

NLWJC- Kagan

Counsel - Box 004 - Folder 010

Whitewater [1]

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Elena Kagan

Subseries:

OA/ID Number: 8248

FolderID:

Folder Title:

Whitewater

Stack:

V

Row:

7

Section:

2

Shelf:

8

Position:

3

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
002. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
003. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
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009. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
010. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
011. list	Phone No. (Partial) (2 pages)	12/14/1995	P6/b(6)
012. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
013. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)

COLLECTION:

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 Counsel's Office
 Elena Kagan
 OA/Box Number: 8248

FOLDER TITLE:

Whitewater [1]

2009-1006-F
ke691

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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015. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
016. memo	Phone No. (Partial) (1 page)	12/13/1995	P6/b(6)
017. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
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PAULA B. SMITH
TIMOTHY L.S. SITZ

OF COUNSEL
WILLIAM R. KING
TITO MAZZETTA

December 26, 1995

Ms. Meg Greenfield
The Washington Post
1150 - 15th Street, N.W.
Washington, D. C. 20005

Dear Ms. Greenfield:

I have followed with great interest the dispute between the Senate Whitewater Committee and the attorneys for President Clinton. Therefore, I have written and am submitting to you a proposed Op-Ed article which I would appreciate your publishing in The Washington Post.

Sincerely yours,


Robert J. Lipshutz

RJL:sbb

Enclosure

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December 26, 1995

ROBERT J. LIPSHUTZ OF ATLANTA, GEORGIA, HAS BEEN A PRACTICING ATTORNEY FOR ALMOST 50 YEARS FOLLOWING THREE YEARS OF SERVICE AS AN OFFICER IN THE UNITED STATES ARMY DURING WORLD WAR II. IN 1977, 1978 AND 1979 HE SERVED AS COUNSEL TO THE PRESIDENT IN THE ADMINISTRATION OF PRESIDENT JIMMY CARTER.

December 26, 1995

THE RECENT DISPUTE BETWEEN THE WHITEWATER COMMITTEE OF THE UNITED STATES SENATE AND THE LAWYERS FOR PRESIDENT BILL CLINTON IS A MATTER OF GREAT IMPORTANCE TO THE AMERICAN PEOPLE.

"LAWYER-CLIENT PRIVILEGE"

THE DOCTRINE OF "LAWYER-CLIENT PRIVILEGE" IS NOT SOME ESOTERIC CONCEPT BUT INSTEAD IS ONE OF THE MOST IMPORTANT PROTECTIONS FOR ALL OF THE AMERICAN PEOPLE.

IF PRESIDENT CLINTON AND HIS ATTORNEYS WERE TO IGNORE THAT FUNDAMENTAL PROTECTION, IT COULD SET A PRECEDENT FOR THE UNDERMINING OF THIS SAFEGUARD FOR ALL AMERICANS IN COUNTLESS SITUATIONS.

IMAGINE THE HAVOC WHICH COULD BE WRECKED WHENEVER A PERSON HAS CONSULTED A LAWYER BUT THE LAWYER THEN WAS FORCED TO REVEAL THEIR PRIVATE DISCOURSE TO A THIRD PARTY:

- IN A DIVORCE SITUATION.
- IN A CRIMINAL ACCUSATION.
- IN A BUSINESS NEGOTIATION.
- IN PERSONAL FINANCIAL MATTERS.
- IN PERSONAL ESTATE PLANNING.
- IN ANY INVESTIGATION OF A UNITED STATES SENATOR, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, OR THE PRESIDENT.

THE "LAWYER-CLIENT PRIVILEGE" IS VITAL TO PROTECT EVERY AMERICAN CITIZEN AND MUST NOT BE BELITTLED OR UNDERMINED! IT IS A DOCTRINE WHICH HAS PROTECTED US FOR MORE THAN TWO HUNDRED YEARS, AND IT MUST BE DEFENDED WHENEVER IT IS ATTACKED.

"THE RIGHT OF A PRESIDENT TO CONFIDENTIAL COMMUNICATIONS WITH HIS STAFF AND OTHER ADVISORS"

THIS RIGHT OF CONFIDENTIALITY IS NOT SOME SELF-SERVING CONCEPT DESIGNED TO SHIELD A PRESIDENT OF THE UNITED STATES FROM CRITICISM. INSTEAD, IT IS A VITAL DOCTRINE WHICH ALLOWS OUR PRESIDENTS TO GET THE BROADEST RANGE OF ADVICE FROM THOSE WHOM HE CONSULTS, IN ORDER TO ARRIVE AT THE BEST POSSIBLE DECISIONS FOR OUR NATION.

WERE SUCH ADVICE NOT SO PROTECTED, MUCH OF HIS ADVICE WOULD BE LESS CANDID, MORE FEARFUL, OR MEANINGLESS. WITHOUT MANY SOURCES OF SUCH UNENCUMBERED ADVICE, NO PRESIDENT WOULD BE ABLE TO MAKE THE BEST DECISIONS OF WHICH HE OR SHE IS CAPABLE.

ALTHOUGH THIS IMPORTANT DOCTRINE WAS USED IMPROPERLY BY RICHARD NIXON, IT HAS BEEN PROPERLY INVOKED BY PRESIDENTS FORD, CARTER, REAGAN AND BUSH AS WELL AS BY EARLIER PRESIDENTS.

AND IT HAS BEEN RESPECTED BY EARLIER CONGRESSES AND UPHELD BY THE UNITED STATES SUPREME COURT.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

15-Dec-1995 01:37pm

TO: Elena Kagan

FROM: Mark D. Fabiani
 Office of the Counsel

SUBJECT: RE: Idea

not a good idea if he hopes to get it published in the new york times. my personal judgment is that the times piece is more helpful to us -- but the congressional folks here may disagree with that. i'll ask. mdf.

JAKE STEIN - 737-7777

If intention is that it's privileged,
- factual issue

↓
3rd persons
doesn't mean
there was a
waiver.

Senate - Absolutist position.

If p were present ... Then a waiver.

You should win eventually.

Fax - papers.

- DK should
leave w/
Ambrey the
essence of
what his
position is

Available for comment

• better - ignores
aspect of Pres

• undermines imp
govt int.

Need to shop
it around

Paul Rothstein -
If legit info

If we can draft
an op Ed, he
might be able to
do it:

of int rule.

When reps of many clients
meet, doesn't always destroy

Key: common legal int →
confidential

issue - whether WH has
legit int in what
was being discussed.

dealing w/ public all the
time / press etc.

stray suit for us.

some people saying:
crime/fraud.
but what was being
discussed was retroactive
no - ev of future misconduct.

Yale — Burke Marshall
~~Andy~~ Gewirtz

Stanford — Barbara Babcock ←
Paul Brest
Gerry Gunther

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2009-1006-F
ke691

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Sam Gross Michigan

P6/(b)(6)

[0017]
Neubauer

Perin
Guthrie

Sullivan - left msg ✓

~~Miller~~

P6/(b)(6)

P6/(b)(6)

P6/(b)(6)

✓ Rob Weiner
Dan Grimmen - Christen
(argued upjohn)

P6/(b)(6)

~~Charlie~~

P6/(b)(6)

~~Bob~~

P6/(b)(6)

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Op Ed

1. Bill Jeffress [P6/(b)(6)] [002]

2. Charles Kiefer (Legal Times) [P6/(b)(6)]

3. Paul Rothstein - if we'll write/shop

4. Lifshitz (if we'll draft)

5. Rob Weiner - if draft

? 6. Miller - if draft

? 7. Hazard - if draft.

Anal. for comment

1. Jake Stein [P6/(b)(6)]

2. Bill Jeffress [P6/(b)(6)]

3. Charles Kiefer

4. Bob Lifshitz [P6/(b)(6)]
fax -

5. Paul Rothstein [P6/(b)(6)] (to Fri)
662-9094 (co)
[P6/(b)(6)] (to Fri)

6. Arthur Miller - Harvard [P6/(b)(6)]

7. Ankil Amar - Yale [P6/(b)(6)]

ZPs to Geoff Hazard
then - figure out how to
use.

Stint to ~~Geoff~~ Arthur Miller
Ankil Amar -
Thinking about writing an
op.ed.

Thinking

- 1. Charles Nessen
- 2. Kathleen Sullivan
- 3. Dan Grimmer

8. Steve Gillers
plausible to can -
overcoming 2 burdens.

9. Rob Weiner.

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Hazard

Wt Lawyers - rep'ing P in all capacity
priv " - " " personally

It both

Assume 2 diff capacities.

Mt of mutual concern

Conf. is not impaired - if mt of com. int.

Tricky q: whether lawyers for P are
rep'ing P in a capacity case wh.
they have an AC priv w/rt Justice
Dept or Conf.

Point assume they do.

All have assumed this.

WHE - comments covered by AC priv -
covered ~~by~~ other organs of govt.
w/rt



Duit has time to do today - put in 2 HPs -
fax to my home -

P6(b)(6)

[003]

Can we a fax to get
it back to you.

give them
piece of paper -

I'll do written stmt.
op ed - glad to
lhr to White House(?)

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~~Arthur Miller~~

Arthur Miller

View coincides w/ yours.

} [Not evidence/civil procedure.]
→

Can we give your name?

Not a mere technicality
In spite of exhaard appetite
for info, there
is a competing
value

Fax #

~~417~~

P6/(b)(6)

[004]

Talk to Steve →
↓
P6/(b)(6)

(he'll give fax #
of wherever I am)

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Atkii Amar

Yes!

- Bob Lipsitz -

A-C privilege. / not exec privilege.

I had communs
w/ private lawyer
when I was counsel.

↓ draft up type
of thing.

↓
[for of ed.]

P6/(b)(6)

[005]

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Nesom

P6/(b)(6)

[006]

Should be a privilege.



dig name / think name
about public/private line.

if this were a mtg amongst
govt lawyers → priv
priv lawyers → priv.

tax

P6/(b)(6)

- Kathleen Sullivan -

Fax -

415-725-8456

Will get back to me.

ROB WEINER

It def priv
{ with Counsel - unusual role.
→ giving advice to the Pres - as Pres

strikes me as easy to legally.
I don't see the argument on the
other side.

analogous to
sit. where 2
sep As. - at
the very least.
Here, saw indiv
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capacities -
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DRAFT sneaking

212-715-1399
conf v. 34A.

- Dan Grimmer -

← Don't know enough about facts

could speak more generally -

Cwright

Messyered

~~XXXXXXXXXX~~

Paul Gewirtz

Burt Neuborne

Dn't know facts enough.

govt EEs → priv lawyer.
↳ not sure all priv'd.

If public p. were speaking to priv
counsel in ~~public~~ capacity.
lawyerly

Integrity turns on knowing what
happened in v. m.

Judge
must
check.

NYT editorial bd -
Dorothy Samuels.

In camera -
that must be.

Questions for Kathy

- why is he so upset?
- what do we do now? all? 14?
- does the change make sense?
- how much would it cost?

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007. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)

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Whitewater [1]

2009-1006-F

ke691

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

1. Call Stein back later in apt - op ed? ^{for the report}
(b)(6) [007]

Looking at question:

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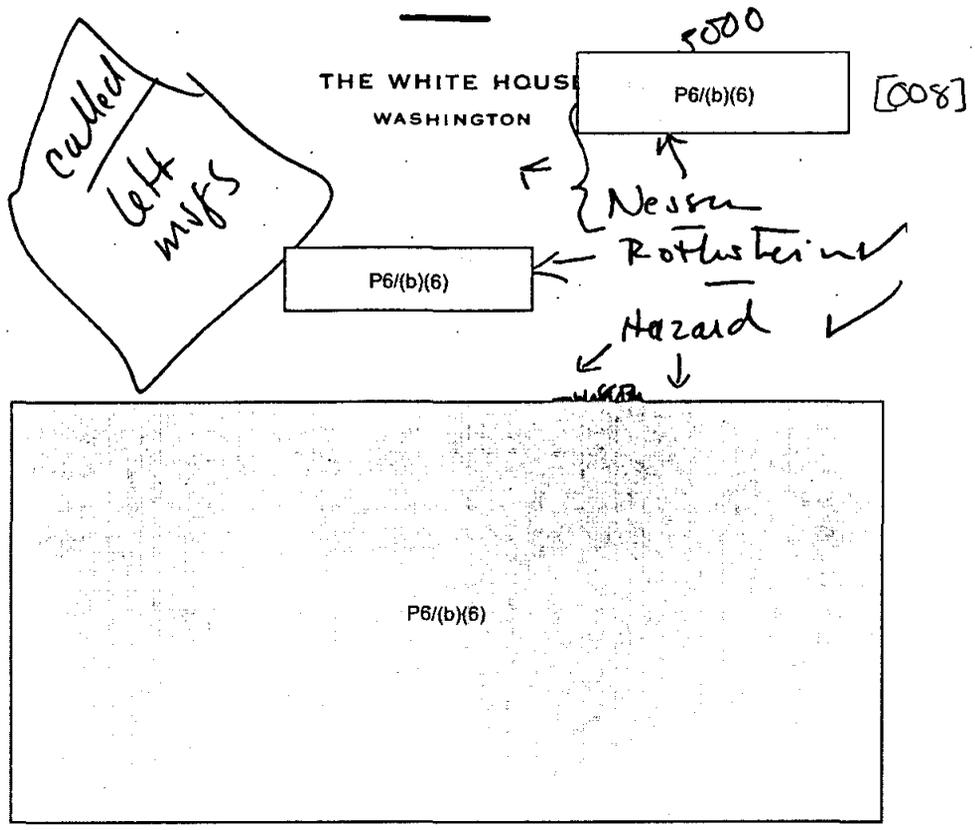
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Nabokov -
Nikolai (son immunity)

Mark
47904

Talked to
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~~HE~~
Rob Weir

P6/(b)(6)

~~FA~~
~~FA~~
~~FA~~

G. Hazard

P6/(b)(6)

[000]

TALKING POINTS ON SENATE COMMITTEE'S SUBPOENA

- The subpoena issued by the Special Senate Committee Regarding Whitewater seeks the production of notes protected by the attorney-client privilege. In so doing, it invades the relationship between the President and his private counsel, seeking to deny him a right to a confidential relationship with his lawyer shared by all Americans.
- The notes at issue were taken by one of the participants in a meeting among the President's private attorneys and his senior White House legal advisors.
- Under common principles of attorney-client privilege law, such a meeting and any notes taken there are privileged because all of the attorneys have a confidential relationship with the President, and the public and private attorneys, though representing the President in different capacities, share a common interest.
- Like lawyers representing private clients, government lawyers representing officials or agencies are subject to an attorney-client privilege that protects from disclosure communications furthering that representation. This privilege applies in full to lawyers serving the Office of the Presidency.
- When lawyers representing separate clients have a common interest, communications between those lawyers (even if the clients themselves are not present) fall within the privilege. The same principle must apply when lawyers represent the President in two separate capacities -- some in his personal capacity and some in his official capacity. Communications between these lawyers, so long as intended to be confidential, will be privileged as to matters of mutual interest.
- The public and private counsel attending the meeting at which the notes were taken shared a common interest: discussion among these lawyers was essential to both representations, as it often will be when the President faces, as he often does, matters that are some blend of the personal and the official. If nothing else, these lawyers had to divide responsibility for representing the President in this matter; they also needed to coordinate their activities, in order for each to provide the President with the best possible representation, to the extent their interests coincided.
- A rule preventing the President's public and private counsel to the President from communicating in confidence fails to recognize the inevitable connection between the President's public and private roles. There cannot be an unbreachable wall between public and private counsel because there is no

unbreachable wall between the public and private President.

- Although the President is not asserting executive privilege, it is clear that a rule preventing the President's public and private counsel from communicating in confidence would undermine important governmental interests. If public counsel cannot communicate with private counsel, the advice that public counsel gives to the President, as to his own and his staff's official actions, inevitably will suffer. For example, public counsel will not be able to provide the best possible advice on such issues as how best to ensure governmental cooperation with congressional and other investigations; the invocation of any applicable privileges; and the appropriate handling of press and public inquiries.
- The Senate's subpoena thus infringes on both the President's rights and the nation's interests. A court of law will not uphold it.

GEOFFREY C. HAZARD, JR.

TRUSTEE PROFESSOR OF LAW
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TELEPHONE: (215) 248-3940
FAX: (215) 248-4707

December 14, 1995

John M. Quinn
Counsel's Office
The White House
Washington, D.C.

Dear Mr. Quinn:

You have asked my opinion whether the communications in a meeting between lawyers on the White House staff, engaged in providing legal representation, and lawyers privately engaged by the President are protected by the attorney-client privilege. In my opinion they are so protected.

The facts, in essence, are that a conference was held among lawyers on the White House staff, and lawyers who had been engaged to represent the President personally. The conference concerned certain transactions that occurred before the President assumed office but which had significance after he took office. The governmental lawyers were representing the President *ex officio*. The other lawyers were retained by the President to provide private representation to him. On this basis, it is my opinion that the attorney-client privilege is not waived or lost.

A preliminary question is whether the attorney-client privilege may be asserted by the President, with respect to communications with White House lawyers, as against other departments and agencies of Government, particularly Congress and the Attorney General. There are no judicial decisions on this question of which I am aware. However, Presidents of both political parties have asserted that the privilege is thus effective. This position is in my opinion correct, reasoning from such precedents as can be applied by analogy. Accordingly, in my opinion the President can properly invoke attorney-client privilege concerning communications with White House lawyers.

The principal question, then, is whether the privilege is lost when the communications were shared with lawyers who represent the President personally. One way to analyze the situation is simply to say that the "President" has two sets of lawyers, engaged in conferring with each other. On that basis there is no question that the privilege is effective. Many legal consultations for a client involve the presence of more than one lawyer.

Another way to analyze the situation is to consider that the "President" has two legal capacities, that is, the capacity *ex officio*--in his office as President--and the capacity as an individual. The concept that a single individual can have two distinct legal capacities or identities has existed in law for centuries. On this basis, there are two "clients," corresponding to the two

legal capacities or identities.

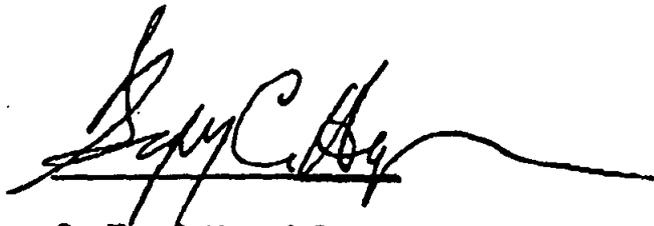
The matters under discussion were of concern to the President in each capacity as client. In my opinion, the situation is therefore the same as if lawyers for two different clients were in conference about a matter that was of concern to both clients. In that situation, in my opinion the attorney-client privilege is not lost by either client.

The recognized rule is set forth in the Restatement of the Law Governing Lawyers, Section 126 (Tent. Draft No. 2, 1989), as follows:

If two or more clients represented by separate lawyers share a common interest in a matter, the communications of each separately represented client...

(1) Are privileged as against a third person...

Inasmuch as the White House lawyers and the privately engaged lawyers were addressing a matter of common interest to the President in both legal capacities, the attorney-client privilege is not waived or lost as against third parties.

A handwritten signature in black ink, appearing to read "Geoffrey C. Hazard, Jr.", with a long horizontal flourish extending to the right.

Geoffrey C. Hazard, Jr.

THE WHITE HOUSE
WASHINGTON

Na
6/20/26

Natalie

Chair of Fed Cts Court
or City Bar Assn of NY
→ Ed Shallet

DeBevoise + Plimpton
212-909-6295

Press calls

WILL DO OP
ED

Yale - Burke Marshall ✓

Stanford - Gerry Gunther ✓
John Hart Gly
Barbara Babcock
Paul Brest

NYU - Norman Dawson

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TIMOTHY L.B. SITZ

OF COUNSEL
WILLIAM G. KING
TITO MAZZE LIA

**THE RIGHT OF A PRESIDENT TO CONFIDENTIAL
COMMUNICATIONS WITH HIS STAFF AND OTHER ADVISORS**

THIS RIGHT OF CONFIDENTIALITY IS NOT SOME SELF-SERVING CONCEPT DESIGNED TO SHIELD A PRESIDENT OF THE UNITED STATES FROM CRITICISM. INSTEAD, IT IS A VITAL DOCTRINE WHICH ALLOWS OUR PRESIDENTS TO GET THE BROADEST RANGE OF ADVICE FROM THOSE WHOM HE CONSULTS, IN ORDER TO ARRIVE AT THE BEST POSSIBLE DECISIONS FOR OUR NATION.

WERE SUCH ADVICE NOT SO PROTECTED, MUCH OF HIS ADVICE WOULD BE LESS CANDID, MORE FEARFUL, OR MEANINGLESS. WITHOUT MANY SOURCES OF SUCH UNENCUMBERED ADVICE, NO PRESIDENT WOULD BE ABLE TO MAKE THE BEST DECISIONS OF WHICH HE OR SHE IS CAPABLE.

ALTHOUGH THIS IMPORTANT DOCTRINE WAS USED IMPROPERLY BY RICHARD NIXON, IT HAS BEEN PROPERLY INVOKED BY PRESIDENTS FORD, CARTER, REAGAN AND BUSH AS WELL AS BY EARLIER PRESIDENTS. AND IT HAS BEEN RESPECTED BY EARLIER CONGRESSES AND UPHELD BY THE UNITED STATES SUPREME COURT.

Bob -
Wonderful!
ELENA

THE WHITE HOUSE

WASHINGTON

December 14, 1995

Professor Arthur R. Miller
Harvard Law School
Cambridge, MA 02138

Dear Professor Miller:

I am faxing, with this letter, some talking points summarizing the Administration's position on the subpoena issued by the Senate Whitewater Committee. We are providing these to a number of people whom we hope will write opinion pieces supportive of that position.

I very much enjoyed speaking with you yesterday. I do hope you can help us on this matter. If you need any help with respect to placing an op ed piece, please call Mark Fabiani, Special Associate Counsel to the President, at 456-7909.

