLANTA J. & ATLANTA CONST., Oct. 21, 1999, at A22. Others in the media have made similar comments:

Abuse of executive privilege is an old story with Bill Clinton, who invoked it to conceal embarrassing information about the Monica Lewinsky affair and former Agriculture Secretary Mike Espy. . . . Unless a credible explanation for pardoning members of a terrorist organization is forthcoming, reasonable people can only conclude Clinton once again is using executive privilege to conceal misconduct.

*Clinton's Pardons Stir Belief He's Abusing Privilege Power*, THE PANTAGRAPH, Sept. 28, 1999, at A12, available in 1999 WL 16668480.

Clinton and his lawyers have invoked executive privilege to dodge responsibility for L'Affair Lewinsky, Whitewater, the China scandals and more. . . . Last week, that very Justice (sic, again) Department relocated a troublesome Waco prosecutor and told FBI agents to stonewall Congress about Clinton's decision to free 11 terrorists belonging to the Puerto Rican nationalist group FALN.

Tony Snow, *Clinton's Assault on Our Souls*, THE STAR-LEDGER (Newark, N.J.), Sept. 23, 1999, at 23, available in 1999 WL 24201214.

<sup>61</sup> Dan Burton, *Clemency Agreement Won't Stop Inquiry*, Federal Document Clearing House, Sept. 7, 1999, available in 1999 WL 2226541; see also 145 CONG. REC. H8878 (daily ed. Sept. 28, 1999) (statement of Rep. Royce) ("By claiming executive privilege, he is telling the American people that it is none of their business. This is not right. It is the business of the American people."); 145 CONG. REC. H8560 (daily ed. Sept. 23, 1999) (statement of Rep. Pitts); 145 CONG. REC. S11085 (daily ed. Sept. 21, 1999) (statement of Sen. Gregg); 145 CONG. REC. S10809 (daily ed. Sept. 14, 1999) (statement of Sen. Hatch) ("The White House and the Justice Department are hiding behind their tired, old ploy of 'studying' whether to assert executive privilege."); 145 CONG. REC. at S10812-13 (daily ed. Sept. 14, 1999) (statement of Sen. Gregg).

<sup>62</sup> See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 26 (1998).

spent to shield wrongdoing, they worry. Government secrecy is something to be feared greatly in a democracy. At times, it serves important functions. Yet all presidents risk undermining their ability to wield executive privilege in proper situations when they use it in improper ones. This is the lesson that President Nixon taught us, and why Presidents since Nixon—with the notable exception of President Clinton—have been so reluctant to use executive privilege.<sup>62</sup>

Another point, which is more helpful to President Clinton, follows from the notion of limited capital: We must beware of criticizing a given use of executive privilege because a President earlier in time waived it in what looked like similar circumstances. A President may waive secrecy in one circumstance not out of principle, but because he may want to preserve his capital of trust to shield future secrets. Or he may waive secrecy because that capital has been depleted because of earlier, entirely correct, assertions of privilege.

Many commentators, nevertheless, criticized President Clinton's FALN privilege claim on the ground that President Ford turned over all evidence about a different pardon, namely, Ford's pardon of President Nixon.<sup>63</sup> Yet, given the political reality of that unique situation, it had to be difficult for Ford to have done anything else. Ford's decision was necessitated by the diminished capital of trust that Nixon engendered, even if there were valid arguments for secrecy. Other situations present different mixes of facts, dissimilar issues of trust, and varying grounds for secrecy. Furthermore, it is quite difficult to evaluate whether one situation is "like" another, particularly when material remains secret. It is not impossible to evaluate such claims; however, caution is warranted in trying to do so.

Even if drawing precise analogies is possible, we should question whether we actually want a system of *stare decisis* for executive privilege. The oft-cited reasons for adhering to precedent in the judicial context, such as concerns about horizontal equity,<sup>64</sup> respect for the past,<sup>65</sup> and stability<sup>66</sup> are either not applicable or not as applicable as they are in the judicial setting. Moreover, the cost is rather high: If presidents have to worry that their waivers will bind not only the matter in front of

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<sup>62</sup> See Rozell, *supra* note 48, at 1071 (stating that "President Richard M. Nixon gave executive privilege a bad name, however, when he invoked these legitimate defenses in a circumstance where clearly the President was trying to conceal White House wrongdoing" and that an "unfortunate consequence of this turn of events has been the attempts by Nixon's successors to conceal even their use of executive privilege. . . . Presidents Ford and Carter generally avoided using executive privilege").

<sup>63</sup> See Jonathan Turley, *Nothing Bars Questioning President's Bad Ideas*, L.A. TIMES, Sept. 27, 1999, at B7; Peter J. Wallison, *Executive Privilege vs. Our Right to Know*, N.Y. TIMES, Sept. 22, 1999, at 27.

<sup>64</sup> See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-97 (1987).

<sup>65</sup> See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066 (1990).

<sup>66</sup> See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748-56 (1988).

them, but future presidents in future matters, then they will be much more reluctant to waive privilege in a given situation. They will fear that their decision to forgo a claim of privilege will tie the hands of another President in some other circumstance, and weaken presidential power. Or, more cynically, they will be tempted to invoke privilege frequently on the ground that they are trying to vindicate the principle of executive privilege for the future, and not out of secrecy concerns in the present. All of this counsels against holding presidents to the same “standard” as the one used by their predecessors in determining whether to waive privilege.

#### CONCLUSION

The argument in the above pages, that the public/private distinction is of little importance when it comes to the President, is not one in favor of the impeachment of President Clinton. Rather, it is one addressed to the future—to trying to help us understand what, if anything, to make of claims about what is personal and off limits when it comes to the President. The public/private distinction was used on both sides of the impeachment debate in ways that were inconsistent and wrong. It is time to put that distraction, too, behind us.