# Kenneth Starr's unconstitutional and illegal impeachment campaign

by Edward Spannaus

In a procedure offensive to the United States Constitution, independent counsel Kenneth Starr is expected to present a report to the U.S. House of Representatives in the near future, which contains the results of Starr's eight-month grand jury investigation of the Monica Lewinsky matter. It is still an open question as to whether Starr will include in his report other matters dealing with his four-year investigation of the President, the First Lady, and their associates around other matters such as the Whitewater real estate transactions, the White House Travel Office affair, the matter of the FBI files, and so on.

Why is this such an affront to the United States Constitution? Because under the Constitution, there is only one way to remove a President from office—that is, to undo an election—and that is through the process of impeachment, trial, and conviction by the Congress.

Impeachment is, by its nature, a completely *political* process—not a criminal process. It is so recognized in the Constitution and in contemporaneous and 19th-century commentaries on the Constitution.

A President cannot be indicted—as we shall see below. Then why is an independent counsel, Kenneth Starr, acting as part of the Justice Department, permitted to use a criminal procedure, including a grand jury, subpoenas to witnesses, immunity agreements, and so on, to gather evidence against the President as if it were a criminal proceeding?

## 'Legal' authority

The legal basis under which Starr will present his report is Section 595(c) of the independent counsel statute, which states that an independent counsel "shall advise the House of Representatives of any substantial and credible information which such independent counsel receives . . . that may constitute grounds for impeachment."

This provision has never been challenged constitutionally—but it certainly deserves to be. Not only is it an abuse of the grand jury process, but it is a violation of the constitutional plan of government.

The initiative for impeachment is itself supposed to come from the House. This point, ironically, is made in a 1992 book *Grand Inquest* by Chief Justice William Rehnquist, who noted the reticence of President Thomas Jefferson to directly ask the House to bring an impeachment proceeding against Justice Samuel Chase of the U.S. Supreme Court. While describing Chase's conduct as a "seditious and official attack on the principles of our Constitution," Jefferson suggested to one of the House leaders that "it is better I myself should not interfere."

Rehnquist writes: "Jefferson, ever the master of indirection, was mindful of the constitutional provision that placed the initiative in such matters with the House of Representatives." (The irony is, that should this Starr-initiated impeachment proceeding reach the U.S. Senate, it is Chief Justice Rehnquist himself who would preside over the trial.)

## Abuse of grand jury material

This unconstitutional arrangement, of Starr presenting his "impeachment report" to the House of Representatives, immediately presents a host of further constitutional problems.

1) The report is likely to be replete with secret grand jury material; even if Starr presents only an "executive summary," as some have mooted, grand jury testimony and evidence would be available to the House for the asking. Grand jury material is supposed to be secret, because the targets and subjects of that testimony have no rights in the grand jury: hearsay is permitted, a target has no right to cross-examine witnesses or to summon witnesses in his own favor. Inside the grand jury room, the Bill of Rights, by and large, does not apply. It is a completely one-sided proceeding.

2) Because of the nature of a grand jury proceeding, grand jury material is only allowed to be used in an actual trial in very limited ways. Witnesses have to be presented afresh in front of the trial jury, where they can be cross-examined; documents must be presented afresh and authenicated, and so on.

3) The purpose of the grand jury is to establish "probable cause" to issue an indictment. The indictment contains accusations based on grand jury material, and may contain references to evidence from the grand jury, but every trial jury is

told that "the indictment is not evidence," and that the burden of proof is on the prosecutors.

But in the case of President Clinton, everyone—Congressmen, commentators, the news media—are treating Starr's report as if it is actual *evidence* of a crime. The assumption is, that the President will be convicted in the court of public opinion by the mere exposure of Starr's report—despite the fact that Starr's report is the result of a secret, one-sided proceeding in which the target—in this case the President—had no rights to confront and cross-examine the witnesses against him, and to present evidence and witnesses in his favor.

This is further reason as to why the entire Starr operation is unconstitutional from top to bottom.

## An elementary guide to impeachment

In response to many questions that have been asked by our readers and associates—both in the United States and abroad—about the impeachment process, we present the following, elementary guide.

**Can a sitting President be indicted?**

No. Article II of the United States Constitution declares: "The executive Power shall be vested in a President of the United States of America." The President is the chief executive; he is the Commander in Chief of the Armed Forces; he is responsible for foreign policy, and for the execution and enforcement of all the laws of the nation ("he shall take Care that the Laws be faithfully executed").

To indict a President, is a constitutional absurdity. In effect, the President would him indicting himself. This is why the Constitution vests the power—and the initiative—for removing a President from office with the Congress.