Very truly yours,



Elena Kagan
Associate Counsel
to the President

THE WHITE HOUSE
WASHINGTON

December 14, 1995

BY TELECOPY

Michael Chertoff, Special Counsel
United States Senate
Special Committee to Investigate Whitewater
Development Corporation and Related Matters
534 Dirksen Building
Washington, D.C. 20510-6075

Dear Mr. Chertoff:

We continue to believe that the proposal set forth in the Williams & Connolly submission should be sufficient to resolve the Committee's interest in the November 5, 1993 meeting among lawyers for the President. And, as you are certainly aware, our concern about disclosing the Kennedy notes has not had to do with the notes themselves, but instead the possibility that disclosure would result in an argument that there had been a waiver (in whole or in part) of the President's privileged relationship with counsel. We have therefore been working from the beginning to devise a solution that would address both the Committee's interest in disclosure and the President's right to confidential communications with counsel.

To that end, I am authorized to make the following alternative proposal. Specifically, we would be willing to turn over to the Committee the notes taken by Mr. Kennedy at the November 5, 1993 meeting under the following conditions:

- (1) The Committee would agree that the November 5, 1993 meeting was a privileged meeting.
- (2) The Committee would agree that it would not argue, in any forum, as a basis for obtaining information about other counsel meetings or for any other reason, that any privileges or legal positions had been waived by permitting inquiry into the November 5, 1993 meeting.
- (3) The Committee would limit its testimonial inquiry about this meeting to the White House officials who attended it.
- (4) The Committee would secure the concurrence to these terms of other investigative bodies, including the Independent Counsel, other congressional committees with investigatory or oversight interest in the

Michael Chertoff, Special Counsel
December 14, 1995
Page 2

Madison/Whitewater matter, the Resolution Trust Corporation (and its successor), and the Federal Deposit Insurance Corporation.

(5) Pursuant to Section 2(c) of S. Res. 120, the Committee would adopt procedures to ensure that any interest the Committee may develop in other matters covered by the attorney-client privilege for the President will be pursued, if at all, on a bipartisan basis.

Please contact me promptly if the Chairman is willing to take the notes and related testimony in accordance with the conditions set forth.

Sincerely yours,



Jane C. Sherburne
Special Counsel to the President

cc: Richard Ben-Veniste, Minority Special Counsel

A14

REVIEW & OUTLOOK

Will Sarbanes Filibuster?

Today marks a key milestone in the White House defense strategy on Whitewater. Up in New Hampshire, it's the filing deadline for the February primaries. The defense team has managed to obstruct and delay long enough that President Clinton will face no substantial challenge from within his own party. The next objective is to deal with Republicans by stalling everything past next November's elections.

Let's call it the Paula Jones ploy. The President won a delay of her sexual harassment case until after he leaves office, and is appealing the judge's ruling that deposition can start now. Why shouldn't this work with Whitewater? Promise cooperation as long as you can, but drag out legal proceedings as long as you can. Hillary admirer Judge Henry Woods will surely be overturned in ruling that Independent Counsel Kenneth Starr lacks jurisdiction in one case involving Arkansas Governor Jim Guy Tucker, but it does run the clock. Governor Tucker now wants his other case delayed while he litigates with the New York Times over access to a reporter's notes.

In response to a Congressional subpoena for notes on a suspicious-looking meeting on November 5, 1993, meanwhile, the White House first offers an attorney-client privilege claim that most lawyers rate in the tenuous-to-frivolous range. For starters, Mr. Clinton wasn't party to the meeting itself, normally a condition for such privilege claims, whether with a lawyer or in the confessional.

Then the White House dangles a claim of executive privilege, a more serious claim even though it lost for Richard Nixon. But it hasn't officially invoked executive privilege yet; two sets of litigation take longer than one. Finally, it faxed a deal to the D'Amato Whitewater Committee yesterday in which an offer to divulge the notes was freighted with dilatory restrictions. The committee rejected this ploy and voted to enforce the subpoena.

As the subpoena wends its way through the Congressional process, Senator Paul Sarbanes has to decide whether to join the Paula Jones ploy. On the Whitewater Committee, he's been the point man of the Democratic defense, and when the subpoena resolution reaches the Senate floor, probably sometime next week, he has the option of conducting a filibuster. It would guarantee more delay, and if he holds enough Democrats he could

block the resolution permanently.

Sen. Sarbanes and other Democrats, though, will have to consider whether the Paula Jones ploy might backfire. Newt-bashing didn't save the day in San Jose on Tuesday, where a concerted anti-Gingrich campaign left Republican Tom Campbell with 59% of the vote in a district where George Bush got 30%. Do Congressional Democrats really want to lash themselves to Bill Clinton's Whitewater mast, or is it time to look for the lifeboats?

Defending attorney-client or executive privilege won't be much fun. A filibuster would give us time to look up all the Sarbanes quotes on the subject from the Watergate era. Then there's the merit of the claim. The White House says the purpose of the November 5 meeting was to brief the new private counsel for the Clintons on a "torrent" of press coverage and other matters relating to Whitewater. But take a look at the chronology below—all the action leading up to the meeting took place before heavy press coverage of Whitewater. And further revelations keep coming; the November 5 meeting itself was disclosed only late last month through questioning of Mr. Lindsey by Sen. Lauch Faircloth. If William Kennedy's notes on the meeting include something like "get Jean Lewis off the Madison case," we have a conspiracy to obstruct justice.

Just last week, too, the White House reported that the mystery phone number (202) 628-7087 was a trunk line bypassing the White House switchboard in case it was overloaded "and may have been provided to certain individuals for that purpose." In other words, Hillary Clinton was bypassing the switchboard to call into the White House the night of Vincent Foster's death. And we learned that Whitewater documents were passed from Mr. Foster to Webster Hubbell during the Presidential campaign, and supposedly were stored in Mr. Hubbell's Washington basement. When they were delivered to Clinton attorney David Kendall, he returned them to the Rose Law Firm, where they later came to the attention of Senate investigators. Mr. Kendall's initiative in this matter suggests that Arkansas legal habits are a little much for a firm like Williams & Connolly.

This is also a point for Congressional Democrats to ponder in deciding whether to join the Paula Jones ploy. If they filibuster, it will be a wondrous spectacle; if they don't, their silence will have an eloquence of its own.

Whitewater, 1993

MAY 5: Small Business Administration Administrator Erskine Bowles informs White House Chief of Staff Thomas "Mac" McLarty of confidential criminal fraud investigation of Little Rock municipal judge David Hale, owner of SBA-charted Capital Management Services.

JULY 21: In Little Rock, the FBI executes a search warrant on Mr. Hale's office.

JULY 22: White House Counsel Bernard Nussbaum and Maggie Williams, chief of staff to Hillary Clinton, search the office of the late White House Deputy Counsel Vincent Foster for a second time. Months later, it is revealed that Whitewater files were removed from the office.

AUG. 16: Paula Casey, a longtime associate of the Clintons, takes office as U.S. Attorney for the Eastern District of Arkansas.

SEPT. 20: Ms. Casey turns aside plea bargain attempts from Mr. Hale's lawyer, Randy Coleman. Mr. Coleman had offered to share information on the "banking and borrowing practices of some individuals in the elite political circles of Arkansas."

Senior White House aide Bruce Lindsey discusses the Hale matter with Clinton commodities adviser James Blair.

SEPT. 21: An assistant U.S. attorney in Ms. Casey's office notifies SBA Administrator Bowles of the planned indictment of Mr. Hale.

SEPT. 29: Treasury Department General Counsel Jean Hanson warns Mr. Nussbaum about confidential criminal referrals the Resolution Trust Corp. plans to issue in the case of Madison Guaranty

Savings & Loan. The referrals mention the Clintons and Arkansas Gov. Jim Guy Tucker.

OCT. 4 or 5: Mr. Lindsey informs the president about the referrals. He later tells Congress he did not mention any specific targets of the referrals.

OCTOBER 6: President Clinton meets with Gov. Tucker at the White House.

OCT. 14: A meeting is held in Mr. Nussbaum's office with senior White House and Treasury personnel to discuss the RTC and Madison.

OCT. 27: Paula Casey rejects the RTC's first criminal referral in the Madison case.

NOV. 5: White House lawyers meet with the Clintons' personal attorneys at the offices of Williams & Connolly. Present for the White House:

Mr. Nussbaum, Mr. Lindsey, a presidential aide not attached to the Office of White House Counsel, Associate White House Counsel William Kennedy III, a former partner in the Rose Law Firm, and Associate White House Counsel Neil Eggleston. Present as personal lawyers: David Kendall of Williams & Connolly, lead attorney, Little Rock attorney Stephen Engstrom, and Denver attorney James Lyons, author of the 1992 "Lyons Report" on the Clintons' finances.

NOV. 9: Jean Lewis, the lead RTC investigator on Madison, is abruptly removed from the case.

In Little Rock, Paula Casey recuses herself from the Madison probe.

NOV. 16: Mr. Eggleston reaches out to a political appointee at the SBA for confidential papers on the Hale investigation.

Baywatch

It was a weird two days earlier this week in San Francisco. A sinkhole opened up and swallowed a million-dollar mansion, and then a typhoon in all but name struck. Then on Tuesday, Willie Brown was elected mayor.

"Street lights, dog-doo and parking meters are not my cup of tea," the former Sun King of the California assembly told an interviewer last year. But when term limits, enacted by California's voters, put an end to his 31-year Versailles reign in the legislature, Speaker Brown looked around and saw no other winnable political job in sight.

By contrast, incumbent Mayor Frank Jordan, who lost in Tuesday's runoff, is an ex-police chief and lifelong San Franciscan who calls himself the "citizen mayor." And until she placed third in November's first round of voting, former Clinton official and lesbian activist Roberta Achtenberg was running on pointedly similar themes, talking about "empowering neighborhoods" and maintaining "clean government." Her target in all this, logically, was Mr. Brown.

Yet when Ms. Achtenberg was knocked out by a narrow margin in the first round, she called on her 27% of the electorate—considered a good proxy for much of the the gay vote—to support none other than Willie Brown, calling him "the humane, progres-

sive" candidate. What happened?

Mr. Brown may be a political carpetbagger, but during his years in Sacramento he made a point of cultivating gay interest groups along with all the others. This week, he cashed in those chits at the only place they were worth anything electorally, and now San Francisco has Willie Brown.

One self-described gay voter wondered in a letter to a local paper why the powerful gay community should follow Ms. Achtenberg in abandoning its interest in good municipal government to affirm a group-think litmus test? "Gay and lesbian supporters of Willie Brown (and possibly Roberta Achtenberg herself) just don't get it. They think that Achtenberg supporters were only supporting her because she is a lesbian, so we should naturally be willing to jump right on the Willie bandwagon. Why should we? . . . There is no good reason that a person should be involved in politics for 31 years."

San Francisco's prosperous, rooted gay community has a keen interest in seeing that the city's problems are well managed, and they certainly have the clout, clout that their fellow San Franciscans have largely learned to be comfortable with. It's time for their political leaders to discover a new litmus test—a commitment to making government work.

Call Hazard -
change a couple of sentences
~~to~~ refer to edit.
disap⁺ree
Then ⁺letter.

Then call Fabiani -

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Paul Gewirtz

(b)(6) (u) [010]

203-432-4961 (o)

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Elma -

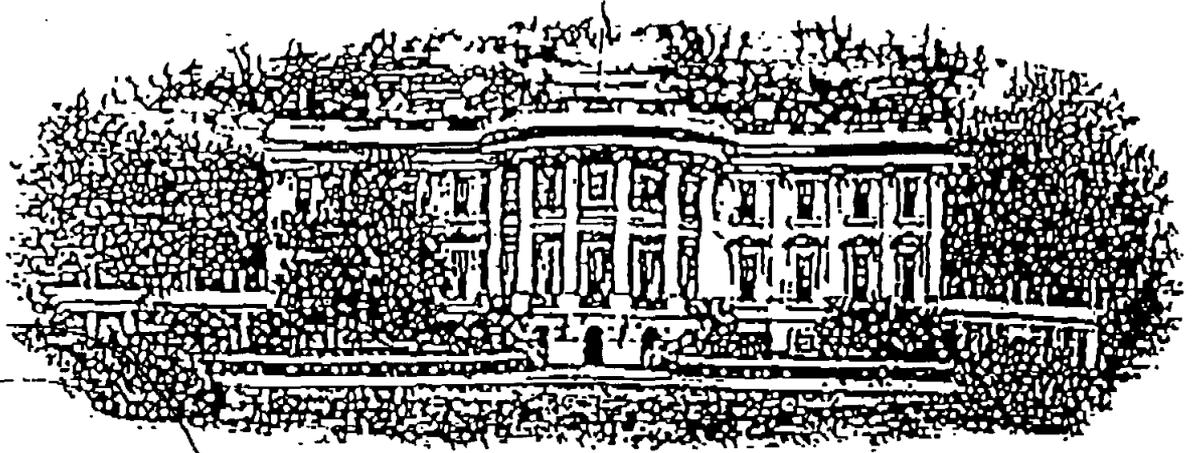
Have all those

folks seen on

papers? -

June 4.

The White House



COUNSEL'S OFFICE

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**NOMINATIONS OF WILLIAM H. REHNQUIST
AND LEWIS F. POWELL, JR.**

*Rehnquist asserts that
OLC Memos are
protected by
A-C privilege.*

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

NOMINATIONS OF WILLIAM H. REHNQUIST, OF ARIZONA, AND
LEWIS F. POWELL, JR., OF VIRGINIA, TO BE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

NOVEMBER 3, 4, 8, 9, AND 10, 1971

Printed for the use of the Committee on the Judiciary



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Mr. REHNQUIST. Senator, I think that goes beyond the bounds of simply my present view as to the comments I made in 1957 and since it is so obviously something that could come before the Supreme Court, I don't think I ought to answer it.

Senator BAYH. It seems to me that would be the purpose of the whole program espoused in Phoenix at the time, not just to say that you had a percentage of Chicanos and Blacks sitting in your classroom, to provide quality education. That is why I think the question is meaningful in terms of your original opposition. It is too easy simply to oppose busing over long distances, which is a very inefficient way to provide educational opportunities. I would concur with that. But to suggest that that is the only reason for busing, the only way it can be utilized, I think is not consistent with the facts.

Mr. REHNQUIST. I think I will stand on my earlier statement.

Senator BAYH. The third question from Senator Hart:

Returning to the May Day demonstrations, Senator Hart wants to follow up on one point Senator Kennedy raised yesterday, leaving aside the question of whether sweeping arrests were made without probable cause, the second point is that because a decision had been made to dispense with even the field arrest procedures, it soon became clear to most observers that the overwhelming bulk of the arrestees couldn't possibly be prosecuted. There was no proper means of indicating who had arrested them or for what offense or in what location. In fact, random assignment of officers as the arresting or complaining policemen was made at the District of Columbia stadium for a number of the arrestees.

Didn't it concern you sufficiently to speak up about it and even after it had become clear they couldn't be lawfully prosecuted, many youngsters were still detained in deplorable conditions and after release their cases were not dropped until the prosecution was in effect kicked out of court by the U.S. court?

Didn't that bother you at all?

Mr. REHNQUIST. I have to assume it is a hypothetical question, although some elements have certainly been demonstrated to the satisfaction of the local courts here. I think some of them are assumptions. But speaking to it as a combined factual and hypothetical question, I did not make any effort to intervene in the matter after the turmoil for two reasons, I suspect:

One is that the Office of Legal Counsel is basically an advisory branch of the Justice Department. The operational divisions—the criminal division, civil rights division, internal security division—are the people who handle things in the courts and in this case, as a matter of fact, I think it was the District of Columbia Corporation Counsel and the U.S. attorneys who were handling it.

The second thing is that, as I recall, my last day in the office before I was down with this back trouble was sometime around May 8 or 9, and I was simply incapacitated from that time until early June.

Senator BAYH. Senator Hart wanted me to make one final comment for him in which he apologizes to you, Mr. Rehnquist, and to the committee, for not being able to be here personally this afternoon to hear the answers to these questions. He said: I thought they were important and I will study the record for the replies.

Now, let me, if I may, go back to where we were before we all had a much needed break for lunch.

It has been my opinion, and I am sure that I am not alone, that you have done a very honest and articulate job of fielding the questions that have been posed.

I have felt that you have handled them sincerely and I hope that you feel that we have asked them with equal sincerity.

It seems to me we are on the horns of a real dilemma, one that I am sure you recognize. You in your writings in the Harvard Law Record suggested that you felt that the nominee's philosophy is ground that should be considered, a subject that should be considered by the Senate, on a Supreme Court nominee.

The President, as few presidents have done before, stressed strongly at the time your name was submitted publicly that it was because of your philosophy and the philosophy of Mr. Powell that you were chosen. That was a compelling reason, that you are a judicial conservative. Before we were told the goal was for a strict constructionist. It has been difficult and perhaps meaningless to try to find any definition of those terms, but what the man himself believes. Because of the responsibility you have had, and it has been a significant one, at Justice Department, you felt compelled not to answer questions covering your own personal views on issues, respecting judicial philosophy, for several different reasons.

I would like to try to define these reasons to see if perhaps there isn't a way that we can deal with the responsibility I feel you have and I sense that you feel that you have, and the committee has, to try to explore in more detail what you really feel about some of these important fundamental issues.

You indicated that you felt it improper to give us your personal views with regard to certain matters where you have been involved in the Justice Department's activities, including in a number of cases refusing to answer questions on the grounds that you have been the Justice Department's official spokesman regarding these subjects either before congressional committees or in making public speeches at universities and other forums.

Could you tell us once again why do you feel, now that you are a Supreme Court nominee, hopefully soon to leave the executive branch, you still feel it is improper to give us your personal views, your personal views on these matters of concern?

Mr. REHNQUIST. I think that it is a generally applicable principle in the lawyer-client relationship that the lawyer does not express his personal view as to the merits of the client's case. I think that that has added applicability here because the effect, assuming that there were some areas in which I disagreed with the position I have publicly taken for my clients would be disadvantageous to them. For that reason I certainly don't feel I can simply answer in areas where I may be in agreement and say "No comment" where I am in disagreement, since the obvious implication would be that where I say "No comment" I am in disagreement; and I think this is less than fateful advocacy on the part of a lawyer toward his client.

Now, I realize that this puts the committee in something of a dilemma. I don't know that it is much different than that posed by the position of other nominees who have come here, but at any rate, I am simply unwilling now, even though I may be a Supreme Court nominee, to foresake what I conceive to be my obligation to my clients.

Senator BAYH. You see, I appreciate and respect that. I was asked by some of the members of the press if I felt that anyone who espoused radical views that you have articulated should be kept off the Supreme Court and I said that frankly I didn't know whether you held radical views. I felt that radicals, left and right, would not benefit the Court, and I thought some of the views that you had espoused could be interpreted by me as radical but that you are interpreting them as part of the Justice Department philosophy. This depending on the Government's self-restraint, this whole business, I feel is very bad. And thus—let me see if there isn't a way to break this log jam.

You feel very strongly about the attorney-client relationship, not only that this would be adverse to the client if you took a contrary position to your client's, but I suppose more basically the common law tradition of not disclosing matters of privilege that are shared by you and your client. Is that accurate?

Mr. REHNQUIST. Both are certainly involved in many of the cases.

Senator BAYH. Well, who is your client?

Mr. REHNQUIST. My clients are the Attorney General and the President.

Senator BAYH. As agent for the entire United States, I suppose, right?

Mr. REHNQUIST. Well—

Senator BAYH. In essence your client is the United States and—

Mr. REHNQUIST. No. That, Senator, I regard as a great oversimplification. Certainly as to the President, if one conceives him to be a client and have a lawyer which I don't think is the happiest expression of that relationship, he is, for all practical purposes, a popularly elected executive who is responsible to the Nation as a whole every 4 years for an electoral mandate.

The Attorney General is the President's appointee. He is responsible to the President. I am the President's appointee to a position where I am responsible both to the Attorney General and to the President.

The CHAIRMAN. I think if you took the position that the whole American people were your clients that you would be fired and you should be fired.

Senator BAYH. I would just as soon not comment on that profound statement.

Senator HRUSKA. Would the Senator allow a comment from the Senator from Nebraska?

Senator BAYH. I will be happy to.

Senator HRUSKA. Thank you.

Perhaps there isn't such a thing as anyone who represents all the people in America, either as a client or as a public official or in any other way; but isn't it true, Mr. Rehnquist, that anyone who represents the President as counsel is representing the man chosen to represent all of the people? As such it is important that he receive the best and most complete legal advice possible. And of necessity much of it must be confidential and bound by the attorney-client privilege.

Mr. REHNQUIST. Certainly the President is the closest thing in a Republican form of government that may be typified as representing the people.

Senator BAYH. Well, let me leave the question, then, that you really have as your clients the entire United States, but confine it to

your having as your client the Attorney General and, one step removed the President.

Am I wrong in suggesting that both at common law and statutorily, from the canon of ethics' standpoint, that the lawyer-client privilege is designed to help the client and not the lawyer? Is that privilege not one to the client and not from the client to the lawyer?

Mr. REHNQUIST. Certainly, the client is entitled to waive the privilege. The lawyer is not.

Senator BAYH. All right. Then we have two types of concern. One, your advocacy in those areas where you now might say that your personal opinion is different from the administration's and you don't want to disclose that because you might undercut your own client.

The second deals with revealing lawyer-client secrets. What relevance does that type of obligation have when the position of the client is already known publicly? In other words, if the administration and the Attorney General have said what they feel about certain elements of the basic tenets of the Bill of Rights, then why do you as a lawyer have any right to protect them from your involvement in that?

Mr. REHNQUIST. Well, I think to the extent that the Department, the administration, takes a public position, I feel free to discuss and have discussed my own personal contribution to that position—the New York Times case being an example; the preparation of the national security wiretapping brief being another example. But insofar as I may have been asked for advice in the process of making administration policy decisions upon which the administration has not taken a public position, there, I think, the lawyer-client privilege very definitely obtains.

