

Starr shreds Constitution in 'Get Clinton' crusade

by Edward Spannaus

When a Federal judge dismissed Kenneth Starr's second indictment of former Clinton administration official Webster Hubbell on July 1, the judge cited two separate constitutional grounds for the dismissal. These were that Starr had exceeded his jurisdiction, in a manner that made the operation of the independent counsel statute unconstitutional, and that he had violated Hubbell's Fifth Amendment rights by forcing Hubbell to produce financial records, and then using those records to prosecute Hubbell on a tax case, thus making Hubbell "the primary informant against himself."

This and other recent events involving Starr serve to highlight something which most commentators have ignored: that Starr is riding roughshod over the Constitution with his inquisitorial assault on the President and the Presidency. Starr's vindictive crusade against the President and his associates is unconstitutional in numerous respects: both by the very nature of Starr's operation, and also with respect to the unlawful and improper tactics used by Starr and his deputies.

As we will see, Starr's use of the independent counsel statute itself is unconstitutional, and beyond that, Starr has specifically violated the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution.

Separation of powers

Starr's use of the independent counsel law is a violation of the Constitution. In 1988, in the case *Morrison v. Olson*, the U.S. Supreme Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act, on the grounds that the independent counsel must operate as part of the Executive branch, under the supervision of the Attorney General. Otherwise, the operation of the law is in violation of the Constitution, which gives to the Executive alone the power and responsibility for law en-

forcement (i.e., "he shall take Care that the Laws be faithfully executed").

This has a number of implications for the manner in which Starr has operated. First, under the statute, he is supposed to follow the guidelines and practices of the Justice Department. Although—admittedly—that gives him a lot of leeway, Starr has managed to even go beyond the Justice Department's bounds. He did so, for example, in the tax-conspiracy indictment of Webster Hubbell, which a number of experts said would not have been approved if Starr had gone through normal Justice Department approval procedures.

Sen. Carl Levin (D-Mich.) has pointed out repeatedly that the requirement that the independent counsel follow department policies and guidelines was held by the Supreme Court to be key to the law's constitutionality; yet, as Levin argues, Starr's efforts to obtain confidential notes from an attorney for the late Vincent Foster violated Justice Department policy—and itself would be sufficient grounds for the Attorney General to dismiss Starr.

In dismissing the Hubbell indictment, U.S. District Judge James Robertson said that Starr had unconstitutionally expanded his jurisdiction so that he could prosecute Hubbell on tax charges unrelated to the original grant of jurisdiction. On Jan. 6, Starr had gone to the special three-judge panel which appoints independent counsels, and had asked for an expansion of his mandate so he could investigate and prosecute Hubbell on tax-evasion and tax-conspiracy charges. Starr had *not* first gone to the Attorney General to seek to expand his jurisdiction, but had gone directly to the special court—which he can only do if the new matter is "demonstrably related" to the original mandate.

When Hubbell challenged the expansion which led to his new indictment, Starr argued that the court trying Hubbell

had no power to review the three-judge panel's action. Judge Robertson said that if this were true, the procedure would unconstitutionally violate the separation of powers (i.e., allowing a court to usurp Executive powers), and he ruled that he did have the power to review the special court's expansion of Starr's jurisdiction. Robertson then ruled that, in fact, there was no connection between the two investigations. He said that the original subject matter of Starr's investigation (Whitewater-Madison), and the tax matters involving Hubbell, "have nothing in common . . . except Webster Hubbell." Starr has not shown that there are any common witnesses, similar patterns of conduct, or similar applicable law, the judge noted.

"The independent counsel's explanation of how this indictment is 'connected with' the original grant was a relationship spanning six degrees of relationship," Robertson wrote. "I find the asserted connection too attenuated and conclude that neither the tax referral order nor the indictment is 'connected with' or 'demonstrably related to' the original grant."

