

NLWJC- Kagan

Counsel - Box 004 - Folder 011

Whitewater [2]

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)
004. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
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006. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
007. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
008. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
009. draft	Submission of the White House to Senate Committee (11 pages)	12/10/1995	P5
010. memo	Phone No. (Partial) (1 page)	12/13/1995	P6/b(6)
011. draft	Letter from the Counsel's Office re: communication (2 pages)	ca. 12/1995	P5

COLLECTION:

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

FOLDER TITLE:

Whitewater [2]

2009-1006-F

ke693

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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So for NYT →

minor
edits - get placed.
OK / great

Cutler?

Te three

cutlier?

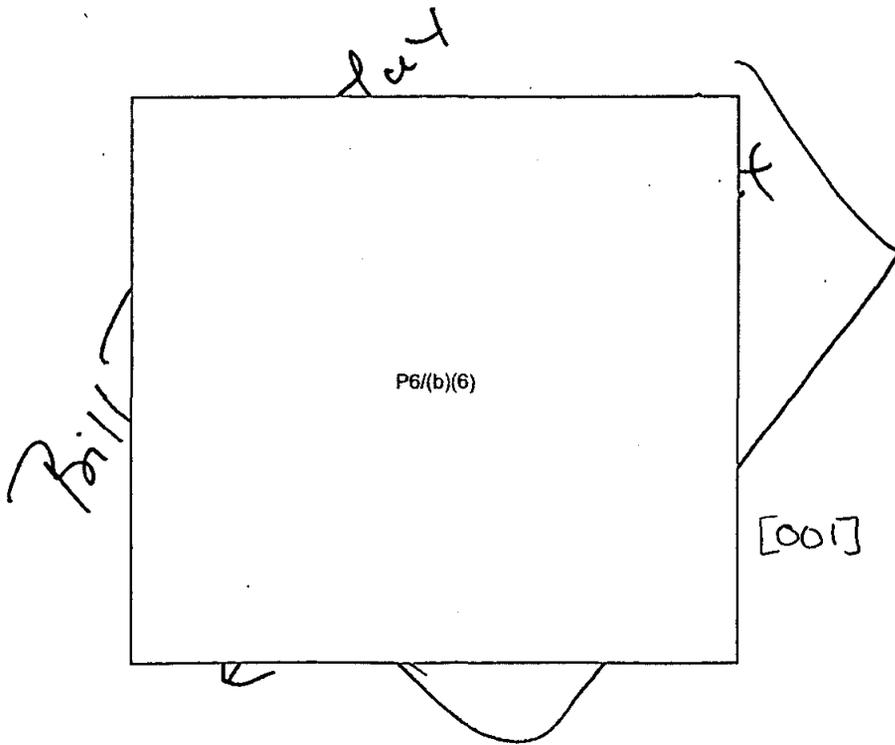
procedure?

his judgment?
OK.

send to papers -
Post

600-800
wds

sooner the
better



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Bill Jeffress

P6(b)(6)

[002]

Totally support K's position

{ Truth is what is: common interest doctrine.
Even if different clients.

Gen'l counsel for insurance / CEO personally.

He would uphold

Randy Turk (partner) represents Both Nolin.
(Someone else?)

Kendall ~~all~~ go old + good friend.

Yes, will write op ed!

Ok w/ Beth -
make sure
she won't be
embarrassed

If filed That's
public
and / fare to me

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4:30 -

1) Steve Giller - NYU

[Redacted] P6/(b)(6)

[003]

very supportive in past

Hy

talk to press
w/ P. ed.
etc.

2) Bill Jeffress

[Redacted] P6/(b)(6)

Miller Cassidy.

call home
others
ground in
action

3) Bob Lipowitz

[Redacted] P6/(b)(6)

Cartier counsel

Lloyd says no

Lloyd

4) Griffin Bell - AG / Bush in / non-Centra investigation

King Spalding

Jim will call - expect a call from me

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Mark

Ask Carter to get others?

1 try to get others?

where to place?