Where the administration has taken a public position and the lawyer is asked not what advice did you give in connection with that position but basically do you personally agree with the position or not, there, I think, it is inappropriate to answer even though a public position has been taken.

Senator BAYH. You see, what concerns me is that not only in testimony before subcommittees of this committee, but also on several college campuses, you have made statements, and when some of us have tried to ask you about the statements you made specifically, each time you said you were speaking as a Justice Department spokesman—also that the audience expected a hard liner, I think, was another response you made to one of our colleagues. In these areas, we haven't been able to get Bill Rehnquist's philosophy for our consideration, and it is those areas that concern me.

You feel those are still protected by the attorney-client relationship?

Mr. REHNQUIST. Yes; I do.

Senator BAYH. That is the type of relationship that I suppose could be waived by the client, could it not?

Mr. REHNQUIST. I would think that it could be; yes.

Senator BAYH. And if some members of this committee would send to the Attorney General a letter asking him to let you have the opportunity to freely express your own personal philosophy, and we got his assent to that, or he gave his assent to you, then you would be free to give us the answers to some of the questions which heretofore you have not answered because of the lawyer-client relationship?

Mr. REHNQUIST. I would certainly think the privilege could be waived by the clients. Now, just who the client is, whether it is the President or the Attorney General, is something that would depend on the particular circumstances.

Senator BAYH. But at least it is not all the people of the United States? We have agreed on that?

Mr. REHNQUIST. I agree on that.

Senator BAYH. Well, would you have any strong objections if I were to send such a letter to both the Attorney General and the President? Is there anyone else who should be asked to participate?

Mr. REHNQUIST. Without suggesting at all my own impressions as to what a response would be, I would certainly have no objection to your sending—

Senator BAYH. I am not making this suggestion lightly. I think you are absolutely sincere and feel you have a responsibility to adhere to the lawyer relationship, but I must say I feel I have an equal responsibility to find a way to penetrate it. You have admitted that by your own writings. The President has admitted it, and yet because of the nuances of the lawyer-client relationship, we aren't really able to get what you feel.

Since you have no feeling that this would embarrass you, I will send such a letter to the President and to the Attorney General and await their reply. And I appreciate your patience in going through all of this with me.

Mr. Chairman, I will send this letter today before the sun goes down, because I don't want this to be "drug" out. I would like for it to be consummated quickly.

The CHAIRMAN. Don't worry; it is not going to be "drug" out. [Laughter.]

About this business, I think that is something this committee ought to pass on.

Senator BAYH. Pardon me?

The CHAIRMAN. I think that is something this committee ought to pass on. I am opposed to it.

Senator BAYH. Do you feel that as one Senator, one member of the committee, I don't have a right as an individual, Mr. Chairman?

The CHAIRMAN. Go ahead.

Senator HRUSKA. Will the Senator yield?

Senator BAYH. I will be glad to discuss this with any of you here, either privately or publicly. It seems to me this gives us an opportunity to let this gentleman express his own opinion.

The CHAIRMAN. This gentleman has been on the witness stand for the last 2 days and has acquitted himself very, very well.

Senator BAYH. I agree. I have said that to the press. I will continue to say it, but one of the problems he has been faced with, Mr. Chairman—

The CHAIRMAN. I am ready to vote.

Senator BAYH. Pardon me?

The CHAIRMAN. And I am ready to vote.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. Yes; I will be glad to get the thoughts of the Senator from Nebraska.

Senator HRUSKA. Mr. Rehnquist, the President in his comments, on your nomination designated you, I believe, as a judicial conservative. Is my recollection correct?

Mr. REHNQUIST. I believe it is, Senator.

Senator HRUSKA. Have you ever discussed with the President personally whether you are a judicial conservative or not, in the context of the nomination for the Supreme Court?

Mr. REHNQUIST. It is not that I have any hesitancy in answering the question, except as to the propriety of repeating any discussion with the President. Since there was none here, I suppose I need have no hesitancy; no, he did not.

Senator HRUSKA. Then, obviously the President, in referring to you and describing you as a judicial conservative, resorted to the same type of information that is presently available to the committee, to wit: Your testimony before committees, your statements, your articles, opinions that you have written, and the observations and the contacts and recommendations of different people who know you. Wouldn't that follow?

Mr. REHNQUIST. Certainly those sources were available to him.

Senator HRUSKA. Yes. Presumably he did consult all or some of these sources. We know, at least as much as he knew when he determined your philosophy. I submit we can do the same.

Now, as to the interest, the very intense interest, of some members of this committee in some expression from you as to your personal philosophy, I would venture the suggestion that this is a rather new-found interest. I recall very well in the committee room when another nominee for the Supreme Court was occupying the nominee's chair which you now occupy. I think for the better part of 2 days the Senator from North Carolina repeated question after question almost without limit, requesting insight into his personal philosophy on various subjects. The answer was always the same. And at one juncture, the nominee said:

Mr. Senator, I have talked to no one, no place, no how at no time about anything since I received this nomination.

Now, that was Thurgood Marshall.

I heard no expression of interest on the part of some other members of this committee in following up that line of questions with that nominee. Always before when a nominee has declined to answer a question when, in his own mind, for whatever reason, it has appeared inappropriate, this committee has honored that decision. This nominee should be treated no differently.

To require answers, aside from the attorney-client privilege, would not be fair to his future colleagues on the Court, assuming confirmation; it would not be fair to the litigants in the Court or to their respective counsel.

And so even if we have a letter here from all of the people of the United States saying it is all right for you to talk, Mr. Rehnquist, those considerations would not be solved, would they?

Mr. REHNQUIST. No; I don't believe they would.

Senator HRUSKA. And that has been my experience, reaching back to the time of Justice Brennan's confirmation. That has been the standard answer, and it has been accepted by this committee. I do

not believe that there is much hope of getting away from the immutable fact that there is a limit beyond which no nominee can in good conscience go in expressing opinions either personal or legal in character at this particular juncture.

As to the waiver, I don't see how you can get a waiver. There is no particular way it can be received nor issued.

Mr. REHNQUIST. Certainly past nominations have generally taken that position, and I think their refusals to answer that sort of question were probably justified.

Senator HRUSKA. They certainly have, and I think upon the reading of any of the prior hearings, that same decision, that same answer, will be found. It has always been accepted by the committee and also by the Senate.

I think you have been more liberal than some of the nominees before us in the extent that you have answered many questions. I would have asserted the answer, the historical answer, much sooner than you have done.

Thank you, Senator Bayh, for yielding to me.

Senator BAYH. Well, I appreciate getting the comments of my colleague from Nebraska. I am sure he is aware as a distinguished attorney that there is ample precedent. One has to look no farther than the American Bar Association Code of Professional Responsibilities, Code of Ethics, under canon 4, to find that the lawyer-client relationship can be waived by the client.

Now, perhaps the client in this circumstance would have no reason to waive it. I feel that this nominee has been struggling as we have been struggling to reconcile the differences which exist in our responsibility. They are not the same and I don't suggest that they are. I sat way down there when we had that particular nominee here and I think the Senator from Nebraska is absolutely right; that is exactly what happened. And I think all of us have to recognize that many times it all depends on whose ox is getting gored and we don't always face each problem with consistency as much as we would like to; we are bound up in our own ideas.

But I do not recall in my public life—that has not been nearly as long as my distinguished friend from Nebraska's—a President of the United States who has ever come on television and has made as the second prerequisite for his nominee, the second consideration, his judicial philosophy, and then to be confronted with that same nominee, a very distinguished legal scholar, who says himself:

Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Now, there are the horns of the dilemma on which we are impaled.

Senator HRUSKA. If the Senator will yield for comment on that point, I don't think there are any horns at all nor any dilemma.

The CHAIRMAN. And no one's ox is being gored.

Senator HRUSKA. The fact is, and the Senator has as good a knowledge of that history as I, that Franklin Delano Roosevelt after he failed legislatively to pack the Court, turned to a deliberate course of appointing liberal judges and he chose them for that and he called them that. Let's not kid ourselves; that is why they were chosen.

And I sat here since 1954, sometimes in semiagony, sometimes in frustration, also sometimes in despair, wondering when that line of judges of liberal philosophy would ever run out and we would come to another kind of philosophy which would lend balance to the utterances and the statements of the Court. And I believe it is about time now that this committee and the Senate and the country take advantage of the happy circumstance that another type of nominee with another philosophy is being considered. It is not true that it is for the first time that that second consideration is being asserted for the appointment of members of the Supreme Court. That is not so. History disproves it; and it is a little late to try to rewrite that history.

The CHAIRMAN. Well, let's proceed.

Senator BAYH. If I might just make one other observation, Mr. Chairman, I think that there probably are some distinguished judges on that Court that have been appointed in the interim described by the Senator from Nebraska who would shudder a bit to be described as part of the liberal bent. I will not name them but I think the record will show who they are.

I want to make clear the distinction between what I am concerned about and what—maybe there isn't a distinction, but it seems to me there is one—a prospective nominee should refuse, has, and undoubtedly will refuse to comment on certain areas because this might abridge his sitting as a judge in cases that come before him. This is one area.

Together we can go through the transcript and enumerate those areas that have confronted Mr. Rehnquist with a problem. I am not at all concerned about those but we can also go through that transcript and we can find a number of areas, a number of questions which I will not repeat at this time, where that was not the basis, where I had the feeling that here was a man who was willing and wanted to give us his thoughts, but he could not do so because he felt he was violating the trust he had with the Attorney General or speaking as a Justice Department spokesman. I see no reason why that should not be lifted. I don't see how it is going to hurt the President or the Attorney General and it is surely going to help the Senate in its consideration.

I am not going to hold my breath until we get that waiver.

Senator HRUSKA. Or until it is asked, either.

Senator BAYH. Oh, perhaps I should hold it until it is asked. But that will be probably an easier time frame than receiving a reply.

Senator HRUSKA. The Senator does not recall a time when any nominee has been before this committee or any of its predecessor committees and when the nominee said "I feel it is improper; it is an improper question which is directed to me and therefore I respectfully regret that I cannot answer it," that that assertion on his part has not been respected by the committee? The validity of that statement is open for examination of previous transcripts by any of the members of this committee or anyone else. The refusal is for the nominee to assert and when it has been asserted, whoever the nominee has been, it has always been respectfully abided by.

Senator BAYH. Then may I ask my colleague from Nebraska if he would help resolve the problem in my mind where the nominee is on record as having said, in support of the administration, speaking

as a Justice Department spokesman, that he favors certain positions that I feel are not in the best interests of the country?

Now, I am unable to separate the nominee from the philosophy that he espoused wearing that hat. Am I obligated then to vote against him?

Senator HRUSKA. Well, in the first place, we have always recognized that a man's status changes when he becomes a nominee. Prior writings will speak for themselves but if he speaks on that same subject in terms of either expressing an opinion on a legal or constitutional proposition, or his present convictions on a proposition of that kind, then he runs into trouble and possible unfairness to his future colleagues if he would have to withdraw from a case. You cannot separate that.

We have always had that and we can examine the writings. We have Mr. Rehnquist's prior record and we will have the opinions of witnesses that will come here; they will give us many interpretations of his philosophy. I can hardly wait until next Tuesday when those explanations start. A witness has a right to be wrong, too.

And so the position that a man assumes when he becomes a nominee is different; it immediately changes and it should be governed by the new circumstances.

Senator BAYH. Well, I want to compliment the nominee again as I have in the past.

You say he has a right to be wrong.

Senator HRUSKA. Any witness has a right to be wrong; any witness.

Senator BAYH. On occasion even a U.S. Senator might be.

Senator HRUSKA. I have known of some times when that has happened also. [Laughter.]

Senator BAYH. The admission has been less frequent, but I think the fact that the nominee has said in the area of equal accommodations that he felt now in retrospect that he would not have that same position, I salute him for that. I just might—

Senator MATHIAS. Would the Senator yield just for one brief observation?

Senator BAYH. If you will let me just read one paragraph from the Congressional Record, I will yield and not force further patience on my colleague or the witness who has been very patient.

I just want to remind my friend from Nebraska that there are some rather distinguished authorities for the line of questioning we were following here which go as follows:

"When we are passing on a judge, we not only ought to know whether he is a good lawyer; not only whether he is honest, and I admit that this nominee possesses both of these qualifications"—as I do about our present nominee—"but we ought to know how he approaches the great questions of human liberty." A gentleman by the name of George Norris, distinguished Senator from Nebraska, made that observation in a similar situation.

Senator HRUSKA. It is still true; still true.

Senator BAYH. All right. I yield.

Senator MATHIAS. Just a very brief observation: I join with my colleague from Nebraska, the Senator from Nebraska, in his feeling. I think that Mr. Rehnquist deserves a considerable degree of understanding and admiration because he has observed the important rules which govern the profession of law.

Perhaps what the Senator from Indiana seeks to do and which I seek to do and other members of the committee think can be done, is limited by our ingenuity and not by the subject matter. We can get at what we need to get at without applying to the President for any waiver. I agree with the Senator from Nebraska.

The CHAIRMAN. Judge Craig.

Identify yourself for the record.

STATEMENT OF HON. WALTER EARLY CRAIG, A U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Judge CRAIG. Mr. Chairman, I am Walter Early Craig. I am currently U.S. district judge for the District of Arizona. I am a former president of the American Bar Association.

I am here, gentlemen of the committee, in support of the nomination of Mr. William H. Rehnquist to be an Associate Justice of the Supreme Court. In passing I might say that I would be less than honest if I did not also say that I endorse wholeheartedly the nomination of Mr. Lewis Powell. I have known him for 25 years. Mr. Powell has a number of witnesses, I understand, to come before this committee, and I endorse everything they say that is good about him. I know nothing but complimentary things about him.

I can say the same for Mr. Rehnquist: I have known Mr. Rehnquist since his admission to practice law in Arizona, both in a professional capacity and since I have been on the bench, which I ascended in 1964.

Mr. Rehnquist's academic achievements are already a matter of record. They are remarkable. The only reason I mention those high achievements is because it relates to his qualifications as a lawyer. In my experience, Mr. Rehnquist's professional skills and ability are outstanding.

I have prepared and submitted to you a written statement with respect to my observations and concern with Mr. Rehnquist's appointment. I am certain that in my experience, throughout the United States, and my acquaintanceship and knowledge of members of the profession, that I could find no one that I would recommend more highly than Mr. Rehnquist to occupy the office of Associate Justice of the Supreme Court of the United States.

He has demonstrated, I think, his patience and judicial temperament in appearing before this body. I have observed it for 19 years, so it does not come as a surprise to me that he has handled himself so magnificently here. I have seen only a relatively few minutes of his testimony, but I have kept in some touch with the progress of the hearings.

In his appearances before my court, Mr. Rehnquist conducted himself not only with outstanding professional skills but with dignity, intelligence, and integrity. I think he has conducted his life that way so long as I have known him.

I do not know, Mr. Chairman, if you care for anything further, but I might comment in one additional respect. I read someplace or heard something about Mr. Rehnquist probably not being the leader of the Phoenix bar or of the Arizona bar. If there is a "leader" of the Phoenix bar or the Arizona bar, I do not know who it is, with the possible exception that it may be my 97-year-old father who is still going to his office.

the nominee's opinion and the result of a rather extensive investigation which I personally have made, I have not found any evidence to sustain this allegation. I did find that he made a speech before one very ultra-rightwing organization. Beyond that, we have no evidence of membership.

Let me move on, if I might, please, so that some of my colleagues can have an opportunity to share their views.

Are either one of you gentlemen familiar with Judge Walter Craig?

Mr. MITCHELL. I am not.

Senator BAYH. He is a former president of the American Bar Association, now a Federal judge in Phoenix. Judge Craig testified in support of Mr. Rehnquist. He happens to be a Democrat, as I recall, and I asked some of these same questions of him that I would ask of Mr. Rehnquist in trying to explore Judge Craig's knowledge, as one of the leading members of the Phoenix bar as well as the American Bar Association and now on the Federal bench, if he had personal knowledge about any bias or prejudice that Mr. Rehnquist may have, and he said quite the contrary. I just wondered if either of your gentlemen would care to comment on that? I thought Judge Craig made a very strong witness in behalf of Mr. Rehnquist.

Mr. MITCHELL. Well, you know, Senator Bayh, I don't want to sound like a racist, but as I have listened to the committee's reaction to some of the testimony that we have presented, the reaction to Mr. Rauh's position, and the assertions made by Senator Cook after the hearing, the trouble with all this is that for some reason the white people that I know and have worked with or who come up and testify before these committees, just don't seem to see this thing in the same light that we who are the victims of injustice see it. So I am not surprised if a judge, who is a Federal district judge, were to come up and say that so far as he knows this is a very wonderful gentleman, and that he is the epitome of fairness, and that kind of thing.

But against that statement which the judge has made, there is a whole body of information by the black community, and it really boils down to a question of whether, in a Senate Judiciary Committee, and in the U.S. Senate, the testimony of a large number of black people against the nominee will have sufficient weight to influence the statement of one white person from the community who happens to be a Federal judge?

I am sorry to say that in my experience in dealing with a great many people who are in important positions in this country you can have 100 black people who are eye witnesses, and stated unequivocally what happened, but one white person can come up and say to the contrary and the testimony of 100 black people will be discredited.

So I would say I think it ought to stand on its own feet. We have said what the people down there who were black think of him, and against that is the statement of a judge.

It would be interesting to see whether the Senate of the United States attaches more weight to the testimony of that one white man than it does to all these other colored people who have expressed themselves as they have.

Senator BAYH. Well, Mr. Mitchell, it has been my good fortune to know you for some time, and we have had some rather intimate conversations on a number of legislative issues. From hearing of your

personal experience I must concur, although I wish it were otherwise, and it probably would be absolutely impossible for anybody who has not walked in your shoes and been subjected to the type of abuse that you have over the years to look at every issue with the same kind of perception that you do, since you have been there.

Do you really think it is fair, let me ask you, in light of some of the battles that have been fought before this committee over the last few years concerning this very subject, a Supreme Court nominee, to say this committee and some of its members have not been sensitive to what the black people of a given constituency have said about a proposed nominee?

Mr. MITCHELL. I would not say that the committee members have not been sensitive. But I would say, with a few notable exceptions, when a statement is made which a black man considers devastating in its impact it just does not seem to have the same credibility and attention that a white person making a counterstatement has.

For example, how could we possibly in the Carswell nomination have been insensitive to the fact that the judge had, as a candidate for office, made an open declaration of his belief in white supremacy? But there were many people who did not think that in itself was sufficient to be against him, and they were prepared to forgive it on the ground that he was young.

But then, as I said this morning, after the nomination was rejected, on the record, in his Florida campaign, the judge went back and did what we had figured he would do all along.

The same thing is true in the Haynsworth nomination. It was our contention that Judge Haynsworth in his interpretation of the Constitution was going to do it in a way that was against the civil rights of Negroes.

It was only a few days ago that there was a case before the Fourth Circuit Court of Appeals in which a majority held that a place of recreation which anybody with a scintilla of eyesight and common-sense could see was being operated under the guise of a private club when in fact it was public but operated under the guise of being a private club for purposes of evading the law, Judge Haynsworth was one of the judges who said it was a private club and there was a very good dissent in that by Judge Butzner, pointing out that to reach that kind of conclusion it was necessary to fly in the face of precedents.

Well, this did not surprise me on Judge Haynsworth's part but I am sure if we had said at the time we were up here testifying that we expected that kind of thing would happen there would be a whole lot of people who would have said no; that just could not happen.

Senator BAYH. Well, you are not looking at one Senator who would have said that, are you?

Mr. MITCHELL. No; I hope I am making it clear that I certainly am not.

Senator BAYH. Your statement was rather sweeping and I wanted to make sure that I was not included.

Mr. MITCHELL. As I remember in that effort, to me the only thing that was needed for the purpose of defeating those nominees was the question of whether they had been faithful to equality under the law as a legal principle, and that, of course, in the judgment of many other people, was not sufficient, and other extensive matters were brought into the picture.

But I said then and I say now and I will always believe that anybody who publicly at any time in his adult career takes a position that the black citizens of the United States are not entitled to equal treatment under the law is unfit to sit on the U.S. Supreme Court and that ought to be the rule.

Senator BAYH. Unfortunately, there are not as many people who share that specific judgment as you would want, and thus it seems to me the responsibility we have for a true test of the quality of the nominee or nominees is to see what their judgment is now and the fact that you are here and I think are making such a credible record indicates that one man with a black face would be received with open arms and with great consideration by this committee.

I am concerned about what white people or black people have said about the nominee, and I am also concerned about what the nominee himself has said.

Mr. MITCHELL. That is what I tried to develop.

Senator BAYH. We developed this on the accommodations and the school matters, we tried to get at it, and I hope we will get testimony from those who have first-hand information on the voting matter. But let me deal just one other question as far as what the nominee himself believes.

I did send a letter referred to by our distinguished colleague from Nebraska to the Attorney General. I have received a reply and since there are no objections, I do not think there is any lawyer-client relationship between the two of us, I would like to put it in the record at this time so everybody would have the opportunity to examine it.

Senator HART. Without objection, it will be received.
(The letters referred to follow.)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., November 4, 1971.

HON. JOHN MITCHELL,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: When President Nixon announced the nomination of William Rehnquist to be a Justice of the Supreme Court, he stated that one of the criteria he used was "the judicial philosophy of those who serve on the Court." The President has said that these nominees share his judicial philosophy, "which is basically a conservative philosophy."

The Members of the Senate Judiciary Committee have been attempting for the last two days to explore for themselves the judicial philosophy of William Rehnquist. Many Members of the Committee appear convinced that this is a fit subject for inquiry by the Senate. Indeed, Mr. Rehnquist has stated at the hearings that he believes that the Senate should fully inform itself on the judicial philosophy of a Supreme Court nominee before voting on whether to confirm him. See also William H. Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, Oct. 8, 1959 p. 7; C. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale L. J. 657 (1970).