The Constitution of the United States provides one and only one method for removing a President from office: impeachment by Congress. This is specified in Article II, Section 4.

**Has this question come up previously?**

Most recently, the issue of whether a sitting President could be indicted came up around Richard Nixon and the Watergate affair. Robert Bork, then the U.S. Solicitor General, was asked for his official opinion at the time. He concluded that a Vice President could be indicted, because of the unimportance of the office, but Bork contended that a sitting President is immune from criminal liability. Bork still holds to that position, which he elaboration in a March 18, 1998 column in the *Wall Street Journal* entitled, "Indict Clinton? How I Wish It Were Possible."

**Is the President subject to a criminal investigation?**

No, he should not be, as long as he is in office. For the same reasons that a President cannot be indicted, to conduct a criminal investigation of a President, using the powers of the Justice Department and a criminal grand jury, is also a constitutional absurdity. The Presidency is a full-time, 24-hour-a-day job. It makes no sense that an inferior officer, such as an Attorney General or an independent counsel acting in his or her stead, could impair the President's conduct of his constitutional duties by dragging him in front of a grand jury, much less indicting him.

**Can a President ever be indicted?**

Yes, but only *after* he leaves office, or is removed from office by impeachment and conviction. Article I, Section 3 of the Constitution says: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

In *The Federalist* Nos. 65 and 69, Alexander Hamilton makes it clear that this is only *after* impeachment; he says that the President would be subject to be impeached, tried, and convicted and removed from office, "and would afterwards be liable to prosecution and punishment in the ordinary course of law."

**What is impeachment?**

Under the procedures for impeachment specified in Article I of the Constitution, the House brings an impeachment (which is the equivalent of an indictment) and the Senate tries the impeachment (i.e., it acts as the court). After the trial in the Senate, if the party is convicted, the Constitution states: "the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." There is no other way to read this, than that it means indictment can only *follow* impeachment by the Congress.

The House acts as the grand jury—sometimes called "the grand inquest of the Nation." Generally charges are referred to a committee (now, the House Judiciary Committee), and the committee can issue a report and resolution upon which the entire House votes. A resolution of impeachment requires a simple majority of the House. Under modern procedure, articles of impeachment are drawn up and voted on as part of an impeachment resolution. The articles of impeachment are presented to the Senate, where the trial takes place.

**What are the grounds for impeachment?**

The Constitution states in Article II, Section 4: "The President, Vice President and all civil officers of the United States shall be removed from Office on Impeachment for, and on Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

The term "high Crimes and Misdemeanors" in this context does not refer to offenses as defined by law or statute, but offenses against the United States. They are acts subversive of fundamental law.

Alexander Hamilton, in No. 65 of *The Federalist,* in writing about the Senate as the court for the trial of impeachments, stated: "The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in

other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political,* as they relate chiefly to injuries done immediately to the society itself."

(This is why Kenneth Starr is reportedly trying to construct an "abuse of power" case against the President, apparently realizing that the Lewinsky matter by itself, or even simple perjury on a non-material issue in a now-dismissed civil lawsuit, is not sufficient to constitute "high Crimes and Misdemeanors.")

**Is impeachment the same as a vote of confidence?**

No, impeachment is very different; it is not simply a parliamentary referendum on a President's policies. In a parliamentary system, the prime minister is chosen by the parliament, and the prime minister holds office, conditional upon the confidence of a majority of the parliament.

In the American constitutional system, with its strong executive and separation of powers, the President is chosen by election, and the results of such an election cannot be lightly overturned.

**How does impeachment compare to a trial?**

In format, it is similar, although it is *not* a criminal trial. The House acts as the equivalent of a grand jury. It then presents the impeachment (similar to an indictment) at the bar of the Senate; it may present articles of impeachment at the same time, or later. The House appoints a committee of "managers of impeachment" who function similar to prosecutors during the trial of the impeachment.

The Senate then summons the party being accused, to answer the articles. The Senate then resolves itself into a court, and acts similar to a jury in a criminal proceeding. In the case of the impeachment of the President, the Chief Justice of the Supreme Court presides; this is because the Vice President, who normally presides over the Senate, has an interest in the outcome, since he would succeed to the office of the Presidency.

At the trial, the House managers present the case for removal from office; the party under impeachment presents his defense, and is allowed to have counsel represent him. Both sides may call witnesses, etc. At the conclusion of the trial, the Senate deliberates and votes, with a two-thirds vote required for conviction.

**Has any President ever been impeached and convicted?**

No. President Andrew Johnson was impeached in 1868, but was acquitted by the Senate on a vote of 34 for conviction, and 19 against—two votes short of that necessary. Richard Nixon resigned in 1974 after articles of impeachment were drawn up against him, but before they were presented to the Senate.