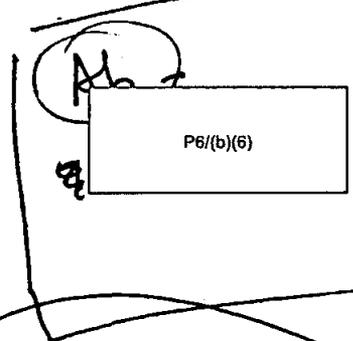
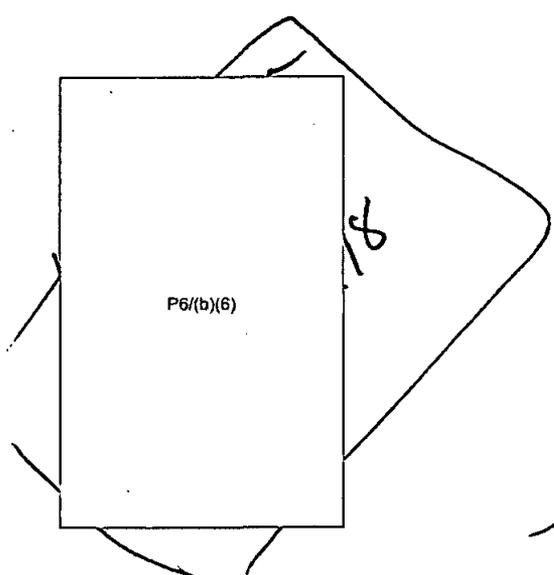
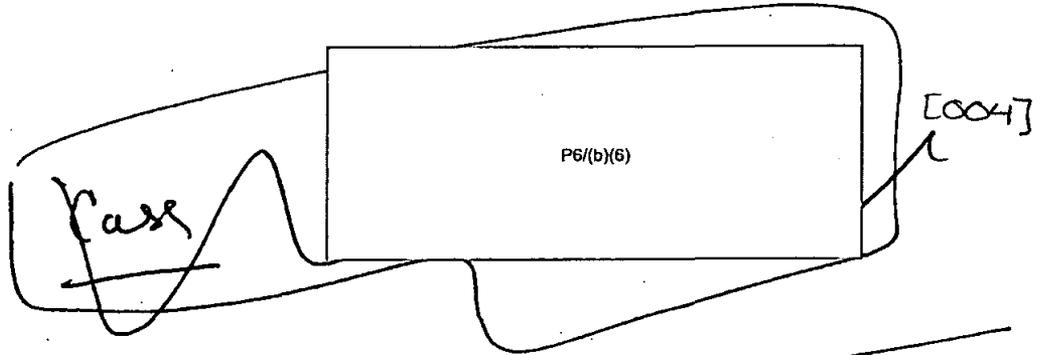
finishes - they're ready to go.
then we go from there.

He should say: we'll help
them get placed in
one of major
newspaper.

WFT
LA Times

of eds
1 hrs

manipulated in
local mts.



Fax to office
Kendall - War
- WFT -

Also - w/ Carter
Security Card
A, B, C.

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Steve Gillers

Getting press calls

spokesperson to press
standing alone
need unclear in legal
service.

2 hurdles

1) ID a legal service that w/ Senate/AC priv.
performing for Pres in official
candidate.

2) Common interest

Highly fact specific
Plausible to meet to advance common goals.

Burden to describe CapIT concern.

P6(b)(6)

[005]

How I see my role -
independent observer.

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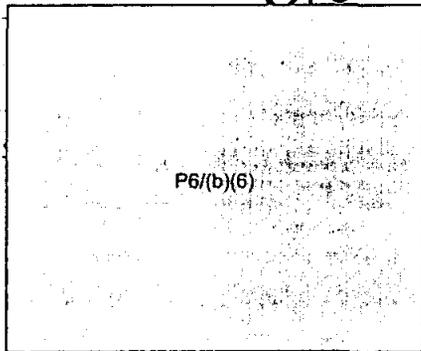
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JAKE STEWART
Mentor



[006]

Tom Mares
GW

\data\1\0001\wp\article\lawcli.priv
December 11, 1995
Draft Nr. 2

The lawyer-client privilege is one of the most fundamental elements of what we call due process of law. It permits a citizen to confide in his lawyer, and to receive advice based on those confidences, without fear that the lawyer will be compelled to disclose either the confidences or the advice. It has its exceptions: the lawyer must protect the client's admission of a past crime, but the lawyer can -- indeed he must -- inform the authorities if the client discloses his intention to commit a crime that has not yet occurred. It can also be waived; if the client authorizes the disclosure of one confidence or item of advice, he may waive his right to bar later disclosures about related confidences or items of advice.