Unfortunately, the Committee has been unable to inform itself fully regarding Mr. Rehnquist's judicial philosophy because he has felt it necessary to refrain from answering a number of questions. Some of the questions at issue involve Mr. Rehnquist's refusal to respond based upon his claim of the lawyer-client privilege arising out of the work as Assistant Attorney General since 1969. In my view, the lawyer-client privilege does not require Mr. Rehnquist to remain silent concerning his own views on questions of public policy and judicial philosophy merely because he has advised the Department of Justice on these matters or because he has publicly defended the Department's position. As one scholarly observer has noted:

"The protection of this particular privilege is for the benefit of the client and not for the attorney, the court, or a third party. The client alone can claim the

privilege, and in fact the client must assert such privilege, since it exists for his benefit." E. Conrad, *Modern Trial Evidence* § 1097 (1950).

And as Professor McCormick has noted (*Handbook of the Law of Evidence* § 96 (1954)), "it is now generally agreed that the privilege is the client's and his alone."

Despite my view that the privilege is inapplicable here, I am writing to urge you—in the interest of the nominee and of the nation—to waive the lawyer-client privilege in this situation. I have made a similar request of the President. This would release Mr. Rehnquist from any obligations he might have under Canon 4 of the American Bar Association Code of Professional Responsibility, see Code of Professional Responsibility, DR 4-101 (c)(1), or any other obligations he may have to refuse to answer questions involving his own views on questions of public policy or judicial philosophy. It is essential that the Senate, which must advise and consent to this nomination, have the fullest opportunity to determine for itself the nominee's personal views of the great legal issues of our time. I hope you will be able to cooperate to this end.

Sincerely,

BIRCH BATH, *United States Senator.*

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 6, 1971.

HON. BIRCH BATH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BATH: As I understand your letter of November 4, 1971, you are requesting that I, as Attorney General of the United States, waive what you refer to as the "lawyer-client privilege" with respect to matters on which William H. Rehnquist, as an Assistant Attorney General in the Department of Justice, has advised me and with respect to which he has taken a public position on my behalf. I further understand that this request is made by you individually rather than by the full Senate Judiciary Committee before whom Mr. Rehnquist has appeared as a nominee as an Associate Justice of the Supreme Court of the United States.

The issue raised by Mr. Rehnquist or any Supreme Court nominee's refusal to respond to certain questions during confirmation hearings is far broader than the scope of the lawyer-client privilege. There are other considerations which prompt a refusal to comment. For example, a nominee may feel that it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions, declining to provide their view of the Constitution as it applies to specific facts.

Even in those few instances wherein Mr. Rehnquist, relying on the lawyer-client privilege, declined to answer questions concerning what advice he may have rendered me, I feel constrained to say that a waiver would be entirely inappropriate. As Attorney General of the United States, I am acting on behalf of the President. In such a capacity as a public official, I do not consider the same factors the private client considers in deciding whether to waive the lawyer-client privilege.

I can well appreciate your personal, intense interest in probing into all aspects of Mr. Rehnquist's work while at the Department of Justice. I am sure you appreciate, however, that it is essential to the fulfillment of my duties and obligations that I have the candid advice and opinions of all members of the Department. Further, I am sure you realize that if I should consent to your request or other requests to inquire into the basis and background of advice and opinions that I receive from the members of my staff, it would be difficult to obtain the necessary free exchange of ideas and thoughts so essential to the proper and judicious discharge of my duties. It would be particularly inappropriate and inadvisable for me to give a blanket waiver of the lawyer-client privilege in this situation. Ordinarily, a waiver should only be considered as it may apply to a specific set of facts. The range of questions which may be put to a nominee is so broad that it would be difficult, if not impossible, to anticipate what a general waiver would entail. Because Mr. Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, renders legal advice to others, including the President and members of the Cabinet, obviously I cannot waive the privilege that may exist by reason of those lawyer-client relationships. And determining the limits of such relationship cannot be done with precision.

I have received a letter from Chairman Eastland and Senator Hruska stating, in their experience, that the Senate Judiciary Committee has never gone behind a claim of the attorney-client privilege or made an effort to obtain a waiver of the privilege from a client of the nominee. While ordinarily I would defer a decision until a request had been received from the Committee, I felt it necessary and desirable in this case to explain to you why I considered your request, or any similar request, inappropriate.

This letter may be considered a response by the President to you with respect to your letter to him of the same date and with respect to the same subject matter.

Sincerely,

JOHN MITCHELL, *Attorney General.*

Senator BAYH. To capsulize the very thoughtful 2-page letter, the Attorney General refused to waive the attorney-client relationship. I will read excerpts from it. For example—

There are other considerations which prompt a refusal to comment. For example, the nominee may feel it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions declining to provide their view of the Constitution as it applies to specific facts.

I suppose it is fair to say that that is a legitimate hypothesis on the part of the Attorney General that we should not require a prospective nominee nor should he reply to questions in this regard that cause him to prejudge a cause.

Mr. RAUH, as a learned attorney, would you concur with that assessment?

Mr. RAUH. Precisely. It was exactly because of that point that I said the lawyer-client privilege did not apply. The right not to comment on cases that are coming before the Court obviously is correct, and we would make no challenge to his refusal on that ground, Senator Bayh.

Senator BAYH. Well, I want to say that this was not the request that I made. I do not see how I could ask a nominee—or the Attorney General to force a nominee or make it possible for a nominee—to answer such questions. That would be totally inappropriate. But contrary to a letter sent by our two distinguished colleagues, Senator Eastland and Senator Hruska, that in their experience the Senate Judiciary Committee has never gone beyond the claim of attorney-client privilege, I do not recall in the 9 years I have been in the Senate a prospective nominee to the highest Court of the land invoking a client-lawyer relationship. Now, I do not recall that ever happening. There are grounds for where a man should refuse to testify, but it is difficult for me to determine what William Rehnquist himself feels in general terms about the critical problems that confront us today unless he can separate himself from the statements that he has made which he now says were made totally as a representative of the Justice Department, which concern me very much.

Do you have any specific suggestions as to how we can get around this lawyer-client relationship, and the prohibition of the Attorney General to waive it?

Mr. RAUH. No; I guess I feel as defeated as you do. I do not think there was any lawyer-client privilege in any situation about which you asked him. I think some of the questions to which he pleaded lawyer-client privilege might, carefully analyzed, have included some possibility of a case before him later on. If he had then said, "I do not want to answer this because it may come before me," I think you would have

stopped right away. In fact, you always did stop when that point was raised, so I do not see that problem.

I think the Attorney General made a terrible error of law. First, he assumed that there was a privilege that does not exist and then he said he would not waive it. I do not know who is acting as his lawyer now; Rehnquist was supposed to be his lawyer and obviously could not act in this matter. So I do not know who is acting as the lawyer for the Attorney General at the moment. But what he is saying is, "There is a privilege that does not exist and we will not waive it anyway."

Senator BAYH. It concerns me, I do not know what to do about it and I thought maybe you could tell me what to do.

Mr. RAUH. I can tell you what you have to do about it. In the absence of any other answer, one has to assume that he meant what he said. In other words, when he went out on the hustings and made a statement, one has to assume that that is what he believes just as you would assume that Mr. Mitchell and I, although we stand here representing more than a hundred organizations, are saying what we believe, not what the organizations believe or what somebody else would tell us. Roughly, we are trying to describe their position, but when we say something we believe it.

I think the only thing the Members of the Senate can do, in the absence of his willingness to amplify his position, is to assume what Rehnquist said is what he believes. And on what he has said, he is not fit to be a Supreme Court Justice.

Senator BAYH. On a number of these occasions, and this will be my last question—you have been very patient and so have my colleagues—on a number of these questions that I posed to him, as you recall from what you said, you read the transcript of the record, I have taken specific quotations and have asked him if these represented his views, his views on human rights, or the administration position. Very frankly this concerns me. I have asked him one basic question: "Did you say this and does this now represent your point of view?" Is that a fair question?

Mr. RAUH. Certainly. I do not see how there can be any question about it or any assertion of confidentiality necessary for the lawyer-client privilege. I think the whole lawyer-client privilege thing before this committee is just like the emperor walking down the street without his clothes on. Nobody knew it until the child said the emperor did not have his clothes on. It is just simply that. There is not a lawyer-client problem here.

Senator BAYH. Thank you.

Senator HART. Senator Hruska.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. I yield completely.

Senator HRUSKA. Even partially would be all right, temporarily. In this committee room not many years ago, the first black man who was ever appointed to the Supreme Court appeared and was questioned. He was subsequently confirmed, and is serving well and creditably across the street.

Time after time after time he was interrogated by some Senators who sat to the right of the chairman, and time after time after time he said, "I decline to answer that question," not only as to his views past and present, but as to comments on cases that had in the past or might in the future come before the court.

Now, I can hardly differentiate that from the situation here where a question is asked of a nominee, and he says, "I do not choose to answer that question; I do not think I should answer it; I think it is an improper question." We have never in the past gone beyond this type of answer of the nominee in this committee to my recollection.

Now insofar as the law on waiver of privileged communications is concerned, my own belief, and I have done some reading and have had some personal experience in this area, is that a lawyer representing other people has no business nor has he a right to waive privileged communications without consulting with those whom he represents. In many instances, as the Attorney General has indicated in his letter, Mr. Rehnquist has served as lawyer and counselor to many officials of the executive branch. It would be impossible to contact all the people he has represented for the purpose of asking their permission to waive the privilege.

But I come back to this proposition: we sat here for 2 or 3 days when Mr. Thurgood Marshall was before us, and we respected his answer when he said, "Mr. Chairman, that is an improper question to ask of one who has been nominated to the bench," because of the many reasons which he recited.

Senator BAYH. If the Senator will yield, or if I have not yielded totally and may reclaim the part I did not yield.

Senator HRUSKA. I will yield.

Senator BAYH. I just want to make one statement because as we look through the record before us we will find the nominee respectfully, very respectfully, and I am not at all concerned about the demeanor or the way he approached this, I think he has legitimate concern, conscientious concern, but in this particular instance he relied on two different and distinguishable grounds. One was that he did not want to put himself in the position where his opinion and his articulating it before the committee would prejudice a case which might come before him as a Supreme Court Justice. That was the answer that has been used on several occasions by almost every nominee that I have had the good fortune to sit on this side of the table to listen to. That was the basis of the refusal of Justice Marshall.

I do not recall anybody relying on another type of reason for not answering. Indeed, the lawyer-client relationship which, as we read through the record, Mr. Rehnquist often involved—he did this not on the basis that he did not want to prejudice the case but that he did not want to disclose any confidence he might have with the Attorney General. He said he did not want to embarrass the administration or something like this, and that is why I think it is entirely proper to ask for a waiver of the privilege. It would be helpful if the Attorney General had sent back a different answer than he sent back to us so we could get not the administration's position, not the Attorney General's position, but get Mr. Rehnquist's position, his thoughts on these critical issues in a general way so we could know whether he indeed did believe the words that came out of his mouth concerning these important matters that we have discussed.

Now, that is the difference I have with my distinguished colleague from Nebraska and the distinguished Attorney General.

Senator HRUSKA. May I suggest that the Senator from Indiana recall that Thurgood Marshall served on the bench before he became

Solicitor General, that he was Solicitor General when he testified to this committee, a highly comparable situation to that of an Assistant Attorney General who is in charge of the Office of Legal Counsel. If he had been asked questions similar to those asked Mr. Rehnquist regarding internal Justice Department affairs his refusal to answer would have been totally justifiable because there are many situations in which the Attorney General requires complete candor from his associates in setting departmental policy and in serving as lawyer for the executive branch. If advice given, and possibly rejected, is to be made public, this candor will be lost.

Mr. MITCHELL. Mr. Chairman, I would like to say I was, of course, present at all of the hearings and I recall distinctly that on one occasion when Mr. Marshall was being considered as an appointee to the Second Circuit Court of Appeals, the only way that it was possible to conduct a hearing was because you, although you were a member of the minority party, convened the hearing and did conduct it.

I recall distinctly also that there were many questions which it seemed to me if Mr. Marshall answered it would raise a lot of additional questions, and to me it seemed that it was not necessary to do it. But I must say he performed in a manner of disclosing everything that anybody could conceivably think of as relevant, and my recollection is that in those hearings you personally commended him for his willingness to try to tell the committee everything within reason that it wanted to know.

I think the problem with the contrast between the Marshall hearings and the Rehnquist hearings is here are matters of great moment which affect the country no matter which administration is in power, and it does seem to me that everybody ought to bend over backward in that kind of a situation to make a full disclosure of the public business.

We have laws which make disclosure mandatory with respect to the ordinary citizen, and I think when something so vital as the Supreme Court is involved there ought to be a full disclosure and the administration itself ought to be willing to bend over backward.

Of course, I agree that nobody ought to be asked to predict how he is going to rule on a question that comes before him in the Court. But I do think that his general philosophy ought to be spread on the record so that the public may know in minute detail just what he stands for.

Senator HRUSKA. During the hearings last week, the witness will remember that it was my suggestion that Mr. Rehnquist was guilty almost to a fault in trying to express himself by way of answering on general personal philosophy. But when he was asked as to matters that came to his official attention as counsel to the President and the Attorney General he respectfully refused, and regretted that he could not answer. I submit that refusal was proper and mandatory.

Senator BAYH. If the Senator would yield.

Senator HRUSKA. I thought that was very fair and it is in keeping with the privilege, confidential privilege, of communication between lawyer and client.

Senator BAYH. If the Senator would please address himself to the question he just raised, that issue was not brought before this committee when Mr. Marshall was here.

Senator HRUSKA. Which question?

Senator BAYH. The relationship he had had with certain administration officials. The concern some of us have is that out of Mr. Rehnquist's mouth have come some statements in support of the administration position concerning the Bill of Rights that are of great concern to us. We simply want to know whether they are his opinions or whether they constitute the Justice Department's, for whom he was serving as a lawyer, as an agent or whatever, and he has refused to disclose whether this is the case or not. I do not see how that bears on the questions directed at Justice Marshall when he refused to answer not because of any secrecy that was necessary between him as Solicitor General and the administration but because he did not want to prejudge a case that might come before him.

Cannot the Senator from Nebraska make a distinction between those two?

Senator HRUSKA. The record will show the nature of the questions which Senator Ervin asked as well as some questions which Senator McClellan asked of Thurgood Marshall. Some of them did bear upon situations that arose while he was the Solicitor General and concerned the discharge of his duties and the Supreme Court cases decided while he held that high office. He declined to answer them, and very properly so, and the same thing is true in regard to the answers given by Mr. Rehnquist.

Mr. RAUH. May I make two points, Senator Hruska, in answer to what you have been saying? First, I do not believe Thurgood Marshall at any time pleaded the privilege of lawyer and client.

Secondly, I do not believe that Senator Bayh in any way is suggesting that he wants any privileged communications. You keep using the words "privileged communications." That means a confidential relationship between lawyer and client. When Mr. Rehnquist went to Brown and made a speech on wiretapping and Senator Bayh now wants to ask him whether that is his view or not, that is not a question based on a privileged communication. Therefore, the lawyer-client relationship does not apply.

If he wants to say, "I intend to sit on that case and, therefore, I will not answer," it would be a proper answer.

Now, he cannot say that because he does not intend to sit on that case as he has already worked on the brief.

Senator HRUSKA. And he frankly said so and he said he would disqualify himself on that particular case.

Mr. RAUH. That is exactly why the lawyer-client privilege does not apply.

Senator HRUSKA. Not privileged communication in that particular instance, perhaps, but in the other instances it did apply. The Senator from Indiana asked the Attorney General to wave some kind of a magic wand and say, "This privilege has now disappeared, you may testify." It does not work and it cannot work that way if the sanctity of privileged communications is to mean anything at all.

Senator HART. Senator from North Dakota.

Senator BURDICK. I would like to thank Mr. Mitchell and Mr. Rauh for their contributions here. I am disturbed by a contradiction in testimony. We will put the two together and perhaps Mr. Mitchell can clarify it for me. On page 4 you talked about the letter from Mr. Moses Campbell, and in the letter it states, and I will quote: "I was

present at the time our Past President"—that was of the NAACP—"Reverend George Brooks and Mr. William Rehnquist exchanged bitter recriminations concerning the group's purpose for marching, intimating that the march was communistically inspired." Mr. Campbell further asserts that Mr. Rehnquist's conduct, "brought irreparable harm and insult to the blacks of Phoenix, Ariz." You say "He opposes the nomination of Mr. Rehnquist. I offer a copy of Mr. Campbell's letter for the record."

On Monday of this week, at page 297 of the record, we find the following language, question put by Senator Hruska—

Judge Craig, in regard to the first whereas of the resolution of the southwest area NAACP I would like to read you an excerpt from yesterday's Washington Post. "When Rehnquist was nominated for the Supreme Court the former Reverend George Brooks"—

I presume the same one mentioned in the letter—

charged in 1965 Rehnquist confronted him outside the State Capitol and argued in abusive terms that a Civil Rights Act later passed by the State legislature should be opposed.

Further quoting from the record—

The Arizona NAACP promptly passed a resolution and the text of the resolution and the whereas read by the Senator from Indiana a little bit ago, now getting back to the story of the Washington Post. By the end of last week Brooks was telling a different story. He now says that the discussion with Rehnquist was calm, the tone was professional, constitutional, and philosophical.

Have you any idea when Mr. Brooks was right?

Mr. MITCHELL. I would say that on two occasions Mr. Brooks had indicated that the conversation was heated and there were recriminations. On one occasion, if he is correctly quoted in the Washington Post, he takes the opposite position. The first time he made that assertion was when Mr. Rehnquist was under consideration for his present position of Assistant Attorney General. In fact, Mr. Brooks was one of the leaders of the group which tried to prevent the confirmation of that nomination by writing to various people and nothing came of it but one of the principal points in the argument against Mr. Rehnquist was his performance up there at the State capital.

Then, subsequently Mr. Brooks made a similar statement which, I think, was published in the New York Times. After that publication I talked with him on the telephone and said I hoped very much that he would come here to testify. He said he would not do so. I subsequently learned that Mr. Brooks' status has changed, that he is now in a position which I think has some connection with either the Federal or the State government, and apparently, like other persons who have information, he is unwilling now to describe the incident in the same fashion as it was described then.

I do not say that to be derogatory or to disparage Mr. Brooks. It is an ugly fact of life in this country, and I guess in many places, that when your economic circumstances are at stake it requires a great deal of courage to be willing to come out and make a statement which might cause you to lose that status, so I would think on the basis of all the information that has been given to us that the Campbell description of that is correct, and that the first two Brooks descriptions are correct, but that the more temperate description is not correct.



Rehusaist - OCC memos
claimed AC priv.
get it out. to Ron writing edits.

public counsel
private
exec privilege - work in v. D

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December 15, 1995

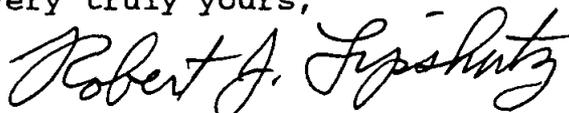
Mr. Howell Raines
Editor, Editorial Pages
The New York Times
229 W. 43rd Street
New York, New York 10036

Dear Mr. Raines:

I have been following with intense interest the current dispute between the Senate Whitewater Committee and the attorneys for President Clinton. Consequently, I have written and am submitting to you a proposed Op-Ed article which I would appreciate your publishing in The New York Times.

I would appreciate your advising me within a reasonable time if you wish to publish this article.

Very truly yours,



Robert J. Lipshutz

RJL:sbb

Enclosure

VIA FEDERAL EXPRESS AND
VIA FAX # 212-556-3815

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ROBERT J. LIPSHUTZ OF ATLANTA, GEORGIA, HAS BEEN A PRACTICING ATTORNEY FOR ALMOST 50 YEARS FOLLOWING THREE YEARS OF SERVICE AS AN OFFICER IN THE UNITED STATES ARMY DURING WORLD WAR II. IN 1977, 1978 AND 1979 HE SERVED AS COUNSEL TO THE PRESIDENT IN THE ADMINISTRATION OF PRESIDENT JIMMY CARTER.

THE CURRENT DISPUTE BETWEEN THE WHITEWATER COMMITTEE OF THE UNITED STATES SENATE AND THE LAWYERS FOR PRESIDENT BILL CLINTON IS A MATTER OF GREAT IMPORTANCE TO THE AMERICAN PEOPLE.

"LAWYER-CLIENT PRIVILEGE"

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IF PRESIDENT CLINTON AND HIS ATTORNEYS WERE TO IGNORE THAT FUNDAMENTAL PROTECTION, IT COULD SET A PRECEDENT FOR THE UNDERMINING OF THIS SAFEGUARD FOR ALL AMERICANS IN COUNTLESS SITUATIONS.

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ALTHOUGH THIS IMPORTANT DOCTRINE WAS USED IMPROPERLY BY RICHARD NIXON, IT HAS BEEN PROPERLY INVOKED BY PRESIDENTS FORD, CARTER, REAGAN AND BUSH AS WELL AS BY EARLIER PRESIDENTS.

AND IT HAS BEEN RESPECTED BY EARLIER CONGRESSES AND UPHELD BY THE UNITED STATES SUPREME COURT.

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Of Counsel
William R. King
Tito Massetta

TELEFAX COVER SHEET

TO: MS. ELENA KAGAN FAX NO. 202-456-1647
OFFICE OF THE WHITE HOUSE COUNSEL
WASHINGTON, D. C.
FROM: ROBERT J. LIPSHUTZ FAX NO. 404/588-0648

Lipshutz, Greenblatt & King
2300 Harris Tower, Peachtree Center
233 Peachtree Street, N.E.
Atlanta, GA 30043

Other Comments: _____

CLIENT NAME & NO. 0291-0001 DATE: 12/15/95

NUMBER OF PAGES INCLUDING COVER SHEET: 4

If you have any questions or problems upon receipt of this FAX, please
contact : ROBERT J. LIPSHUTZ at 404-688-2300.