The Bill of Rights

Now, let's look at other areas in which Starr has violated the rights and protections guaranteed by the Constitution's Bill of Rights:

First Amendment: Starr has subpoenaed news organizations seeking information about their contacts with the White House; he subpoenaed bookstores for information about books purchased by Monica Lewinsky, he interrogated former reporter and White House adviser Sidney Blumenthal about what people in the White House were saying about Starr's office.

And, in a clear violation of the First Amendment's protection of speech and of the right to petition the government, Starr subpoenaed Bob Weiner, an employee of the White House's drug policy office, after Weiner had made telephone calls from his home to fellow Democrats in Maryland urging that the local prosecutor should investigate Linda Tripp for illegally taping telephone conversations.

Fourth Amendment: Starr accepted and has used the tapes of telephone conversations made by Linda Tripp in violation of Maryland's wiretap statute. Illegal wiretapping and electronic surveillance are violations of the Fourth Amendment's protection against unreasonable searches and seizures, and, under Maryland law, it is not only illegal to tape telephone calls without the other party's consent, but it is also unlawful to *disclose* or to *use* the contents of any illegal taping.

Fifth Amendment: The Fifth Amendment is the cornerstone of criminal justice, and Starr has violated at least three of its provisions:

1. Grand jury abuse: Starr has used his grand juries to browbeat and intimidate witnesses in an effort to force them to "cooperate," and he has leaked secret information from grand juries to create an aura of guilt around his targets.

2. Due process of law: One could write a book on this alone, as regards Starr's operation. Some of the most egregious violations of due process are selective prosecutions (targeting people solely because of their association with President or Mrs. Clinton), and vindictive prosecutions—such as the second indictments against Susan McDougal and against Webster Hubbell in retaliation for their refusal to cooperate by giving false testimony against the President.

3. Self-incrimination: Starr was slapped particularly hard by Judge Robertson for attempting to force Hubbell to be a witness against himself in violation of the Fifth Amendment's prohibition against compelled self-incrimination. While Hubbell was in prison for the first indictment (involving overbilling of his law firm's clients), Starr had subpoenaed all of Hubbell's business and tax records. Hubbell refused to comply, invoking his Fifth Amendment privilege against self-incrimination. Starr obtained a court order forcing Hubbell to produce the records under a grant of immunity from prosecution, and then used the records to build an entirely new case against Hubbell et al.

In his July 1 ruling, Judge Robertson said that Starr's subpoena of Hubbell's tax records was "the quintessential fishing expedition." He said that the documents were subpoenaed for one case (an investigation of obstruction of justice) and were used to build an entirely different case (the tax case). "Mr. Hubbell was thereby turned into the primary informant against himself," the judge declared.

Sixth Amendment: The failure to disclose exculpatory evidence concerning witnesses implicates both the Fifth Amendment (due process) and the Sixth Amendment (the right to call and confront witnesses). Starr's office was aware of frequent contacts between his key witness, David Hale, and paid agents of the *American Spectator* magazine and Richard Mellon Scaife, and Starr has acknowledged that these contacts were "FBI supervised."

The Sixth Amendment also guarantees the right to "assistance of Counsel" in one's defense. This is the constitutional grounding for the attorney-client privilege, which Starr has invaded many times. Most egregious were his efforts to obtain the confidential attorney notes regarding Vincent Foster. Starr also violated the Sixth Amendment by having his agents approach and interrogate Monica Lewinsky outside the presence of her lawyer, when they knew she was represented by counsel, and then later by issuing a subpoena to Lewinsky's first lawyer, as well as to the President's lawyers.

Eighth Amendment: The Eighth Amendment prohibits "cruel and unusual punishments." In an effort to force Whitewater defendant Susan McDougal to cooperate and give false testimony, Starr's office caused McDougal to be incarcerated for contempt of court under barbaric conditions, which her lawyer described as "torture." On June 25, a Federal judge in Little Rock, Arkansas granted her early release for medical reasons—belatedly righting a gross injustice perpetrated by Starr.