Until the current Whitewater hearings, no one has questioned the right of federal officials to invoke the lawyer-client privilege. Indeed, the records of the Senate Ethics Committee will confirm instances where a Senator has invoked the privilege and the Committee has accepted the claim. In the Whitewater hearings, a new question has been raised -- whether the privilege applies when a government official is the client and another government official is one of the client's lawyers.

With one exception, the government official should clearly be entitled to invoke the privilege. The exception is mandated by a statute (28 USC § 535) providing that if a federal official learns of evidence indicating that another federal official has

- 2 -

committed a federal crime, the first official has a duty to inform the Department of Justice. But in all other situations, there is no valid reason for denying the privilege when asserted by a federal official to protect his or her communications with his or her government lawyer.

It is a fair question whether a federal lawyer should accept a lawyer-client relationship with a federal official concerning a personal matter. But many matters raise a combination of both official and personal issues. There are many cases in which it has long been the practice for the President or other federal officials to confide in and seek advice from a government lawyer, as well as from private lawyers, on a matter that has both personal and official aspects. Here are some recurring examples:

- The offer, receipt and disposition of gifts from persons who are regulated by or seek to do business with the Government.
- The preparation of personal tax returns which, like the President's, are promptly made public, including both the legal and appearance aspects of reporting particular items as income or deductions.
- Responding to press, congressional or law enforcement inquiries concerning alleged acts or omissions before or during the period of federal office.
- Responding to civil legal proceedings instituted during the period of federal office, such as lawsuits against

the official, congressional subpoenas, and judicial subpoenas to appear as a witness in cases to which the official is not a party.

In all of these situations, a President, the President's spouse and other federal officials should be entitled to consult their federal as well as their private lawyers, and to invoke the same lawyer-client privilege that every American citizen enjoys. See the attached excerpts from the draft Restatement of "The Law Governing Lawyers" being prepared by the American Law Institute, but not yet approved by its governing Council. Moreover, the

President's public & lawyers and private lawyers should be ~~entitled~~ entitled to consult with each other, so long as they share common interests -- as they

And lawyers may consult together without losing the benefit of the privilege common interest

will often do -- without losing the privilege. The State committee mistakes the law when it suggests otherwise.

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Timothy L. S. Sitz

Of Counsel
William R. King
Tito Mazzetta

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: PLEASE REVIEW THIS DRAFT AND THEN CALL ME.

- BOB LIPSHUTZ

CLIENT NAME & NO. 0291-0001 DATE: 12/14/95

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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PAULA B. SMITH
TIMOTHY L.S. SITZ

OF COUNSEL
WILLIAM H. KING
TITO MAZZETTA

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 THIS 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.**

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.

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TITO MAZZETTA

EXECUTIVE PRIVILEGE

"EXECUTIVE PRIVILEGE" 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.

LAW OFFICES
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WILLIAM R. KING
TITO MAZZETTA

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.

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- 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]

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

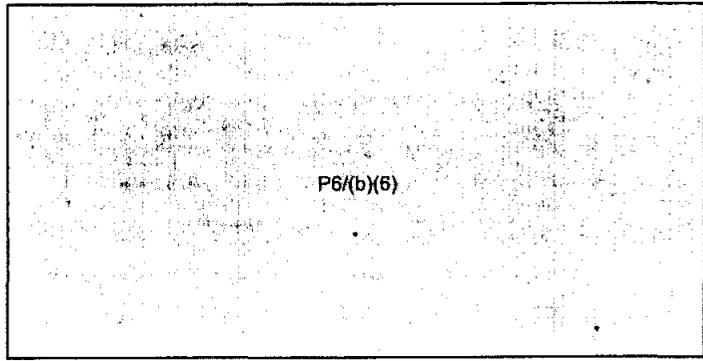
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Cutler ← Culvahouse
Baker
Bell

- ✓ Nolan
- ✓ Carr
- ✓ Gillis
- ✓ Jethress
- Stein
- ✓ Morgan



Talked to.