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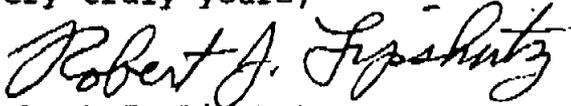
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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

16-Dec-1995 04:43pm

TO: Jack M. Quinn
TO: Jane C. Sherburne
TO: Mark D. Fabiani

FROM: Elena Kagan
 Office of the Counsel

SUBJECT: wall st journal reply

Mark mentioned to me on Friday that the Wall St Journal had promised us space to respond to its editorial and suggested that Hazard convert his opinion letter into a letter. I talked to Hazard about the idea this morning. Hazard doesn't want to write a letter himself. Instead, he wants Jack (or someone else in the counsel's office) to write a letter, indicating that we asked an independent expert (the most eminent independent expert etc. etc.) to give us an opinion and then quoting as much of that opinion as we want. This seems OK to me, and I do think it's the only thing Hazard is comfortable with. Do we go ahead, and if so who writes the letter, and what would that person (Jack? Jane?) like it to say?

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
012. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)

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Counsel's Office
Elena Kagan
OA/Box Number: 8248

FOLDER TITLE:

Whitewater [1]

2009-1006-F
ke691

RESTRICTION CODES

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

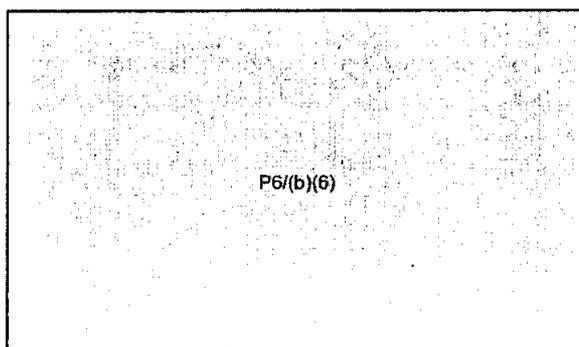
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

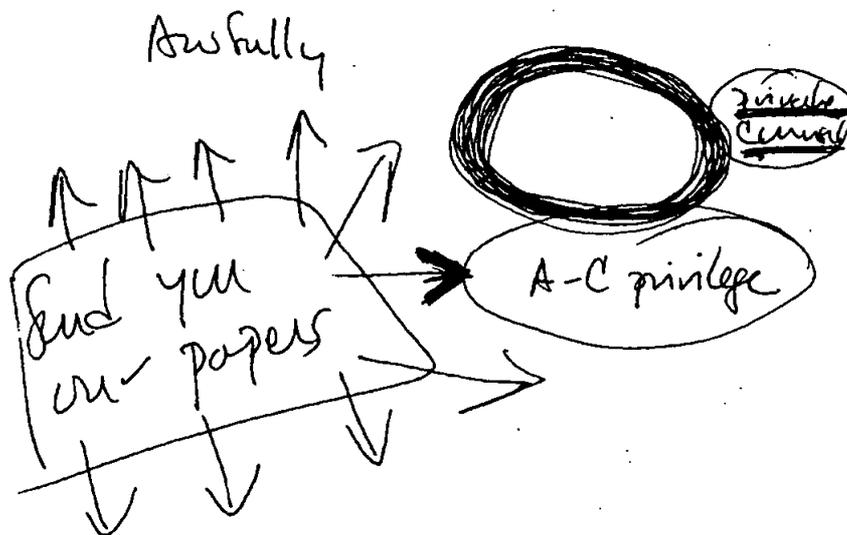
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE
WASHINGTON

- Burke Marshall -



[012]



THE WHITE HOUSE
WASHINGTON

December 18, 1995

BY TELECOPY

Michael Chertoff, Special Counsel
Richard Ben-Veniste, Minority Special Counsel
United States Senate
Special Committee to Investigate Whitewater
Development Corporation and Related Matters
534 Dirksen Building
Washington, D.C. 20510-6075

Gentlemen:

We are aware of statements made by the Chairman indicating a willingness to contact Independent Counsel Kenneth Starr to request that he agree that making the Kennedy notes public will not effect a waiver of the President's attorney-client privileges. We are encouraged by this development. As stated in my letter of December 14, 1995, securing such agreements from the various relevant entities, including the Independent Counsel, before making the notes public is absolutely essential to maintaining the President's ability to have a confidential relationship with his counsel.

Counsel for the President are undertaking today to secure the participation of these entities in appropriate non-waiver agreements. We would like to meet with you as soon as possible to determine how we can best work with the Committee to secure promptly such agreements.

With regard to the other requirements set forth in my December 14 letter, we understand the Committee is prepared to accept (2) and (3). With respect to requirement number (1), we propose a modification under which the Committee would simply acknowledge that a reasonable claim of privilege has been asserted with respect to confidential communications between the President's personal lawyer and White House officials acting as lawyers for the President.

As you know, requirement number (5) reflects our hope that any interest the Committee may develop in other matters covered by the attorney-client privilege will be pursued, if at all, in a bipartisan manner. We are prepared to drop this requirement

Michael Chertoff, Special Counsel
Richard Ben-Veniste, Minority Special Counsel
December 18, 1995
Page 2

based upon our expectation that we can resolve the current dispute without a highly partisan vote in the Senate this week. However, we submit that bipartisan support is warranted in circumstances such as this, where the precedents being set by the Committee's actions regarding matters of privilege are of such significance.

As soon as we have resolved these remaining matters, the White House will turn over the Kennedy notes to the Committee. Please let me know when we might meet. I look forward to hearing from you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jane C. Sherburne". The signature is fluid and extends across the width of the text block.

Jane C. Sherburne
Special Counsel to the President

cc: Independent Counsel Kenneth Starr

THE WHITE HOUSE
WASHINGTON

December 12, 1995

By Hand Delivery

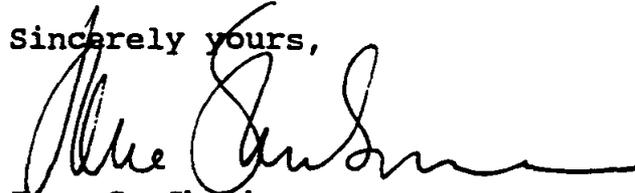
The Hon. Alfonse M. D'Amato, Chairman
The Hon. Paul S. Sarbanes, Ranking Member
United States Senate
Special Committee to Investigate Whitewater
Development Corporation and Related Matters
534 Dirksen Building
Washington, D.C. 20510-6075

Gentlemen:

On November 8, 1995, the Committee issued a subpoena to William H. Kennedy, III, former Associate White House Counsel, seeking his notes of a meeting he attended at the offices of Williams & Connolly, personal counsel to the President and Mrs. Clinton on Whitewater-related matters. Mr. Kennedy has been informed by both the White House and Williams & Connolly that the privileges attaching to these notes have not been waived, and has declined to comply with the subpoena on these grounds. The Chairman in his transmittal letter invited Mr. Kennedy to submit a legal memorandum explaining the basis for any objections to the subpoena. The White House is submitting the enclosed memorandum to the Committee to explain the important governmental interests and privileges implicated by the subpoena.

We remain willing to work with the Committee to find a way to provide information about this meeting reasonably necessary to the Committee's inquiry without unduly compromising the important principles we have described in the enclosed submission.

Sincerely yours,



Jane C. Sherburne
Special Counsel to the President

Enclosure

THE WHITE HOUSE
WASHINGTON

SUBMISSION OF THE WHITE HOUSE
TO THE SPECIAL SENATE COMMITTEE REGARDING
WHITEWATER AND RELATED MATTERS

December 12, 1995

This memorandum sets forth the position of the White House regarding the Committee's subpoena to William H. Kennedy III, formerly Associate Counsel to the President. The subpoena seeks production of notes taken by Mr. Kennedy while he was in government service at a meeting among the President's private counsel and his senior White House legal advisors at the offices of Williams & Connolly on November 5, 1993. In pursuing these notes, the Committee is attempting for the first time to invade the confidentiality of the attorney-client relationship between the President and his private counsel.

It is critical that the position of the White House be understood in its proper context. As explained below, the President has cooperated with the Committee by authorizing release of thousands of pages of White House records and encouraging the testimony of scores of White House employees, including a number of White House lawyers, without asserting any of the privileges to which he is entitled. He has done so in order to facilitate inquiry into and review of all official activities of the White House as they relate to Whitewater matters. This subpoena, however, would primarily expose, not the official activities of the White House, but rather the

President's attorney-client relationship with his personal lawyers. In this narrow area of overlap between official and personal matters, waiver of applicable privileges would have the effect of requiring the President to give up one of the most central elements of the attorney-client relationship -- that of confidentiality between attorney and client. There are strong justifications for some areas of overlap between official and personal representations which must be permitted without denying the President of the United States the right to a confidential relationship with his private counsel.

The Committee's action also implicates important governmental interests -- namely, first, the ability of White House counsel to discuss in confidence with the President's private counsel matters of common interest that indisputably bear on both the proper performance of Executive Branch duties and the personal legal interests of the President and, second, the ability of White House counsel to provide effective legal advice to the President about matters within the scope of their duties, including the proper response of executive branch officials to inquiries and investigations arising out of the President's private legal interests.

No doubt the overarching and most visible interest at stake in this dispute is the right of the President to enjoy the same confidential attorney-client relationship as any other American citizen. That personal attorney-client relationship began, in all meaningful senses, at the Williams & Connolly

meeting. It was at that meeting that individuals who were knowledgeable about the facts surrounding what has come to be known as "Whitewater" met with the President's newly retained private counsel to inform him of what they knew -- based, in some cases, on their own earlier private legal representation of the President and, in other cases, on their knowledge of Whitewater matters as it came to them in connection with their official duties.

It was also at the Williams & Connolly meeting that the private and government lawyers began to allocate between them responsibility for handling, respectively, the personal and government dimensions of the legal work before them. There can be no doubt that the Whitewater inquiries have required massively time-consuming and burdensome responses, not only from the President's private counsel, but also from counsel at the White House. The White House lawyers thus attended this meeting in furtherance of their own executive branch duties as the President's governmental counsel -- in the interest of counseling the President and others about how best to manage the Whitewater inquiries in a fashion that would maintain both the efficiency and the integrity of the White House.

If notes of this type of meeting are accessible to a Congressional investigating committee, then the White House Counsel could never communicate, in confidence on behalf of the President, with the President's private counsel, even when the discussions in question are properly within the scope of the

official duties of the governmental lawyers. Such a rule would deprive the White House Counsel of the ability to advise the President and his White House staff most effectively regarding matters affecting the performance of their constitutional duties. Because these public interests are inextricably intertwined with the private attorney-client claims at issue, the Senate and, if necessary, the courts should consider fully the executive and public attorney-client privilege implications of the subpoena at hand.

I. The President's Official Legal Advisors and His Private Counsel Must Be Able to Communicate in Order to Provide Full and Informed Advice

At times, matters that bear on the President's personal legal interest will affect the performance of his official duties -- as well as those of his subordinates. The converse is also true: official actions can affect the President in his personal capacity. On such occasions, the President well may require advice from attorneys advising him in both his official and his personal capacities. These matters might include, for example: the public disclosure of a tax return about which White House spokespersons will be questioned; the filing of public financial disclosure forms; the placement of personal assets in a blind trust for the purpose of satisfying governmental ethics laws; or the filing of a lawsuit against the President personally in which he must consider asserting a governmental immunity.

More than any other government official, the President's private and public roles inevitably blend. The President lives in an official residence and travels officially even for vacations that would be personal matters for other government officials. He is "on duty" 24 hours a day, 365 days a year. As history makes clear, every White House is inevitably called upon to answer inquiries about normally personal matters, such as presidential family members and past activities. Moreover, even the private interests of the President may implicate numerous official questions about such matters as privileges, conflicts of interest, and the like. The consequence of this blending is that when legal issues arise for the President, they often have both official and personal components. It is impossible to determine as an abstract matter that a matter is purely personal or purely official. Rather, coordination is required to ensure that each legal officer acts properly within his or her sphere so that personal matters are handled by personal lawyers and official matters are handled by government lawyers. A perfect, bright line is rarely available for the President's lawyers. They must decide together how the "blended President" should be properly represented.

The matters now before the Senate Committee are precisely of this mixed "public-private" nature. They include allegations about transactions that took place before the start of this presidency, which clearly involve the President's personal legal interests, but are made significant because of,

and affect, the Presidency. They also involve allegations about how various federal officials and agencies have conducted themselves in investigating others in connection with those pre-presidency transactions. Most importantly for the White House Counsel's Office, these matters have implications for the proper role of White House staff in addressing them, as well as for the President. This Office must ensure that appropriate boundaries are observed by the President to avoid potential conflicts of interest or allegations of preferential treatment or bias. And, while the Committee has spent some time probing the personal conduct of the President, it has spent vastly more time compelling the production of tens of thousands of pages of official White House records and the testimony of dozens of White House employees about the conduct of their official duties. There is thus a clear and indisputable intersection of public and private interests -- interests properly of concern to both private counsel for the President and White House lawyers.

In circumstances like these, neither the President's official lawyers nor his private lawyers could function effectively if they could not consult with one another freely and in confidence. First, as indicated, they must be able to communicate to ensure that they appropriately divide responsibility for handling legal matters for the President so that public matters are handled by public lawyers (e.g., complying with the Committee's subpoenas to the White House) and private matters are left to private counsel (e.g., advising the

President on his taxes). Second, they must communicate so that both White House counsel and private counsel are fully informed about matters of common interest when they render legal advice. Finally, White House counsel and private counsel must communicate so that, where their interests overlap, they may render advice that takes into consideration both the President's personal interests and his constitutional duties.

II. The November 5, 1993, Meeting Served Both Governmental and Personal Interests

In early November 1993, a variety of allegations regarding the relationship between Whitewater Development Corporation and Madison Guaranty, raised by David Hale, a municipal court judge under indictment in Arkansas, appeared almost daily on the front pages of newspapers across the country. Those allegations led both to calls for a serious investigation to illuminate the facts and resolve the matter and to deafening partisan attacks intended to undermine the Presidency. Because the allegations involved President and Mrs. Clinton's personal investments and touched matters occurring before the President entered office, it was necessary and appropriate for private counsel to be retained to assist in handling the matter. At the same time, it was apparent that the White House Counsel would be called upon to advise the President and his White House staff about how address the matter appropriately in the performance of their official functions.

The primary purpose of the November 5 meeting was to brief the new private counsel hired by the Clintons. That briefing was carried out by the private and governmental lawyers who had handled various private or public aspects of these matters for the President. But the meeting also served important governmental purposes. This meeting came immediately on the heels of news stories about "Whitewater". The appearance of the numerous news accounts made clear that the matter was no longer just an official news story to be handled by the White House. Rather, certain aspects of the matter would require the representation of the President by a private attorney. Thus, the meeting resulted from the need to ensure the proper allocation of responsibilities between government lawyers, who have an obligation to address the official components of this matter, and the private attorney, who would address the personal legal aspects of the matter.

To understand this requires an appreciation of the reasons the various attendees were at the meeting:

- David Kendall, a partner at Williams & Connolly, had just been retained to be lead private counsel for the Clintons on Whitewater-related matters. He arranged the meeting and, jointly with White House Counsel Bernard Nussbaum, decided who should be present.
- Steven Engstrom, a lawyer in private practice, had been retained as local counsel in Little Rock, Arkansas, to assist Mr. Kendall.
- James Lyons, a lawyer in private practice in Colorado, had provided legal advice to the Clintons with respect to the Whitewater investment

during the 1992 presidential campaign, and had a continuing attorney-client relationship with the Clintons.

- Bernard Nussbaum, the White House Counsel, was responsible for advising the President and White House staff regarding the governmental implications of the matter and ensuring an appropriate division of responsibility with private counsel.
- Neil Eggleston, Associate Counsel to the President, had been asked by Mr. Nussbaum to assist him handling the matter.
- William Kennedy, Associate Counsel to the President, had information and insight to impart based on his provision of legal advice regarding the Whitewater investment to the Clintons while in private practice.
- Bruce Lindsey, a senior White House official who is also a lawyer, had been handling the matter for the White House since members of the press began asking questions about Whitewater issues in the Fall of 1993. Mr. Lindsey, who had been asked to deal with the Whitewater matter because of his legal expertise, was invited to the November 5 meeting in his capacity as a lawyer, and would not have been included were he not performing legal duties in connection with these matters for the President.¹ Mr. Lindsey since that time has joined the Office of Counsel to the President.

By participating in the meeting, the governmental lawyers present were serving legitimate and necessary public interests. It was very clear to all concerned that the White House would have a continuing role in responding to Whitewater-

¹ Although Mr. Lindsey, currently Deputy Counsel to the President, at the time had the title of Assistant to the President, Senior Advisor and Director of Presidential Personnel, he clearly did not attend the meeting in connection with White House personnel matters. Rather, he was there in furtherance of the legal role in which he served the President on Whitewater matters.

related allegations. It could be predicted, for example, that White House counsel might be called upon to advise the President and his White House staff regarding the extent and conditions of cooperation with Congressional and other investigations of the matter; any invocation of executive privilege; the appropriate handling of press inquiries; and the proper response to any questions that might arise about the manner in which investigations of various Whitewater-related matters were being conducted within the executive branch.

To handle all of these governmental responsibilities, Mr. Nussbaum, with other White House lawyers assisting him, had to establish a relationship with the President's private counsel that would allow them properly and efficiently to divide responsibility for representing the President in the matter, and also would allow them to coordinate their activities to the extent their representational interests coincided. The November 5 meeting marked the beginning of this process.

A critical aspect of this process involved the sharing of information between private and governmental lawyers in a manner that would enhance their respective representations. The government lawyers at the November 5 meeting both received information and imparted information that they had derived from a prior private representation of the Clintons -- as in the case of Mr. Kennedy -- or had been provided to them in the course of official duties.

Both the receipt and the provision of information served legitimate public purposes. Access to the information that Williams & Connolly was assembling would assist the President's governmental lawyers in advising him regarding the official aspects of the matter. At the same time, the ability to brief the President's private counsel in confidence allowed the governmental lawyers to transfer responsibility for the impending personal aspects of the matter outside the White House without unduly distracting the President by requiring him to be the direct vehicle of all such communications. There is no basis whatsoever for believing that any of these communications were in any way improper.

III. Because Legitimate Governmental Interests Require The Participation Of White House Counsel In Meetings Of This Nature, Such Participation Cannot Defeat The Attorney-Client Privilege That Applies To It

The memorandum of law submitted today by Williams & Connolly explains why the personal attorney-client relationship between Mr. Kendall and the President requires that the confidentiality of this meeting be respected. The presence of White House lawyers at the meeting does not destroy the attorney-client privilege. On the contrary, because the presence of White House lawyers, who themselves enjoy a privileged relationship with the President and who are his agents, was in furtherance of both Mr. Kendall's and White House counsel's provision of effective legal advice to their mutual client, their presence

reinforced, rather than contradicted, the meeting's privileged nature.

As explained above, compelling governmental interests, including the need for coordination between governmental and private counsel and the appropriate mutual sharing of information, required the attendance of White House counsel at the November 5 meeting. If the President's governmental attorneys could not consult with his private lawyers without breaching the privacy of the personal attorney-client relationship, then the President's governmental and private lawyers would be separated by an untenable wall between them. This would both thwart legitimate governmental interests and deprive the President of the effective assistance of private counsel.

The law governing attorney-client privilege does not require this result. Although counsel representing the Office of the President and private lawyers representing his personal interests in connection with the same matters have a relationship that may be sui generis, essential principles of the law governing privileges plainly compel the conclusion that appropriate communication regarding those matters falls within the privilege.

First, the presence at the meeting of governmental lawyers did not defeat the reasonable expectation of confidentiality attaching to the meeting. Such expectation of confidentiality is an essential element of a privileged

communication. A communication uttered in the presence of a third party normally is not privileged, because the disclosure to one who has no duty or inclination to keep the client's confidence defeats this expectation.² But precisely because the President reasonably expected that the governmental lawyers attending the meeting understood their obligation as lawyers for the Office of the President to keep the substance of the meeting confidential, their presence was consistent with its privileged status.³

Like lawyers representing private clients, government lawyers also have an attorney-client relationship with the agencies or officials they represent that protects communications in furtherance of that representation from disclosure.⁴ Lawyers

² See United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (Wyzanski, J.) (for the attorney-client privilege to apply, the communication must take place "without the presence of strangers"); United States v. Melvin, 650 F.2d 641, 646 (5th Cir. 1981) ("[T]here is no confidentiality when disclosures are made in the presence of a person who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality").

³ See, e.g., Kiryas Joel Local Dev. Corp. v. Ins. Co. of North America, 1992 U.S. Dist. LEXIS 405, *8-10 (S.D.N.Y. Jan. 15, 1992) (presence of third party insurance agent and broker, retained by client, at meeting with attorney did not defeat the privilege; "They were not strangers to the matter, their presence at the meeting has a reasonable explanation, and there was good reason for [client] to have an expectation under the circumstances that they would not disclose the substance of the discussions").

⁴ It is widely accepted that the attorney-client privilege protects communications between representatives of governmental organizations and their attorneys. See generally Rice, Attorney-Client Privilege in the United States § 3:12 (1993):

serving the Office of the President must hold their client's communications confidential, whether they are received directly

Provided that the [government] attorney is licensed to practice law in at least one jurisdiction, the attorney-client privilege should protect communications with him by appropriate representatives of his government client for the purpose of obtaining legal advice or assistance.

See also, e.g., "Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications Counseling the President," 6 Op. O.L.C. 481, 495 (1982) (Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel) ("[T]he attorney-client privilege . . . functions to protect communications between government attorneys and client agencies and departments . . . much as it operates to protect attorney-client communications in the private sector"); Restatement (Third) of the Law Governing Lawyers § 124 (Council Draft No. 11, Sept. 28, 1995); Green v. Internal Revenue Service, 556 F. Supp. 79 (N.D. Ind. 1982) (attorney-client privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("Courts have generally accepted that attorney-client privilege applies in the governmental context").