[007]

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Lloyd Cutler -

Boehling on privilege issue -

Whether an atty can assert priv for:

✓ advice on private mtr
when giving

507 lawyers

(Paula Jones)

respond as President

People - frame the §. narrowly

A.B. Culvahouse

Howard Baker

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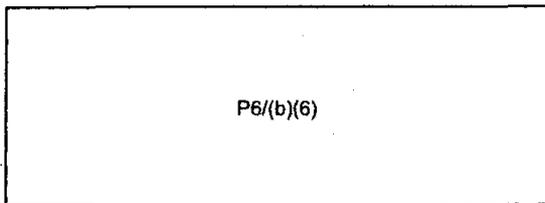
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State a proposition: is
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If we have one where
we have past auditors, it would be helpful

All restatement of
law relating to
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P6/(b)(6)

[008]

MARK

During summer -

Marshall
Chernomirsky
Gerhardt

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want to know more
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some can't express bc
of privilege
What issues here

on - a la Carter -
relationship btw
public counsel +
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Fighting back
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- Op Ed piece
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2 more writing
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if it has to be put -
so be it.
general point -
relationship btw.
with Counsel +
Pres's
priv atty

help writing?
research

quickly / 1 piece.

The New York Times

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Budget Games

Haley Barbour, chairman of the Republican Party, thinks he has found a rhetorical device to fend off White House attacks on the G.O.P.'s proposed cuts in Medicare. People should focus, he says, not only on how much the two sides want to cut but on how much each wants to spend. The G.O.P. wants to spend \$1.65 trillion over the next seven years. The White House would spend \$1.68 trillion. Mr. Barbour concludes that the difference — \$30 billion or about 2 percent — is too small to matter and that President Clinton's vicious attacks on the Republican plan amount to demagoguery.

Mr. Clinton has wrongly ridiculed the G.O.P. for proposing modest hikes in subsidized premiums. But Mr. Barbour's rhetorical thrust is little better. The two plans differ by amounts that the \$30 billion figure does not begin to capture.

Consider the following example. The White House and Republicans agree to spend the same amount, say \$300 billion, on Medicare in 2002. But they disagree now much Medicare will cost in that year under current law. The Republicans estimate Medicare will cost \$500 billion. The White House estimates \$400 billion. Despite Mr. Barbour's contention that the two plans are the same because they will spend the same, the Republicans would have to cut Medicare by twice what the White House would cut to hit the common target.

These very different economic projections, in turn, would require quite different cost-cutting strategies. Once those policies are in place, they would hit hospitals, physicians and enrollees no matter whose projections turn out to be more accurate. Indeed, the G.O.P.'s plan would cut payments to hospitals and physicians by about \$100 billion more than the White House's would.

Can the gap between the two plans be bridged in time to reach a budget agreement this year? A compromise is within reach. Mr. Clinton could, for example, agree to the G.O.P. plan to raise premiums by about \$50 billion. The Republicans, in turn, could agree to cut hospital and physician payments less — with a "look-back" procedure that would increase those cuts if budget targets were exceeded.

The Congressional Budget Office announced yesterday that budget-cutting can be about \$135 billion less onerous than previously estimated in order to reach balance in seven years. Most of the windfall ought to be used to save Medicaid, food stamps and tax credits. Some could also be used to bring the White House and G.O.P. together on Medicare.

The fight over Medicare is not, as Mr. Barbour argues, over scraps. But Congress and the White House are unlikely to find compromise if one side insists the differences do not exist.

Traveling Whitewater Files

Just when it seemed possible that the White House could not handle Whitewater any more clumsily, here come two new moves to undermine public confidence.

The disclosure that Vincent Foster removed three files from Hillary Clinton's law firm during the 1992 election campaign and turned them over to the Clintons' political fixer, Webster Hubbell, is truly a blow to those who want to believe the Clintons have nothing to hide. The files related to Mrs. Clinton's work for Madison Guaranty, the savings and loan owned by the Clintons' Whitewater investment partner, James McDougal. The White House will no doubt argue that the files are innocuous.

But that claim seems lighter than air compared with the fact that they were stored in the basement of a lawyer later convicted of a felony and that they disappeared from the Rose Law Firm in a year when the Clinton campaign team was perfecting its stonewall defense on Whitewater.

The other matter has to do with the dubious claim of lawyer-client privilege being advanced by President Clinton about a 1993 meeting at which his senior lawyers and aides discussed Whitewater. Mr. Clinton seems headed for a messy legal showdown

with the Senate Whitewater committee. But the President is stretching attorney-client privilege beyond any reasonable limit and also revoking his promise of openness about this matter.

Surely no one wants to intrude on exchanges between the President and his personal lawyer. But this meeting included a top political aide, Bruce Lindsey, and a battery of attorneys on the public payroll, including White House Counsel Bernard Nussbaum and two of his assistants.

The committee reasonably wants to know about government matters that may have been discussed, such as the handling of the investigation by the Treasury Department and the Resolution Trust Company into Madison Guaranty. A court will decide whether notes taken at the meeting and a White House memo about the session can be deemed personal legal papers. That will take an expansive interpretation in Mr. Clinton's behalf.

To be sure, citizen Bill Clinton is entitled to litigate all he wants and to claim whatever privacy the courts will give him. But President Clinton, the politician and national leader, cannot expect the public to be reassured by mysteriously mobile files and promises of openness that disappear behind the lawyer-client veil.

Show Trial in China

Wei Jingsheng, China's leading campaigner for democracy, goes on trial for his life tomorrow in a proceeding that exposes the emptiness of Beijing's claim to be a society ruled by law. If the Clinton Administration means to maintain any credibility as a defender of human rights in China, it must make a maximum effort to win Mr. Wei's freedom.

After 20 months of secretive administrative detention, Mr. Wei was formally arrested last month on the baseless charge of trying to overthrow China's Communist Government. Then his trial was scheduled with less than a week's notice. As of 48 hours before the opening of courtroom proceedings, the attorney hired by Mr. Wei's family had not received written notice of the charges and had not been given an opportunity to meet with his client.

China's leaders want to make an example of Mr. Wei, who has already suffered more than 14 years' imprisonment for advocating political freedom. Their goal is to intimidate the intellectuals who began speaking out again on human rights issues earlier this year. If Beijing succeeds without paying a stiff international price, freedom in China will experience a heavy and lasting defeat.

The renewed persecution of Mr. Wei should stiffen the spine of the Clinton Administration, which has been ceding ground on human rights in China ever since it unwisely severed the link between rights and Beijing's trade privileges in 1993. The Administration has a special responsibility in Mr. Wei's case, since his latest detention began just after he met with Assistant Secretary of State John Shattuck in March 1994. If China considers a meeting between one of its citizens and an American diplomat an attempt to overthrow the Government, nothing that could fairly be called "normal" relations between Beijing and Washington is possible.

Should this show trial proceed to its scripted conclusion, the appropriate response would be to renew Washington's drive for censure of China by the United Nations Human Rights Commission next March. The last such effort fell one vote short. Beijing has suggested that it might release prisoners and take other steps to avoid U.N. censure.

By raising its voice on Mr. Wei's case, Washington can ease the plight of China's most prominent democrat and help forestall new pressures against others less well known but equally courageous.

Waiting for the New Broom

The news that the Pataki administration has gutted the fraud-fighting office of New York State's Inspector General is depressing. Gov. George Pataki promised time and again that he would bring in a new broom to sweep out the dusty politics-as-usual of the Cuomo era. But his regime is beginning to resemble an old mop, the kind that makes the floor look worse than it did before the scrubbing.

This page has already nagged the Governor to make public the still-unreleased financial reports from his inauguration, to tell his commissioners flatly that they should not be raising funds for his reelection campaign, to get behind campaign finance reform and to tell his former running mate, Dennis Vacco, to stop stuffing the Attorney General's office with well-connected Republicans.

We turn now, with some feeling of ennui, to the office of the State Inspector General, which investigates fraud and corruption in state agencies. When Mr. Pataki took office it had about 25 employees. Twenty-two were let go. Only five replacements have been hired, most with ties to the Republican Party. Donald Hutton, the new First Deputy Inspec-

tor General, went overnight from being a \$35,000 railroad police officer to an \$80,900 job as the number two man in a sensitive state investigative agency.

The Inspector General usually refers 8 to 12 cases a year to the State Ethics Commission, but since Mr. Pataki took office only one case has been referred. The toll-free tip line stopped being answered. Would-be whistle blowers who put their complaints in writing did not fare much better. Some of the office's mail has been returned to the senders because nobody came to pick it up.

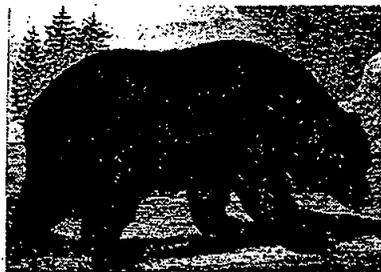
Happily, while one hand of the Pataki administration was messing around with the Inspector General's office, the other was picking a qualified candidate for the top job. Roslynn Mauskopf, the new Inspector General, is a former chief of the frauds bureau in the Manhattan District Attorney's office. Ms. Mauskopf has already managed to turn the tip line back on and get rid of Mr. Hutton, who she says was only a transitional employee anyway. We urge her to get a new team together as quickly as possible, and start sweeping.