The application of attorney-client confidentiality in the government context is explicitly recognized in the rules of the District of Columbia bar. Under D.C. Rule of Professional Conduct 1.6, a lawyer may not knowingly reveal information protected by the attorney-client privilege or certain other information gained in the professional relationship, in the absence of waiver or an explicit exception. The rule clearly applies to government lawyers. See D.C. Rule 1.6(i) (identifying the client of the government lawyer as the agency that employs the lawyer unless expressly provided otherwise by law, regulation, or order); D.C. Rule 1.13, comment [7] ("the lawyer represents the agency acting through its duly authorized constituents"). The only additional exception for government lawyers arises when revelation of a client confidence or secret is permitted or authorized by law. See D.C. Bar Rule 1.6(d)(2)(B); see also id., Comment [34] ("such disclosures may be authorized or required by statute, executive order or regulation"). In other respects, a government lawyer has the same obligation of confidentiality as does a private lawyer.

or through agents of his choosing (such as his private attorneys).

White House lawyers participated in the November 5 meeting because, as described above, their attendance was essential to the performance of their official duties. At the meeting, governmental lawyers were necessarily exposed to communications the disclosure of which would provide insight into the private representation of the Clintons, including private counsel's opinions and analysis and discussions that, directly or indirectly, revealed confidences of the Clintons. But because the discussion was also in furtherance of the representation of the Office of the President, White House counsel were bound by their own ethical obligations to keep the discussion confidential. The meeting, which simultaneously served the purposes of the lawyers representing the Office of the President and counsel for the Clintons personally, thus stood at the intersection of two separate privileged relationships that reinforced one another and which should not now be used to destroy each other.

Second, the communications of the governmental attorneys and the private attorneys were protected under the common interest rule. The common interest doctrine allows lawyers representing different clients, when their clients' interests coincide, to communicate in furtherance of these mutual

interests without breaching the privileges of their clients.⁵ The rule is based on the recognition that (1) consultation among lawyers for clients facing the same issues promotes the effectiveness of legal services; and (2) where clients share a mutual interest in a matter, they may have a reasonable expectation that their confidences will be preserved.

The President's public and private lawyers handling Whitewater-related matters clearly shared a common interest that would support the application of this rule. As described above, discussion among the lawyers representing the President's public and private interests in this matter was essential to the effectiveness of both representations. At the same time, it was

⁵ See, e.g., United States v. Schwimmer, 892 F.2d 237, 243 (2nd Cir. 1989) (the common interest rule "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel"); Hodges, Grant & Kaufmann v. Internal Revenue Serv., 768 F.2d 719, 721 (5th Cir. 1985) ("The privilege is not . . . waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication."); Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995) ("Under the common interest rule, individuals may share information without waiving the attorney-client privilege if: (1) the disclosure is made due to actual or anticipated litigation; (2) for the purpose of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties"). Though the rule has most frequently been applied where the parties work jointly in anticipation of litigation, it is has not been limited to that circumstance. See, e.g., SCM Corp v. Xerox Corp., 70 F.R.D. 508, 514 (D.Conn. 1976) (common interest rule applied to companies sharing "a business interest in the successful exploitation of certain patents. Whether the legal advice was focused on pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear").

quite clear that the President's public and private fortunes would be linked together, as political actors seized on the Whitewater allegations in an effort to disable him. Going into the meeting, all of the lawyers had a reasonable and accurate understanding that the others present shared a common interest and would maintain their confidences.⁶

IV. Disclosure of The Communications Will Destroy The Ability of Government Lawyers to Have Confidential Communications

During the hearings before this Committee, Chairman D'Amato has repeatedly indicated his acceptance of valid claims of attorney-client privilege. That privilege applies without reservation or question to the notes in issue. The attorney-client communications involved here were also bound up with the exercise of governmental functions that implicate the governmental attorney-client aspect of the executive privilege. And, although the White House has refrained from asserting

⁶ The fact that several of the lawyers attending the November 5 meeting work for the government in no way precludes application of the common interest doctrine. The case law provides that a government entity and a private party can share a common interest so that communications among their attorneys can be privileged. See United States v. AT&T, 642 F.2d 1285, 1300 (D.C. Cir., 1980) (MCI and the United States share a common interest so that sharing of work product does not waive the privilege; "The Government has the same entitlement as any other party to assistance from those sharing common interests, whatever their motives"); Chamberlain Manufacturing Corp. v. Maremont Corp., No. 90 C 7127 (N. D. Ill. July 20, 1993) (communication between private manufacturing corporation and the Department of Justice privileged).

executive privilege before the Committee, the intersection of that privilege and the attorney-client privilege should be weighed carefully by the Committee and, if necessary, the courts.

Executive privilege clearly would protect notes of the November 5 meeting. The Constitution gives the President the right to protect the confidentiality of material the disclosure of which would significantly impair the performance of the President's lawful duties, particularly against incursions by the legislative branch. Thus, courts will not order the President to release documents "that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President".⁷

The notes at issue fall within this description. As explained above, in matters such as these, consultation between attorneys within the Office of the President and his private counsel are essential to permit the President's official attorney-advisors to render effective legal advice. Disclosure of the notes would preclude such consultation, and would therefore deprive the President of the United States of the opportunity to receive the soundest possible advice regarding

⁷ See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974). See also United States v. Poindexter, 1990 U.S. Dist. LEXIS 2881, *3 (D.D.C., March 21, 1990) ("[I]n view of the special place of the presidency in our constitutional system and the status of the President as the head of a branch of government coordinate with the Judiciary, the courts must exercise both deference and restraint when asked to issue coercive orders against a President's person or papers").

legal matters. As the Supreme Court has stated clearly, protecting the quality of the advice provided to the President by affording confidentiality to information relating to the advisory process is a legitimate exercise of executive privilege.⁸ The purposes of the executive privilege therefore squarely support the protection of the notes.⁹

The Committee says that it wishes to examine the notes in order to determine if improper use was made of confidential information allegedly obtained improperly by government officials. But the Committee has available to it other effective ways of obtaining this information. The Committee can examine all participants in the meeting, other than Mr. Kendall or Mr. Engstrom, to elicit all information they were capable of imparting at the meeting. The White House even has offered not

⁸ The executive privilege rests on a recognition that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." United States v. Nixon, 418 U.S. 683, 708 (1974). As the Supreme Court has stated, fear of disclosure of the content of one's advice operates "to the detriment of the decisionmaking process." Id. at 708. See also Association of American Physicians and Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993) ("Article III not only gives the President the ability to consult with his advisors confidentially, but also, as a corollary, it gives him the flexibility to organize his advisors and seek advice from them as he wishes").

⁹ The fact that the notes are in the possession of Mr. Kennedy, not the executive branch, is irrelevant to the executive privilege analysis. First, the notes were generated while Mr. Kennedy was performing duties as an executive branch employee. Second, the President can by assertion of executive privilege prevent the disclosure of information in the hands of third parties. See United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976).

to challenge the assumption that the participants imparted all such knowledge at the meeting. The Committee also can ask all participants at the meeting, other than Mr. Kendall or Mr. Engstrom, about their actions after the meeting. In this way, the Committee can make its desired inquiries.

The Committee has rejected this alternative avenue of obtaining information because it already knows: (1) that any "confidential" governmental information obtained by White House officials had been made public by the time of this meeting; and, (2) that no participant at the meeting improperly interfered with the investigation of this matter. In sum, the Committee appears to be seeking, not information necessary to its investigation, but rather a confrontation with the executive branch of government.

Nonetheless, we remain willing to work with the Committee to find a way to provide information about this meeting reasonably necessary to the Committee's inquiry without unduly compromising the important principles we have described in this submission.

* * *

The President has provided his full cooperation with the Special Committee and other entities investigating Whitewater and Related Matters. In a spirit of openness and with considerable expenditure of resources, the White House has produced thousands of pages of documents and made scores of White House officials available for testimony, foregoing assertion of

applicable privileges. In view of this cooperation, the Committee's attempt, after eighteen months, to invade the relationship between the President and his private counsel smacks of an effort to force a claim of privilege by the President, who must assert that right to avoid risking the loss, in all fora, of his confidential relationship with his lawyer. This attempt to win headlines and seek political advantage by denying the President a right enjoyed by all Americans surely is an illegitimate exercise of Congressional investigative power that should not be sanctioned by the full Senate. It will not be permitted by a court of law.

STATEMENT

Mark D. Fabiani
Special Associate Counsel to the President

Every American has the right to seek private advice from a doctor, lawyer, or minister. Senators, Speakers and Presidents enjoy this same right, along with every other American citizen.

The President's representatives have offered to make available to the Senate Committee all the information it needs. This information can be provided without violating the important right of a person to receive private advice from a lawyer.

Unfortunately, Senator D'Amato has rejected our offer to provide this information without invading the attorney-client relationship. That is because this is about partisan politics, pure and simple. This is not about seeking the truth; it is about inflicting political damage on the President. We now have no choice but to say: Enough is enough.

The attached legal memoranda set forth the foundation of our position. The President's representatives remain open to a reasonable compromise with the Senate Committee that would provide the information the Committee requests without violating the important principle that every American has a right to seek private advice from a lawyer.

DNW 12:30
→ Grete Van Susteren legal hr.
→ AC privilege
- 2 law students

looking to hr
checkpt.

Mittelehrant

DECEMBER 15, 1995

MS. ELENA KAJAN:

FOR YOUR INFORMATION.

A handwritten signature in cursive script, reading "Daniel M. Gribbon". The signature is written in black ink and is positioned centrally on the page.

DANIEL M. GRIBBON

DANIEL M. GRIBBON
1201 PENNSYLVANIA AVENUE, N. W.
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To The Editor:

The widespread criticism of the Clintons' invocation of the attorney-client privilege with respect to their attorneys' memoranda of conversations with them and with each other (e.g. Editorial New York Times December 12, 1995) reflects a serious misconception of the privilege and its acknowledged role in the administration of justice.

Fifteen years ago, then Justice Rhenquist, speaking for a unanimous Supreme Court in Upjohn Co. v. United States, re-affirmed in language admitting of no ambiguity the essential role of the privilege and the related work product doctrine in promoting "public interests in the observance of law and administration of justice." The Court emphasized two elements of the privilege that appear to be largely overlooked in comments on the current demands by the Senate Special Committee.

The privilege, the Court held, recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. In addition, the Court said, if the purpose of the privilege is to be served, the attorney and client must be able to predict

with some degree of certainty whether particular discussions will be protected since an uncertain privilege is little better than no privilege at all.

That the privilege has long been recognized as an essential element of the judicial system is seen from the Courts reliance on its 1888 decision in Hunt v. Blackburn in which it declared that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

The fact that several sets of lawyers were involved in the conversations in question appears to have confused the issue. It should not. All attending the meeting in question were representing the Clintons and no one else, and had only their interest to protect. It is well established that the privilege fully applies to conversations between several lawyers representing different clients when the clients all have a "common interest" or are presenting a "joint defense." The application of the privilege when several lawyers are representing the same client appears never to have been challenged and should be free of doubt.

The closely related work-product doctrine, which, similarly serves the public interest in the administration of justice, is also applicable in this matter. That

doctrine stems largely from the unanimous 1947 decision of the Supreme Court in Hickman v. Taylor. Concurring in that opinion, Justice Jackson wrote, "I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have said to him." The Senate Special Committee is demanding from the Clintons' lawyers such an account.

Daniel M. Gribbon
Daniel M. Gribbon*
Washington, D.C.
December 15, 1995

* Counsel for Petitioner in Upjohn Co. v. United States

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The Communist Comeback

Less than five years ago as Communist Party leaders fled their Moscow offices, frantically destroying files as they went, the very survival of the party seemed in doubt. Sadly, Sunday's parliamentary election erased that doubt. Though a final count will not be available for several days, the Communist Party seems likely to finish with better than 20 percent of the vote, double the nearest rival. That makes it the strongest political force in Russia.

Together with the robust showing by the ultranationalist Liberal Democratic Party, led by the firebrand Vladimir Zhirinovskiy, the election was a reversal for the forces of reform, and an undeniable rebuff to President Boris Yeltsin. His party is running third, with about 10 percent of the vote.

Many Russians, disillusioned by disorder and economic dislocation, plainly want stability and greater financial security. But whether they want the new Russian empire cavalierly promised by the Communists is doubtful.

The Communist resurgence is disheartening, but not calamitous. Political and economic reform in Russia have advanced too far to be brought to a dead stop by this election. The new State Duma, or lower house of Parliament, will be more conservative than the old, but not much more unified. Unequal in power to the presidency, it cannot force a drastic change in direction unless an opposition coalition can put together a two-thirds majority to overturn Yeltsin vetoes, which seems unlikely.

What it can do is slow reform. Through obstruction more than action, the new legislature can force Mr. Yeltsin to continue a drift toward more conservative policies that he began after the last parliamentary election two years ago.

Russians, taught by their own history to expect the worst, are already talking darkly of civil conflict and a return to the violent confrontations between the President and Parliament that shook Moscow in October 1993. Speculation is high that Mr. Yeltsin

will cancel next June's presidential election. The same prophets predicted earlier this year that he would cancel the parliamentary election.

Russia has certainly proved itself capable of political deformity over the centuries, and there is no guarantee against new turbulence. But several points ought to be kept in mind in Moscow and Washington in the days ahead that suggest this election was a warning, but not necessarily a prelude to the end of reform.

To begin with, this was a democratic election, one of the largest in history. More than 60 percent of eligible voters, or about 60 million Russians, cast ballots. Whatever their doubts about the future, they showed their commitment to democracy. When the Bolsheviks, an earlier incarnation of the Russian Communists, came back from near-extinction in 1917, their popularity was hardly put to a vote. Nor did the Soviet Communists ever need to assemble a legislative coalition to pass a law.

While moderates remain divided, and at least one reform party lost ground, the threat of a united front of neo-Communists and nationalists seems premature. The Communist leader, Gennadi Zyuganov, an obscure official in the Soviet era, will find it no easier than other politicians to work with the mercurial Mr. Zhirinovskiy.

Both men have made promises they cannot keep. Russia lacks the military and economic muscle to rebuild its empire, no matter how much the two men may like to talk about it. The Russian economy, just coming out of a tailspin, cannot be forced back under state control without crashing.

Mr. Yeltsin, for his part, must resist the temptation to resort to authoritarian rule as he deals with a quarrelsome legislature and looks ahead to a presidential election that could put a Communist or nationalist in his Kremlin office. Russians clearly relish the exercise of their voting rights, something their political leaders will have to accept.

Averting a Constitutional Clash

President Clinton may be moving to avoid a constitutional confrontation with Congress over the Senate Whitewater committee's access to notes taken by a White House lawyer at a Whitewater meeting two years ago that was attended by senior officials and personal lawyers for Mr. Clinton and his wife, Hillary Rodham Clinton.

If Mr. Clinton relinquishes the documents, it would be a positive departure from the evasive tactics that have marked the Clintons' handling of questions about Whitewater since the 1992 campaign. Mr. Clinton's assertion that the subpoenaed material is protected by lawyer-client privilege, and his quieter claim of executive privilege, are legally dubious and risk a damaging precedent.

A forthcoming response to the Senate's request would seem especially timely in view of new disclosures that more records have disappeared from the Rose Law Firm. These documents deal with Mrs. Clinton's legal work for Madison Guaranty, the failed savings and loan run by their Whitewater partner. This news comes one week after the disclosure that Vincent Foster removed three files from the firm during the 1992 election campaign and turned them over to the Clintons' trusty political errand-runner, Webster Hubbell.

The dispute with the committee involves notes taken by William Kennedy 3d, an associate White House Counsel, at a November 1993 meeting at the offices of the Clintons' private attorneys. This meeting was attended by three members of the White House Counsel's office, three lawyers for the Clintons and Bruce Lindsey, one of the President's

senior political aides. Clearly, lawyer-client confidentiality ought to apply to Mr. Clinton's exchanges with his personal lawyer. But to try to extend the privilege to such a broadly constituted meeting is a stretch, especially given the committee's mandate to find out whether Administration officials, including some at the meeting, may have improperly used confidential Government information to aid the Clintons' private defense.

Mr. Clinton's various lawyers, and some legal ethics experts, speak of the overlap of the President's public and private roles to justify the claim of lawyer-client privilege. But this argument misses the vastly different and even conflicting responsibilities of Mr. Clinton's two sets of attorneys.

As for executive privilege, it ought to be a way to protect a narrow band of Presidential privacy on important matters of governance, including national security. It is a distortion of the doctrine's history to raise it to block a legitimate Congressional inquiry into the Clintons' Arkansas financial dealings and the official conduct of senior Administration aides.

A decent resolution that had the White House handing over the notes seemed to be in sight over the weekend. But yesterday Senator Alfonse D'Amato, the committee chairman, complained that the White House was trying to bargain in the media instead of negotiating with the committee. It should still be possible to make arrangements before tomorrow, when the full Senate is due to take up the matter. If not, the Senate has no choice but to vote to go to court to enforce the committee's subpoena.

Mr. Pataki's Block Grants

The welfare and Medicaid proposals made by Gov. George Pataki last week would apply to those New York State programs the same misguided reform principle that Congressional Republicans are using to refashion Federal poverty programs. In his own variation of a block-grant system, the Governor would turn over parts of Medicaid and welfare to counties to run with fixed allotments of state money that would not change as local poverty rolls changed.

Block grants would make for bad Federal policy — and even worse state policy, encouraging counties to skimp on New York's neediest families. Specifically, Mr. Pataki would turn over home-care and Medicaid coverage of able-bodied single adults to the counties. He would have counties run employment and other non-cash assistance programs for welfare recipients and give counties the option of taking over cash assistance for the poor.

The potential cruelty of this idea would be obvious the next time a recession hits. Counties would be forced to handle burgeoning caseloads either by cutting benefits, dropping enrollees or raising revenues through higher taxes, hardly likely in a recession.

Even in ordinary times, counties will be tempted to cut poverty programs, including Medicaid coverage, and pass along the savings in the form of tax cuts to businesses and families. That way counties can discourage needy people from moving in and encourage their own poor citizens to move out. Because family migration across county lines is potentially great, the incentive for counties to slash

poverty benefits will also be great.

The tone of the Pataki budget plans is unfair. It rails against paying for training residents at teaching hospitals under Medicaid even though many health-care experts say the system has provided relatively high-quality, low-cost care to the hospitals' indigent and other patients. The administration accuses Medicaid of helping teaching hospitals add unnecessary layers of residents, even though the state system scrupulously avoids paying more to hospitals that hire additional residents.

New York does pay too much for Medicaid. Some of the Governor's reforms, such as placing recipients in managed care, make sense. But the excess should be put in perspective. For example, state Medicaid spending on children is only about 13 percent higher per recipient than in other Middle Atlantic states. Some of the gap between New York and other states can be explained by New York's high cost of living. New York includes under Medicaid benefits such things as hospital coverage for able-bodied single adults that other states provide under separate programs. That way the Federal Government picks up half the tab, hardly something the Governor should be attacking. The gap that is left, after putting the accounting systems on the same basis, would not be gigantic.

Medicaid and welfare can no doubt be pruned without doing injustice. But the huge cuts proposed by Mr. Pataki and the perverse incentives that would be unleashed by the block-grant reform are attacks aimed primarily at counties and cities, like New York City, that care for the state's poor.

Saving American Savings

By LLOYD BENTSEN

In his strongly worded veto of the Republican budget, President Clinton reached out to Congress, emphasizing his desire to find "common ground." One area where common ground already exists is in the need to bring the Individual Retirement Account out of retirement.

Both the president's "Middle Income Bill of Rights" and the Republican budget bill allow millions more Americans to benefit by contributing to IRAs. Of course, IRAs cost the Treasury in the short run. But it's a sound long-term investment, and both the president's plan and the congressional plan cost about the same. Both have endorsed expanding the IRA because it is a proven winner in increasing personal and national savings. And no objective could be more important. Savings provide individuals with economic security and provide capital for growth.

I must confess some personal interest in these proposals. Both are patterned after legislation I introduced as chairman of the Senate Finance Committee with Sen. Bill Roth (R., Del.), who now heads that committee. Congress twice passed the "Bentsen-Roth" IRA with overwhelming bipartisan support, and it was included in tax legislation that, unfortunately, President Bush vetoed for other reasons.

The expanded IRA is also endorsed by top economic experts, including Martin Feldstein and Daniel Feenberg of the National Bureau of Economic Research, Steven Venti of Dartmouth, and David Wise of Harvard. Originally skeptical that IRAs increased savings, Jonathan Skinner of the University of Virginia and R. Glenn Hubbard of the Columbia Business School recently completed a study that concludes there is "persuasive" and "compelling" evidence that IRAs increase both personal and national savings.

By nearly all accounts, Americans save

too little for retirement—or for a first home, college education and unforeseen medical expenses. In less than 15 years, the U.S. savings rate has dropped by half. Indeed, Americans today save less than at almost any time since World War II. The Germans and British now save double what we do, and the Japanese and French save three times as much.

When we fail to save enough, we either have less to invest in economic growth or we must borrow from abroad. Unfortunately, we have witnessed the consequences of increasing reliance on foreign investment. In just over a decade, the U.S. has been transformed from the largest creditor nation in the world into the largest debtor.

Why does our savings rate trail others? One reason is that the tax codes of other countries encourage savings, while ours discourages it. In poll after poll, Americans say that they would use IRAs to increase personal savings if they were eligible to do so. Expanded IRAs were thoroughly road-tested in the early 1980s. They are not a new idea. They are user-friendly and easy to understand. IRAs are popular because they work.

Given the choice of writing a check to their IRA or paying more to the IRS, millions of Americans opted for saving through the IRA. From 1981 to 1986, contributions to IRAs were fully deductible for all Americans, and IRAs accounted for one-third of the nation's net savings. After 1987, when Congress severely limited the deductibility of IRAs, the amount saved in IRAs dropped precipitously—even by those still eligible to deduct fully their IRA contributions.