Don't bring back the bears

By Helen Chenoweth

Naturalists will tell you that when a predator seizes hold of its prey, the prey will often stop struggling. It will seem to cooperate with the predator in order to make its final moments as painless as possible. Why does that scenario come to my mind after reading reports that the forest products industry and timber workers are cooperating with environmentalists who are driving the grizzly bear "reintroduction program" in the United States?

Artificially introducing grizzly bears to areas traditionally used for human activities makes about as much sense as introducing sharks to the beach. But the federal government is determined that the intro-



duction program will proceed at any cost.

The cooperation that is currently taking place between the forest management interests and advocates of the grizzly bear program is driven by fear that the federal government will forge ahead regardless of the wishes of local residents. That fear is well-founded after enduring the federally-imposed grey wolf introduction. That still doesn't make the plan a good one.

In fact the artificial introduction plan is a terrible idea for three reasons. First, introducing the bears addresses only an emotional attachment to the romance of having grizzly bears roaming the wilderness.

Rep. Helen Chenoweth is an Idaho Republican.

The only practical purpose the grizzlies would serve is if they ate grey wolves. But, alas, I am informed that the grizzly bear's palate is more refined than that.

Simply because an animal may have once inhabited a certain part of the country is no reason why that animal must roam there again. In fact, grizzly bears do better in open spaces, where they can use their speed to their advantage, than they do in heavily forested areas. Grizzly bears may have once roamed the land where Chicago now is. Does that make it necessary for them to be introduced to State Street?

Currently, the plan is expected to call for five to 10 bears to be introduced into the Selway Bitterroot Forest in Idaho sometime next year — with a greater number being introduced later. Although the areas targeted for the bears are remote, a single grizzly can range across 168 square miles. It will be only a matter of time before there is an additional deadly encounter between human beings and an artificially introduced grizzly.

This brings up the second point. Already, in just the past few months, more than a half dozen people have been mauled by grizzly bears, including several fatalities. In most of these cases, the people were not engaging in any sort of provocative behavior. They were simply hiking or in their tents, and the attacks came lightning fast.

What exactly do the proponents of the grizzly bear program intend to say to the grieving family of a hunter or hiker who has been mauled or killed by a grizzly bear? What benefit from the program will justify the loss of even one human life?

Sometimes the price of preventing a death is too high for society to pay. Take highway safety for example. We could probably all but eliminate the number of highway fatalities if the speed limit were reduced to 35 mph. But society rates the cost of time and money to be too high. Conversely, it costs society nothing

to leave well enough alone when it comes to grizzly bears. The cost of not artificially introducing grizzly to the United States is zero. But with the artificial introduction program, we will be spending at least \$6 million to make the woods more dangerous.

When lives are in danger, so are the activities that bring us into potential contact with the grizzly. To minimize conflict between man and the grizzly, vehicle travel, camping, hiking, hunting, fishing or any other kind of human activity will likely be restricted, if not eliminated from the introduction area — 5,000 square miles. To protect man from the bear, the government may remove man from the ecosystem. This sacrifice is being repeated all too frequently throughout the west.

The third point is simply a matter of priorities. Even if one can build a compelling case for artificially introducing grizzly bears into U.S. forests, rendering huge tracts of land dangerous to humans, how do we justify the cost?

Under the best case scenario, it will take us seven years to finally bring the federal budget into balance. That is seven years before we even begin to start paying down the principal on a \$5 trillion debt. During this process we are asking nearly every segment of society to make sacrifices. How then do we justify spending more taxpayer dollars on such a dubious program?

The artificial introduction of grizzlies is highly questionable under the best conditions. Given our budgetary constraints, it's madness.

But suppose the federal government continues along this seemingly inevitable path. Shouldn't we then be consistent about it? Consider this modest proposal: Some people say the population of certain types of sharks isn't faring so well lately. If we proceed with the artificial grizzly introduction program, let us be consistent and also artificially introduce great white sharks into certain coastal waters of California.

Why Mr. Clinton has no special privilege

By Mark R. Levin

Whenever Bill Clinton is called to account for his personal conduct, he ducks behind the presidency for cover. When Paula Jones sued him for allegedly molesting her, Mr. Clinton called her a pathetic liar, and then claimed "presidential immunity" from all civil suits. He said the president should not be subjected to bothersome lawsuits as they would impede his ability to lead the country. And Mrs. Jones' lawsuit should be dismissed, thereby denying the former Arkansas state employee her day in court.

Now, confronted with a Senate Whitewater investigation seeking access to pertinent notes — which were taken at a critical meeting on Nov. 5, 1993, and involve the Whitewater scandal — Mr. Clinton asserts "attorney-client privilege," hoping to prevent the probers from reading them. Specifically, the president said the following:

"In all the history of these inquiries, no one has ever asserted before that the president should have no personal lawyer-client relationship. And so that is the issue. And it seems to me that if that's going to be the rule, then perhaps a judge ought to decide that and ought to determine what the limits are."

Well, Mr. Clinton has it wrong again. The issue is not whether a president can assert attorney-client

privilege covering discussions he had with his private lawyers. He certainly can, and no one objects to this use of the privilege. The issue is whether Bill Clinton waived attorney-client privilege when he used his government attorneys, paid for by the American taxpayer, to work on his private legal matters, like Whitewater.

The fact is that Bill Clinton asked Webster Hubbell, Vincent Foster and William Kennedy — all of whom had been partners at the Rose Law Firm with Hillary Clinton — to join the new administration. Mr. Clinton appointed Mr. Hubbell to a top Justice Department position, and he assigned Mr. Foster and Mr. Kennedy to work with him in the White House Counsel's Office. When the president placed these individuals on the public payroll, they ceased being his private lawyers. They were paid by the public to do the public's work and were prohibited from working on the Clintons' private legal matters, such as Whitewater. And the Clintons were prohibited from asking or allowing these government lawyers to work on their private legal matters as that would be an illegal gratuity.

Nonetheless, Mr. Hubbell brought Clinton campaign files with him to Washington, where he stored them at his house. Mr. Foster brought Whitewater and other private Clinton records to his White House office, where he used them from time-to-time and stored them. These records, then, were in the hands of the government, and the Clintons knew it. And they also knew that Mr. Foster had been working on Whitewater-related mat-

ters for them while collecting a government check.

Therefore, not only did the Clintons voluntarily waive the right to keep their communications with these lawyers confidential — which is what is meant by attorney-client privilege — but since they were prohibited from using Mr. Hubbell and Mr. Foster, or any government lawyers, for private legal matters, they must reimburse the treasury for these unlawful expenditures.

And let's not forget Mr. Kennedy. Before coming to the Clinton White House, he told the Senate Whitewater Committee he represented the Clintons on Whitewater-related matters in 1991. He also testified that he attended the Nov. 5, 1993, meeting of private and government lawyers merely to "impart" the information he learned in 1991 to the Clintons' new private counsel.

That would be fine, except for two fatal problems. First, if Mr. Kennedy was merely "imparting" information, why did he take notes at the meeting? That's not "imparting" information. That's gathering information. Since Mr. Kennedy was a government lawyer while attending the Nov. 5, 1993, meeting, his notes are not privileged.

Second, there were other government lawyers at the Nov. 5, 1993, meeting — as well as Bruce Lindsey, who, at the time, was not employed at the White House as a lawyer but as director of personnel — who had nothing to "impart" that was covered by the attorney-client privilege. Moreover, any information they received from the Clintons' new private counsel would not be privileged either.

In short, President Clinton abused his office by spending unlawfully gained public funds to subsidize his private legal affairs. He waived the attorney-client privilege, therefore, by his own misconduct. And now he seeks special privilege as he attempts to impede Senate investigators from their task.

Mark R. Levin is director of legal policy at Landmark Legal Foundation and a contributing editor of National Review.

What the Russian army wants

By Deborah Yarsike Ball and Theodore P. Gerber

The large number of serving military officers now running for the Russian parliament has led many in Russia and the West to conclude that Russia's still fragile democracy may be about to give way to some kind of military dictatorship. But a poll we carried out among Russian officers last summer suggests that such fears are misplaced and that the Russian officer corp may in fact include some of Russian democracy's best, if least expected, recruits.