Both the president and the Republican Congress want to reverse that trend with broadly similar plans. Both expand the availability of the traditional deductible IRA. And both create a new non-deductible

IRA. Contributions would come from after-tax income and earnings could be withdrawn tax-free. And both plans allow savings accumulated in an IRA to be withdrawn penalty-free for other critically important purposes.

Another important IRA proposal is to make the tax code more family-friendly by allowing one who works in the home to contribute the same amount to an IRA as his or her spouse employed outside the home. Current law unfairly limits homemakers' IRA contributions to a fraction of what others may make. Both plans would accomplish other critically important objectives:

- The dream of home ownership remains out of reach for many Americans, often due to the difficulty of saving for a down payment. Both plans would allow IRA funds to be used to buy a first home.

- American families are increasingly concerned about their ability to meet the rising costs of a college education. Both plans would allow IRA funds to be used to pay for college.

- A serious unexpected illness or the need for long-term medical care threatens the economic security of American families. Both plans would allow IRA funds to be used to pay for medical expenses and long-term care.

We must not allow all these important objectives to be imperiled during the hurly-burly of budget negotiations. The president and Congress (and I) share a common goal of balancing the budget. But these goals are imperiled unless we provide incentives for all Americans to resume a culture of savings. Universal availability of IRAs will encourage Madison Avenue to urge Main Street to "Save Now" rather than "Buy Now."

Mr. Bentsen, a former chairman of the Senate Finance Committee and Treasury secretary, is now a lawyer in Houston.

No Attorney-Client Privilege for Clinton

The first thing to remember in considering President Clinton's refusal last week to comply with a Senate Whitewater Committee's subpoena for notes from a 1993 meeting between his personal lawyers and White House attorneys, is that the U.S. Congress is not a court of law. Congress's power to investigate is almost unfettered; no court has ever ruled that attorney-client privilege applies in congressional hearings.

It's hard to imagine how Mr. Clinton could win the court case that is about to en-

Rule of Law

By Joseph E. diGenova

sue; the law and tradition of congressional investigations are simply not on his side. Since the founding of the republic, Congress has consistently maintained that the privilege "cannot be claimed as a matter of right before a legislative committee," as a congressional study put it in the mid-'80s—though it occasionally may do so as a matter of courtesy. It has based this view on English common law and parliamentary history, as well as on congressional tradition. Most important of all, both houses of Congress have declined to adopt changes to their chambers' standing rules to incorporate any specific recognition of attorney-client privilege.

In the 19th century, during a House investigation of the Credit Mobilier scandal, the counsel to the Union Pacific Railroad was held in contempt of Congress and jailed in the Capitol for invoking the privilege and refusing to disgorge documents.

In 1934, Sen. (later Justice) Hugo Black, as chairman of a panel investigating common carriers, refused to recognize the privilege for papers being held by William MacCracken, an attorney for some of the carriers. Black decided that none of the papers in MacCracken's possession could

be withheld under the claim of privilege.

In the 1970s and '80s, John Dingell's infamous and feared House Subcommittee on Oversight and Investigations routinely rejected claims of attorney-client privilege. Chairman Dingell was fond of saying: "It is my firm conviction that the commonwealth precedents, customs of both the Commons and the House, fully sustain rejecting a claim of attorney-client privilege if it impedes in any manner whatsoever the necessary inquiries of the Congress in determining whether a law of the United States may have been violated or whether that law accords sufficient protection to the American people."

In observing that the Dingellian principle was "gaining credence on the Hill," James Hamilton, counsel to the Watergate Committee in the 1970s, called it "pernicious" at an American Bar Association conference in the 1980s. Indeed, during Mr. Hamilton's Watergate tenure, constitutional guardian and civil libertarian Sam Ervin refused to recognize the privilege for any government lawyer in the performance of official duties.

He declined, for example, to permit Justice Department official Robert Mar-dian to invoke it. Claims of privilege were likewise rejected for G. Gordon Liddy, Bebe Rebozo and Herbert Kalmbach, President Nixon's personal attorney. Unlike Mr. Clinton, Mr. Nixon waived the privilege with regard to White House Counsel John Dean's testimony.

In 1986, while I was U.S. attorney for Washington, D.C., a House Foreign Affairs subcommittee looking at the business activities of former Philippine President Ferdinand Marcos rejected a claim of attorney-client privilege and held two attorneys in contempt for failing to produce documents. The subcommittee "determine[d] that the legislative need for the information outweigh[ed] the arguments against production."

In the course of determining whether to recognize attorney-client privilege, the Democratic-controlled subcommittee did an exhaustive study of its application in Congress and opined: "Congress has taken a limited view as to the applicability of [the] attorney-client privilege. Congressional committees have entertained, as a matter of discretion, claims of such privilege. However, where in the particular circumstances an investigation determines that the legislative need for the information outweighs the arguments against production, such production has been required."

In the Iran-Contra hearings, the Select Committee recognized attorney-client privilege for Richard Secord, Albert

No court has ever ruled that attorney-client privilege applies in congressional hearings.

Hakim and Oliver North but maintained it didn't have to. It was a matter of discretion, it said, not a matter of law.

The bottom line is that the attorney-client privilege is not constitutionally grounded and has no judicially recognized place in the lexicon of congressional probes. In 1959 in *Barenblatt v. U.S.*, Justice John Marshall Harlan said that "the scope of the power of inquiry is, in short, as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."

This legal history is not obscure. It is well known to every lawyer who does business on Capitol Hill. Why, one wonders, have the lawyers who live in the White House chosen to ignore it?

Mr. diGenova, a Washington attorney in private practice, has served as a special counsel, a U.S. attorney, and a chief counsel to the Senate Rules Committee.

Hour of Lead

By AMITY SHLAES

NEW YORK—Benjamin and Janice Pinckney are sweat-equity heroes, the kind big cities long for. In 1975 the post-office employee and his wife plopped down \$13,500 at a city auction to buy a rundown brownstone in Brooklyn's Bedford Stuyvesant neighborhood. Over the years they've poured much more than that into the house, restoring historic details on ceilings and moldings. They rent their refurbished top floor to a family of grandmother, mother, and toddler—Mrs. Pinckney baby-sits for the toddler. A plaque at the front of their house bears their name in italic script: "The Pinckneys."

Lately, though, the city has proven more threat than friend to these homeowners. One day this summer brought a

dramatic. But the Centers for Disease Control and federal and state officials have tightened standards and taken to speaking of a "silent epidemic." The CDC has lowered the "level of concern" for lead in children's blood several times: Today children need only play in lead dust—not eat it—to get "lead poisoning." A 1992 federal lead law does back off from the kind of wholesale carpentry New York orders. But it also widens the net of regulation to include the tens of millions of American homes that contain lead paint. This year the U.S. Department of Housing and Urban Development will publish regulations that will require owners to disclose lead hazards when they sell homes.

"Many lawyers talk about lead as the next asbestos," says Clifford Case, a New York attorney who follows lead policy. In New York, he notes, the courts have said

that owners are liable for lead hazards in their homes—even those they don't know about. He also notes that multimillion-dollar awards from lead cases have caused most insurance companies to cease insuring for lead hazards.

To understand what a lead scare can mean to a homeowner, it helps to hear the details of stories like the Pinckneys. The health department never told Mrs. Pinckney when it visited her apartment, although it stopped there twice. It just sent her what she found "a confusing order" to change her apartment within five days. After six calls and a trip downtown, Mrs. Pinckney finally reached the city, and it gave her extra time to find a contractor. Then it fined her \$750 anyway for missing the deadline it had granted her permission to allow to pass.

Health department spokesman Fred

Winters says, "It's not the policy of the department to fine somebody after offering them an extension—there must be something more going on here."

But never at any point did Mrs. Pinckney and a city official have any discussion about what might be the specific source of the lead poisoning. Removing walls and replacing them with new molding would cost \$10,000. The Pinckneys couldn't borrow that much, so they settled on a \$5,500 job that obliterated the apartment's architectural detail. They finally obtained a loan from a credit program for Brooklynites with limited incomes. But the money didn't cover the value they lost by putting sheet-rock over historic detail.

The Pinckneys also aren't certain that lead in the apartment caused the child's problem. Lead is ubiquitous in Brooklyn. Just last year, the city's careless sandblasting effort at the Williamsburg Bridge showered lead-contaminated dust on playgrounds and streets.

"There's a general myth here that landlords are rich people," says Karen Haerter, a local real estate broker in the Pinckneys' neighborhood, where many of the buildings are two-family dwellings owned by fixed-income retirees. The city, she says, "doesn't actually care whether the child got [an elevated lead level] from the house where he lives, because they want lead-free houses." A recent \$9 million judgment for a lead-exposed child also terrifies property owners. Ms. Haerter: "This is going to drive homeowners under."

Tenants have complained about the health department's behavior as well. But "our priority is to protect the child, first and last," rebuts Mr. Winter of the health department. "We don't order an abatement [of lead] unless there is a significantly lead poisoned child present." Some strong evidence against New York's radical approach comes from a study of what the same policy yielded in Massachusetts. "[D]eleading," wrote doctors at a Boston hospital, "resulted in a significant, albeit transient, increase in blood lead levels." The state's deleading orders actually made kids so sick they were forced to undergo a painful treatment, chelation.

One scientist who has found an alternative to the rip-and-gut policy is Dr. Renate Kimbrough. She went to Granite City, Ill., a smelting town, to study children whose lead levels were around the same lead levels as those of the children in this story. Her state-funded project found that washing children's hands and keeping their fingernails short were important; so was insistent counseling and covering over peeling areas with fresh paint or contact paper. Her work reduced children's lead levels by half.

Activist groups like the New York City Coalition to End Lead Poisoning justify their campaign by noting that some children in New York still have high lead levels: Montefiore Hospital in the Bronx hospitalizes some 135 children with levels at around or over 40 each year. These children, almost all poor, do often live in neglected apartments with genuine lead hazards. The trouble with New York law and political practice, though, is that they fail to distinguish between children who need rescuing and those who don't. "Public health activists need to learn more about cost-effective measures. If they don't, they'll kill the affordable housing stock in this city—and deprive the very children they want to help of homes," says Marianna Koval, a lead consultant.

In New York, the biggest victim of the aggressive policy is the city itself. Because New York owns some 45,000 housing units, it is landlord to many apartments containing lead violations. The city currently faces 600-700 lawsuits on behalf of children alleging lead poisoning. Settlements in these cases average more than \$500,000. The litigation wave also reaches the national economy, and even Wall Street. This year a Manhattan federal court certified a class action against the Federal Home Loan Mortgage Corp. (Freddie Mac) on behalf of children allegedly exposed to lead hazards.

As for the Pinckneys and other owners, they're simply wiser to the perils of home ownership. "Now I know," says Mrs. Pinckney. "It seems like it's time to warn all the rest of the people on the block."

TEST YOUR KIDS

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Are LEAD levels high?
CALL
1-800 LAW SUIT
Lead Poisoning Causes:
• lowered IQ
• learning disabilities
• hearing problems
• behavior problems

LAW OFFICES OF
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SUITE 200
INQUIRIES WELCOME
For nearest N.Y.C.
Department of Health
Lead Testing Center
Call: 212-334-7893

Matchbook advertisement
by law firm handling
lead cases.

"My main concern was for the child." When the construction men departed, though, the Pinckneys were left with big bills and even bigger questions. How "poisoned" was this symptomless child? (The city wouldn't tell them—that information was confidential). Had the apartment really poisoned the toddler? Wouldn't rebuilding the apartment create dust that could hurt the child more?

The Pinckneys' case is just one of hundreds of instances in which New York City charges into private homes in the name of protecting children from lead poisoning. Lead dust is everywhere in big cities like this one, and kids sometimes get into it. New York law requires labs to report lead levels in toddlers' blood to the city health department. When toddlers "flunk" routine blood tests it sets off a seemingly unstoppable chain of events. City inspectors come to people's homes and advise them on the children's health. They also stamp walls containing lead—even lead below the surface—with red ink letters reading "lead." Then they order families or landlords to remove lead to protect the children.

The trouble is that zealous city officials and Draconian city laws want to make homes "lead-free"—removing much or all of lead everywhere—rather than merely "lead safe"—removing lead that can reach the child. It's an unreasonable policy, given that the lead levels provoking such action were deemed "normal" as recently as five years ago. It's a dangerous policy, given that studies show that ripping out lead can make kids far sicker than they might have been to start with. And it's a prohibitively expensive policy, given that New York has 1.9 million homes with some lead in them. Mayor Rudolph Giuliani said lead removal and lead suits "have a severe financial impact on this city."

As usual, New York presents an extreme case. But its lead mania is part of a national subversion of what was once a legitimate Great Society goal. Many Americans first became conscious of the problem when a famous ad campaign from that era featured poor pre-schoolers picking chips off walls and eating them. Toddlers' metabolisms make them particularly vulnerable. Leaded gas in the air and in apartments severely poisoned children throughout the 1960s and early 1970s. Twenty years ago, kids died of the problem—regularly.

Nowadays, the lead warriors can claim victory. Since we deleaded gas and outlawed the sale of lead paint, lead levels in American children's blood have decreased

Our Family's Story

I'm biased about this story. I came to it through personal experience.

Last August we painted our living room and uncapped a series of events so strange I couldn't have invented them.

The workmen departed our house in a cloud of dust. We and our two sons swept and vacuumed away remaining traces of their work. In the two weeks that followed, our two-year-old, Theodore, played with the vacuum cleaner. It was a stupid thing for us to allow. How stupid we learned only in September, when Theo's pediatrician phoned to tell us Theo had "flunked" a routine test for lead in his blood.

"Acceptable" was 10 micrograms per deciliter or fewer in a child's blood: Theo had a 25. The doctor told us that level triggered the mandatory intervention of the city: Its lead poisoning unit would tell us what to do. We were a Public Health Matter.

What had we done to Theo? "You have a lead poisoned child," the director of the city's lead protection unit told me. Citing the Centers for Disease Control—it sounded authoritative—another medical expert suggested our cavalier behavior had permanently shaved eight IQ points from our son's intelligence. On a day Theo was away from the house—thank goodness!—a health department official explained that lead dust contaminates everything, and that toys made in Asia were dangerous because they can contain lead. He instructed us to throw away our rugs and Theo's stuffed purple tiger. One by one, Theo's little metal cars went into the garbage can.

Lead dust is toxic, and high lead levels kill children. Here, though, are some things officials ringing the alarm bells didn't tell us. The science on lead in Theo's range, above ten but under 30, is very politicized. Some scientists say lead at that level ruins brains; others say the data are too murky to prove any significant damage. The most famous bit of research showing that high lead coincides with lower intelligence comes from work with children whose lead levels are far higher than Theo's.

Other facts: Most kids who have high lead suffer from a host of other problems. Lead poisoned kids are frequently malnourished kids. "Robust" would be a kind adjective for our 35-pounder. (For readers who need more convincing, see Diane Ruppel Shell's review of lead science in the December issue of the Atlantic).

For me the "emergency" came into context when I learned that Theo's 25 was no more than the national average in the 1960s. I looked up median lead levels for kids in Chicago, the town where I grew up, during the 1960s, the years I did that growing. That level was 30. That news meant that according to modern experts' logic, my siblings, I, and every other kid who grew up in that city in the 1960s have "lost" at least ten IQ points to lead. Somehow, though, many of us—Chicagoans still made it to college.

We still wanted to lower Theo's lead level to average. It turned out that to do so we were forced to build a team of

lawyer, contractors, and lead consultants. That is because the city dismissed our argument that the lead problem came from the painters' sanding. It ordered us to remove lead paint from any wall that had once been painted with lead. The city position was that pinpricks made to hang paintings on otherwise intact walls represented an "imminent danger" to Theodore. The lead, they insisted, could "pop" out and poison him. Their solution: Strip the wall. In fact they ordered us to rebuild our house, removing traces of lead from top to bottom—the contractor's bare-minimum estimate was \$70,000.

The cost took our breath away, but money was actually the least of it. Our doctors said ripping out walls, doors and windows as the city ordered we do—immediately—was crazy. Our children and the previous owners' had lived in the house without lead troubles. But dust from this renovation, the doctors said and wrote, would poison our kids—genuinely.

It says something about our era that most of the advice from friends and experts on how to handle this drama included litigation. I reprint the sorry list of suggestions for reader amusement:

- Move. (The city said it would still require the changes).
- Squeal on your neighbors. (Nearly all Manhattan and Brooklyn brownstones are lined with lead).
- Sue the contractor. (That wasn't on. We liked Fred too much to try to take away his pickup).
- Sue the former owner—he sold you the house with the lead in it. (Also a "no." They are our friends. Besides, if everyone in our situation sued, New York would have 1.9 million more lawsuits.)
- Sue the city for poisoning your child with its radical efforts. (Someone down the road was doing that.)
- Sue your insurance for not covering lead.
- Best of all: Have Theodore sue us.

In the end, thanks to lawyers, a wise lead consultant named Marianna Koval, and our city councilman, Ken Fisher, the city and we reached an amicable settlement: The bill will run in the mere tens of thousands. We haven't gotten far with the work yet, but we did clean up the remaining lead dust in the vacuum cleaner closet that caused the problem.

In the course of these talks, Theo's lead level dropped deep into the normal range. This city informed us that we still must renovate: Only that would make our house safe. It has told us, though, that it will consider reduced renovation orders for families who feel they can identify the source of their troubles. That would be a big help for families with fewer resources than ours.

—AMITY SHLAES



Theodore

THE WHITE HOUSE

WASHINGTON

December 20, 1995

BY TELECOPY

The Hon. Alfonse M. D'Amato, Chairman
United States Senate
Special Committee to Investigate Whitewater
Development Corporation and Related Matters
534 Dirksen Building
Washington, D.C. 20510-6075

Dear Chairman D'Amato:

As I informed you yesterday we would, Counsel for the President have undertaken to secure non-waiver agreements from the various entities with an investigative interest in Whitewater-Madison matters. I requested an opportunity to meet with your staff to determine how we might work together to facilitate this process. Mr. Chertoff declined to meet.

Nonetheless, we have succeeded in reaching an understanding with the Independent Counsel that he will not argue that turning over the Kennedy notes waives the attorney-client privilege claimed by the President. With this agreement in hand, the only thing standing in the way of giving these notes to your Committee, is the unwillingness of Republican House Chairmen similarly to agree. As I am sure you are aware, two of the Committee Chairmen who have asserted jurisdiction over Whitewater matters in the House have rejected our request that the House also enter a non-waiver agreement with respect to disclosure of these notes and related testimony.

We have said all along that we are prepared to make the notes public; that all we need is an assurance that other investigative bodies will not use this as an excuse to deny the President the right to lawyer confidentiality that all Americans enjoy. The response of the House Committee Chairmen suggests our concern has been well-founded.

If your primary objective in pursuing this exercise is to obtain the notes, we need to work together to achieve that result. You earlier stated that you were willing to urge the Independent Counsel to go along with a non-waiver agreement. We ask that you do the same with your Republican colleagues in the

The Hon. Alfonse M. D'Amato, Chairman
December 20, 1995
Page 2

House. Be assured: as soon as we secure an agreement from the House, we will give the notes to the Committee.

Mr. Chertoff has informed me that the Committee will not acknowledge that a reasonable claim of privilege has been asserted with respect to confidential communications between the President's personal lawyer and White House officials acting as lawyers for the President. In view of the overwhelming support expressed by legal scholars and experts for the White House position on this subject, we are prepared simply to agree to disagree with the Committee on this point.

Accordingly, the only remaining obstacle to resolution of this matter is the House.

Sincerely yours,



Jane C. Sherburne
Special Counsel to the President

cc: The Hon. Paul S. Sarbanes, Ranking Member

THE WHITE HOUSE

WASHINGTON

TO: LLOYD CUTLER

FROM: ELENA KAGAN

SUBJECT: PRESIDENTIAL INVOCATIONS OF ATTORNEY CLIENT PRIVILEGE

Prof. Hazard had no specific examples. He thinks Nixon and Reagan both asserted that the privilege was effective. But he could give no facts relating to such assertions.

GEOFFREY C. HAZARD, JR.

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December 14, 1995

**John M. Quinn
Counsel's Office
The White House
Washington, D.C.**

Dear Mr. Quinn:

You have asked my opinion whether the communications in a meeting between lawyers on the White House staff, engaged in providing legal representation, and lawyers privately engaged by the President are protected by the attorney-client privilege. In my opinion they are so protected.

The facts, in essence, are that a conference was held among lawyers on the White House staff, and lawyers who had been engaged to represent the President personally. The conference concerned certain transactions that occurred before the President assumed office but which had significance after he took office. The governmental lawyers were representing the President ex officio. The other lawyers were retained by the President to provide private representation to him. On this basis, it is my opinion that the attorney-client privilege is not waived or lost.

A preliminary question is whether the attorney-client privilege may be asserted by the President, with respect to communications with White House lawyers, as against other departments and agencies of Government, particularly Congress and the Attorney General. There are no judicial decisions on this question of which I am aware. However, Presidents of both political parties have asserted that the privilege is thus effective. This position is in my opinion correct, reasoning from such precedents as can be applied by analogy. Accordingly, in my opinion the President can properly invoke attorney-client privilege concerning communications with White House lawyers.

The principal question, then, is whether the privilege is lost when the communications were shared with lawyers who represent the President personally. One way to analyze the situation is simply to say that the "President" has two sets of lawyers, engaged in conferring with each other. On that basis there is no question that the privilege is effective. Many legal consultations for a client involve the presence of more than one lawyer.

Another way to analyze the situation is to consider that the "President" has two legal capacities, that is, the capacity ex officio--in his office as President--and the capacity as an individual. The concept that a single individual can have two distinct legal capacities or identities has existed in law for centuries. On this basis, there are two "clients," corresponding to the two

legal capacities or identities.

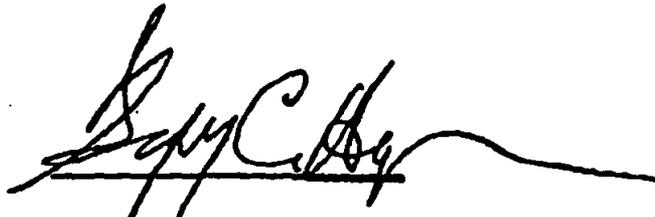
The matters under discussion were of concern to the President in each capacity as client. In my opinion, the situation is therefore the same as if lawyers for two different clients were in conference about a matter that was of concern to both clients. In that situation, in my opinion the attorney-client privilege is not lost by either client.

The recognized rule is set forth in the Restatement of the Law Governing Lawyers, Section 126 (Tent. Draft No. 2, 1989), as follows:

If two or more clients represented by separate lawyers share a common interest in a matter, the communications of each separately represented client...

(1) Are privileged as against a third person...

Inasmuch as the White House lawyers and the privately engaged lawyers were addressing a matter of common interest to the President in both legal capacities, the attorney-client privilege is not waived or lost as against third parties.

A handwritten signature in black ink, appearing to read "Geoffrey C. Hazard, Jr.", with a long horizontal flourish extending to the right.

Geoffrey C. Hazard, Jr.

Editorial Notebook

Homesick for Communism

Many Russians, to rephrase Winston Churchill, apparently believe that Communism is the worst form of government except for all the other forms.

That seems astonishing, especially to an American who lived in Moscow in the last years of the Soviet Union. After enduring all those endless lines in the Arctic winter to buy a stunted head of cabbage, after quietly suffering all the grandiloquent nonsense about Lenin's ideals and studying Marxism-Leninism until the mind went numb, after watching your country sink into an economic and political stupor, how could someone vote for the Communist Party?

Millions of Russians did in Sunday's parliamentary election, raising the Communist Party from the dead and making it the most powerful political organization in Russia. The resurrection is disturbing, yet at the same time intriguing.

In one sense, the vote seems to be the political version of the Stockholm syndrome, the phenomenon common in hostage cases when terrorized victims begin to identify with their captors. Russia is still recovering from more than seven decades of Soviet tyranny, and many Russians apparently still identify more closely with the dictators who controlled their lives than with the democrats who freed them.

But something else seems to be at work. Many Russians, particularly the elderly and those still living in rural areas, appear genuinely nostalgic for the security blanket that came with Communism. For all the terrible pain it inflicted, and the millions of lives it destroyed, Soviet Communism provided a crude safety net that gave citizens the illusion that the Communist Party was looking after their interests. The development of a free market has ripped away the net.

The Communist system was suffocating, patronizing and calculated to keep the country obedient. Some Russians recognized it as a narcotic, and fought to

Russians Miss Their 'Workers' Paradise'

overcome it. The internal security forces were always there to silence them. Most Russians chose not to take that risk, or ceased to care what the purpose of the system was as long as bread was cheap, jobs were plentiful, education was universal, health care was free and vacations were subsidized. The bread was excellent, but many people now seem to have forgotten that lots of the jobs were pointless, education was politically contaminated, health care was atrocious and Soviet vacations were Spartan.

The whole enterprise was ideologically dressed up as a workers' paradise. Though some Russians were true believers, most were smart enough to see through the pseudo-science. But the system still enveloped them.

Now that people have had a taste of unemployment, inflation, crime and other problems that have come with democracy, it is shrewd politics for the new Communists to suggest that the old days were actually pretty good. The party, at least for now, has distanced itself from the most brazen practices of the past, including one-party politics, censorship and repression of dissent.

The reporting and the polling data from Russia show the Communists gained from discontent about an uneven economy and upheaval in Russian life. Voters in Moscow, St. Petersburg and some other urban centers — where the benefits of reform have materialized most quickly — voted for reform candidates. Nearly everywhere else, Communists and nationalists did well, singing from essentially the same page of promises about restoring order and economic stability, shorthand for the Communist safety net.

Reform in Russia is far from dead, but it has run into a formidable obstacle — the past. To prevail in the months and years ahead, the reformers will have to convince millions of their countrymen that the uncertainty of freedom is preferable to the security of Communism, as deadening as it was. PHILIP TAUBMAN

Clinton Has a Right to Privacy

By Stephen Gillers

Bill Clinton may be the only C.E.O. in America who can't talk with his lawyers in private. His effort to claim lawyer-client privilege for a 1993 meeting between his personal lawyers and White House counsel about the Whitewater investigation has provoked speculation that he is hiding something. Worse, this effort is being compared to President Richard Nixon's attempt to conceal the Watergate tapes. Yesterday, the Senate voted to take Mr. Clinton to court.

Unlike executive privilege, which President Nixon invented in his failed effort to hide Watergate crimes, the lawyer-client privilege dates back to Elizabeth I and was part of American law at independence. The privilege, which makes it safe to confide in lawyers, is no technicality.

So why is the President being Nixon-baited for wanting the same rights as the rest of us? Partly because some in Congress reject his claim, partly because he initially claimed too much and partly because of uncertainty in the law. As a result, we are headed for a constitutional showdown that is unnecessary and unwise, and still avoidable.

Stephen Gillers is a professor at New York University School of Law.

Lawyers meet.
They take notes.

The root of the impasse is Mr. Clinton's need for two sets of lawyers. Private lawyers represent the Clintons in the investigation of Whitewater, their 1980's land deal. But Whitewater has reached into the 1990's to include claims of official cover-up and misuse of government information. Those charges require the advice of White House lawyers.

There are two things to know about lawyers. They hold meetings and take notes. In 1993, both groups met to clarify responsibilities and share information. William H. Kennedy 3d, an associate White House counsel, took notes, and the Senate Whitewater committee subpoenaed them over the President's claim of privilege.

After early reluctance, the President is now willing to deliver the notes and waive any privilege for the White House lawyers at the meeting. What his personal lawyers fear, however, is that doing so may waive the Clintons' privilege with them. Some in Congress have dismissed this fear, but the law on such waivers is as cloudy as the Great Salt Lake. The President is right to worry.

Mr. Clinton made a mistake when

he initially demanded that, in exchange for the notes, Congress and the independent counsel on Whitewater, Kenneth W. Starr, agree that the files were privileged. Republicans on the Senate Whitewater committee were properly offended. Such a concession could be used against Congress in later battles. The President then asked for a promise that delivery of the notes would not waive his privilege with private counsel.

Mr. Starr and the Senate Committee accepted this compromise. But on Tuesday, two powerful House committee chairmen, Jim Leach of Iowa and William Clinger of Pennsylvania, balked. The issue may now go to Federal court, where the President, in order to protect his personal privilege, will be forced to assert the White House counsel privilege that he is now prepared to waive.

In more than 200 years, we have had the good sense not to ask the courts to decide whether the President can assert lawyer-client privilege before Congress. The law's ambiguity over this question encourages compromise as the only way to avoid a court test that neither branch wants to lose.

The main obstacle now to compromise is the baffling objection of Representatives Leach and Clinger. As a result, we are facing a needless constitutional conflict over the confidentiality of notes the President is prepared to give up, because this is the only way left for the Clintons to secure their right to private counsel. □

Make a Budget Deal Now

As budget talks floundered in Washington yesterday, President Clinton angrily blamed the band of fire-breathing conservative Republican freshmen in the House for preventing Speaker Newt Gingrich from negotiating seriously. The President was not wrong in his assessment, but he was not wholly right either. The negotiations are at an impasse at least as much because Mr. Clinton has not shown his own hand on where he wants the budget to go. With a substantial part of the Government still shut down in the week before Christmas, both sides need to take the process more seriously and make concessions to get things going.

The budget talks come at an extremely fluid time on both sides of the aisle. On the Republican side, the first signs of disagreement are emerging between Speaker Gingrich and Bob Dole, the Senate majority leader. After the first budget shutdown of a few weeks ago, Mr. Dole was not the only one to recognize that it was the Republicans, not Mr. Clinton, who got the public's blame for intransigence. He has made it clear that he did not agree with keeping the Government shuttered in this second round. The President slyly went out of his way yesterday to drive a wedge into the G.O.P. camp by praising Mr. Dole for making a good-faith effort to negotiate, as opposed to Mr. Gingrich.

But on the Democratic side, the divisions are even deeper. Many liberal Democrats were dismayed when Mr. Clinton boxed himself in last month by promising to balance the budget according to Congressional scorekeeping. They feared that in order to get a deal, he would scrap key parts of his agenda, including programs that protect poor children. But if Mr. Clinton refuses to move toward the Republicans, he risks losing the support of dozens of moderate and conservative Democrats. Among these is a group of lawmakers calling themselves the Blue Dogs, a parody of the old term "yellow dog Democrats," whose party loyalty was so great that they would vote for a yellow dog over a Republican. Right now it is the conservative and moderate

Democrats and some moderate Republicans in the House and Senate who are waiting for Mr. Clinton to sit at the table and deal.

In face-to-face negotiations with Republican leaders, Mr. Clinton has been stalling. He effectively reneged on his promise to show how he would balance a budget in seven years, using the more conservative economic assumptions of the Congressional Budget Office. In fact, his plan fell at least \$300 billion short. Tactically, it may have been shrewd of him to hold back. The public opinion polls show that the White House has captured the high ground politically, with growing numbers of Americans viewing the President as resolute in protecting programs that help children, the poor and the elderly. But now Mr. Clinton should move. He should seize on some of the ideas of the centrists and try to forge a unified Democratic position that modifies the White House's original proposals.

Specifically, Mr. Clinton should continue to demand that the Republicans modify their cuts, preserving federally guaranteed Medicaid, food stamps and nutrition programs. In exchange he should radically scale back, if not drop, his proposed middle-class tax cut. The blue dogs favor no tax cut at all until the budget is balanced, a position that might give the President some cover if he moves toward it. Mr. Clinton would also move the talks along by signaling a willingness to raise the heavily subsidized premiums that the elderly pay for Medicare. Republican leaders have gone first on this proposal, and it has won some support among the moderate Democrats.

The deal that could emerge from this process is probably not one that liberals would swallow. Nor is it one that the cadre of true believers breathing down Mr. Gingrich's neck would accept. But with the right mix of concessions and demands, Mr. Clinton might be able to break the current impasse, get a better deal than he could get from endless delays and preserve a broad set of principles on which he can run for re-election.

Stuffing the P.B.A.'s Stocking

The New York State Legislature is attempting to send the New York City police union a \$5-million-a-year Christmas present, and put the bill on the city taxpayers' tab. Gov. George Pataki, who has thwarted the lawmakers' pandering to the Patrolmen's Benevolent Association before, will have to come to the rescue once again.

The issue this time is a bill requiring the city's Police Department to promote sergeants and lieutenants assigned to investigative work at certain bureaus. More than 400 sergeants who have been on the job for 18 months would get an automatic promotion to sergeant supervisor, and a \$9,000-a-year raise. An additional 176 lieutenants would become lieutenant commanders, and get an extra \$7,000.

The bill was part of a package of legislation designed by the P.B.A. to bypass the collective-bargaining process. It is a longstanding tradition in Albany for public-employee unions to ask the Legislature for benefits they fail to win at the negotiating table. While the practice is always outrageous, it is worse when the union is as powerful as the P.B.A.

Mr. Pataki vetoed the other bills in the P.B.A. package. The Senate majority leader, Joseph Bruno, never sent the automatic-promotions bill to the Governor, possibly to save his fellow Republican from having to offend the police union once again.

But this week Mr. Bruno suddenly shipped the measure to the Governor's desk.

There are many arguments against the bill. It would give this special benefit only to officers working in two of the Police Department's high-prestige bureaus — organized crime control and detectives. Sergeants and lieutenants who labor in other areas, such as internal affairs, transit or housing, would be left out in the cold. It removes the police commissioner's present power to award these promotions for good performance. Most important, at a time when Albany is preparing to slash aid to the city, the last thing the Legislature should be thinking about is mandating a new expense.

The Giuliani administration, which has tied its fortunes to the success of the Police Department, has fiercely opposed the P.B.A. bills. In an appalling display of childishness, city police officers staged a ticketing slowdown this fall in an attempt to "punish" the Mayor for thwarting their pet proposals.

The resurrection of the automatic-promotion bill is an obvious attempt to save face for the P.B.A. leadership. Mr. Pataki, who angered the union with his earlier vetoes, may be tempted to throw the P.B.A. a sop. But he must stand firm. By vetoing it, he will send a message that on his watch, the state is no longer going to be held hostage to the whims of powerful special interests.

DEC 20 '95 04:23PM AMER LAW DIV

P. 2

December 20, 1995

TO : Honorable Jim Leach
Attention:

FROM : Mort Rosenberg

SUBJECT : Acceptance of Assertions of Attorney-Client Privilege
By Congressional Committees

It is well established by congressional practice that acceptance of a claim of attorney-client privilege before a committee rests in the sound discretion of that committee. It cannot be claimed as a matter of right by a witness, and a committee can deny it simply because it believes it needs it to accomplish its legislative function. In actual practice, all committees that have denied the privilege have engaged in a process of weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within its jurisdiction, against any possible injury to the witness. Committees, among other factors, have considered whether a court would have recognized the claim in the judicial forum.

The legal basis for Congress's prerogative in this area is formidable and is substantial, although no court has directly ruled on the issue. It is based upon its inherent constitutional prerogative to investigate which has been long recognized by the Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government department. The attorney-client privilege is, on the other hand, a judge-made exception to the normal principle of full disclosure in the adversary process which is to be narrowly construed and is confined to the judiciary forum. The common law privilege has been deemed subject a variety of exceptions, including communications between a client and attorney for the purpose of committing a crime or perpetuating a fraud or other obstruction of law at some future time, and to a strict standard of waiver. However, it has been held by at least two federal circuits that disclosures to congressional committees do not waive claims of privilege elsewhere. See, *Florida House of Representatives v. Dept. of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *Murphy v. Dept. of the Army*, 613 F.2d 1151, 1156 (D.C. Cir. 1979).

No President has ever claimed the attorney-client or work product privilege before the Congress. Normally, the President asserts executive privilege, a

-2

constitutionally based claim that would broadly encompass sensitive communications between him and his closest advisors. In the present circumstances, the President is relying exclusively on the common law privilege and has expressly eschewed reliance on his executive privilege. As a consequence, it would appear that a congressional committee in determining whether to accept the claim, in addition to considering whether there has been a waiver of the privilege or has been vitiated by one of the exceptions to a valid claim, may also weigh the unique injury to the Office of the President or to the President personally that a denial would effect.

The President and his attorneys have claimed that the November 5 meeting of seven attorneys ostensibly to divide up responsibilities between the President's private and public interests with respect to the Whitewater matter is protected by the attorney-client privilege under the rule that a client may communicate with separate attorneys on matters of common legal interest, for the purpose of preparing a joint legal strategy. This has been called the "common interest", or "community of interest" rule. It is an exception to the general principle that communications in the presence of, or shared with, third-parties destroys the confidentiality of the communications and the privilege protection that is dependent on confidentiality.

To come within this rule, it is incumbent upon the proponent of the privilege to explicitly define the nature and scope of the interest (the case law is uncertain whether the interests must be *identical* or only *similar*) and specifically the extent to which any legal interests overlapped with other non-legal interests. The subject of each shared discussion is to be examined by a court in context. The fact that the client and third party have common general interests on some matters will not justify sharing of confidences on all related matters.

The November 5 meeting potential raises a number of issues, any one of which could vitiate the claim of privilege. These include (1) Was Bruce Lindsey an inappropriate third party to the discussion? (2) Was it appropriate for William Kennedy to wear a private attorney's hat while he was employed as associate counsel to the President? (3) Was the meeting primarily devoted to giving legal advice on behalf of the President or was it primarily about developing a political strategy for him?

The purpose of having separate attorneys cannot be simply a ruse to utilize the privilege to prevent disclosure.

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013. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8248

FOLDER TITLE:

Whitewater [1]

2009-1006-F
ke691

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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C/oy d [unclear]

P6/(b)(6)

8/10

[013]

THE WHITE HOUSE
WASHINGTON

Beth N. [unclear]

P6/(b)(6)

left msg

~~Bill Taylor~~

~~P6/(b)(6)~~

~~Zuckerman Spader.~~

~~Nicole -~~

~~P6/(b)(6)~~

~~Stier says Ely.~~

~~67909 / Mark - Fax 2
456-5055~~

✓ Sten Gillers - persuasive [unclear]

P6/(b)(6)

JUDGE—

Cloyd Cutler is calling:

A.B. Culvahouse

Griffin Bell

Howard Baker

I have called:

Folks at Chicago

Steve Gillers

Bill Jeffress

Tom Morgan

Any help would be greatly appreciated. We need people who will support the general proposition—through op eds or other contacts with the press—that conversations between a President's White House counsel and his private counsel can, in at least some circumstances, be privileged (under the attorney-client privilege)

Elena

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THE WHITE HOUSE
WASHINGTON

FAP

P6/(b)(6)

[014]

Get mat'ls to
Geoff Hazard -
find address.

Prof. Geoffrey Hazard

P6/(b)(6)

THE WHITE HOUSE
WASHINGTON

Fred Fielding
Wiley Rein & Fielding.

Response to
your request
for further information

Send mat'ls

Providing them to a
number of people whom we
hope will write opinion
pieces supportive of the
Administration's position.

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✓1) Fax to Bill Jeffress

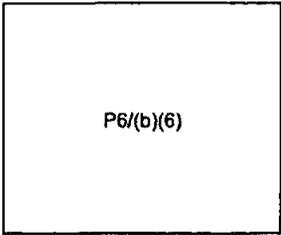
Ash to ask ← 2) Fax to Cutler
Cultrane
Bell
~~Miller Baker~~

✓3) Fax to Star Gillers

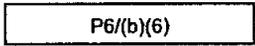
✓4) Talk to AS

✓5) Call Jake Stein.

✓6) Call with Nelson - oh re Jeffress
other ideas.



[05]



~~Mark~~
~~cover letter~~

~~Burdick~~

~~Mark~~

Mark
cover letter?
(mailing -) who?

~~Mark~~

~~Mark~~

Dashwartz

Crim detent

Mike Tigar

✓ every boldskin -
read 4 crim del.
asst.

~~Mark~~

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016. memo	Phone No. (Partial) (1 page)	12/13/1995	P6/b(6)

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EXECUTIVE OFFICE OF THE PRESIDENT

13-Dec-1995 12:55pm

TO: Jack M. Quinn
TO: Jane C. Sherburne
TO: Mark D. Fabiani

FROM: Elena Kagan
Office of the Counsel

SUBJECT: press contacts etc.

*Review -
please address
for all these people
+ give them to
Mark Fabiani's
asst for an overnight
mailing.*

So far, the following people have agreed to make themselves available for comment:

- 1. Bill Jeffress -- Miller Cassidy P6/(b)(6)
- 2. Jake Stein -- former independent counsel, now with his own firm P6/(b)(6) [016]
- 3. Chuck Tiefer -- former Solicitor to US House of Reps, now at U of Md Law School P6/(b)(6)
- 4. Bob Lipsitz -- former White House counsel to Carter, now with his own firm P6/(b)(6)
- 5. Paul Rothstein -- Georgetown Law School P6/(b)(6)
- 6. Arthur Miller -- Harvard Law School P6/(b)(6)
- 7. Ahkil Amar -- Yale Law School P6/(b)(6)

Bill Jeffress is writing an op ed.
Charles Tiefer is writing a piece for the Legal Times.

Ahkil Amar will decide whether he wishes to write an op ed after he reviews our submissions; I think he probably will

Paul Rothstein, Arthur Miller, and Geoffrey Hazard have agreed to look at statements we write for them based on my discussions with them (which I have notes on); presumably, if they're happy with such statements, we can use them however we wish to do so. (Hazard is generally sympathetic to us, but does not want us to give his name to the press until he sees such a statement.) I obviously can't do this and call more people at the same time, so I'd like to get some sense from Mark and others about priorities.

Others are reviewing our material prior to deciding whether we can use them in any way.

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THE WHITE HOUSE
WASHINGTON

Paul Neuborne
NYU Law School

P6/(b)(6)

[017]

overnight mail

get address +

give to Mark
Fabiani's
asst

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THE WHITE HOUSE
WASHINGTON

December 13, 1995

Prof. Geoffrey Hazard

P6/(b)(6)

[018]

Dear Professor Hazard:

I am sending by overnight mail a copy of the submissions of the White House and of Williams & Connolly to the Special Senate Committee on Whitewater. I am also sending, as well as faxing, a summary statement of our position that communications between the President's public and private counsel are covered by the attorney-client privilege as to matters of common interest.

We of course hope that you agree with our position on the applicability of the attorney-client privilege and that you can help to make clear to the press and public the importance and appropriate scope of that privilege.

Thank you very much for your consideration and assistance.

Very truly yours,



Elena Kagan
Associate Counsel
to the President

Under well-established principles, the notes subpoenaed by the Special Senate Whitewater Committee fall within the attorney-client privilege. These notes were taken at a meeting among the President's private attorneys and his senior White House legal advisors. These two sets of lawyers represent the President in two different capacities -- the one, in a personal capacity and the other in an official capacity. There are many matters, however, of mutual concern to them both. With respect to such matters, private and public counsel can communicate without breaching the privilege: the confidentiality that the privilege protects embraces communications between the two sets of counsel, as well as between each set and the President. This conclusion follows from the usual rule that lawyers of different clients who share common interests may invoke the privilege as to their communications. The same is true when the "different clients" are the President in his official and his personal capacity.

The only possible argument against this conclusion is a very broad one: that governmental attorneys for the President do not have any attorney-client privilege with respect to other units of government, including the House and the Senate. But no President has accepted such an argument; to the contrary, all have assumed that their communications with White House attorneys are protected by a privilege as against other units of government. The current White House, in its objection to the subpoena, has made a strong case that this is the correct position. And once again, assuming this position is correct, it follows as a matter of routine attorney-client privilege law, that the President's governmental attorneys may confer with the President's personal attorneys without breaching any privilege.