We asked 600 field-grade majors, lieutenant colonels and colonels — what they thought about democratic values and the social changes Russia is going through. Three commanders out of four rejected the statement that "democracy is ill-

suited for the people of Russia" and two out of three disagreed with the suggestion that Russia would have to turn to "authoritarian rule" to solve its current problems. And over



90 percent of the officers said that it was "important that Russia be committed to protecting human rights."

Most officers did want a strong leader — but only one committed to working within rather than against the democratic process. A majority of the officers in our survey said that

they supported Russian nationalist leader Gen. Alexander Lebed, but they said they did so not because he would restore "order" or reestablish the Soviet Union, but rather because he was committed to slowing down or reversing the economic reforms many officers blame for their current difficulties.

Thus, our interviews did not find an officer corps committed to an authoritarian restoration, but rather one desirous of using democratic institutions to advance group interests. But that commitment does not eliminate all grounds for concern: Given their feelings about the economy, the officers elected to the parliament will undoubtedly back those — including the communists — who want to reverse privatization and any further moves toward a market economy.

In a situation in which many officers have not been paid for months and cannot guarantee that their men will be fed on a regular basis, such a judgment on the part of the officers is hardly surprising. But as we contemplate the Russian election returns, we should remember that the officers have decided that "it's the economy, stupid — not the empire!"

Deborah Yarsike Ball is a postdoctoral fellow at the Center for Security and Technology Studies, Lawrence Livermore National Library. Theodore P. Gerber is assistant professor of sociology at the University of Oregon.

The Washington Times

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November 5, 1993

Before we all get out our crying towels about how the mean old Senate Whitewater Committee is trying to deprive President Bill Clinton of his right as an American to invoke attorney-client privilege, let's seek a bit of perspective.

The president and chief Clinton cheerleaders, Vice President Al Gore, Chief of Staff Leon Panetta and Sen. Christopher Dodd, have a new mantra, repeated in speeches, on the Sunday morning talk shows and in interviews with reporters. Even the president, the mantra goes, has the right to confidential discussions with his lawyer. The new mantra has surfaced lately as a response to Whitewater Committee Chairman Sen. Alfonse D'Amato's request for testimony or notes from former Associate White House Counsel William Kennedy about a Nov. 5, 1993, meeting he had with David Kendall, the Clintons' personal attorney, as well as then-White House Counsel Bernard Nussbaum, deputy counsel Bruce Lindsey, and Associate White House Counsel Neil Eggleston. Mr. Kennedy and the White House have until this evening to cough up those notes, or face a subpoena.

In truth, no one would deny that the president should and does have protections covering private discussions with his lawyer equal to those of his fellow Americans. All the same, Bill Clinton is hardly on an equal footing with other citizens in the legal-representation department.

How many private citizens, for example, have the power and the resources to obtain confidential information they're really not entitled to have about investigations into their past financial dealings that are leading to indictments of their partners and friends — and possibly themselves as well? Bill Clinton did. His appointees in the Treasury Department made sure he — or at least his staff — knew about criminal referrals forwarded by the Resolution Trust Corp. after its investigation of the failure of Madison Guaranty Savings and Loan Association. Madison was owned by Mr. Clinton's old friend and Whitewater partner, James McDougal, and those referrals led ultimately to the indictment of Mr. McDougal, his ex-wife, Susan, and Bill Clinton's successor as governor of Arkansas, Jim Guy Tucker. Mr. Clinton's White House aides also obtained a report on a Small Business Administration investigation of Arkansas judge David Hale — who was accusing the president of pressuring him (at the time Mr. Clinton was governor of Arkansas) to make an improper \$300,000 SBA loan to Susan McDougal.

How many private American citizens, furthermore, get free legal services (on the backs of U.S. taxpayers) from the high-priced likes of Bernard Nussbaum, Lloyd Carter and Abner Mikva — not to mention their many high-powered subordinates in

the White House Counsel's office? Bill Clinton did and does. There are serious and legitimate questions about how or whether attorney-client privilege applies to lawyers — like Mr. Kennedy — who in fact work for the U.S. government, rather than for private citizen Bill Clinton. (For the last word on that subject, see Mark R. Levin's piece opposite.) That issue will no doubt end up in a courtroom, if Mr. D'Amato is forced to issue a subpoena.

Given the extraordinary nature of the president's position, as well as the extraordinary nature of his access to information about investigations involving his former associates, the appeal to his rights as a private citizen is worse than disingenuous.

And given the degree of evasion, obfuscation and downright obstruction the White House and all its denizens have served up during Senate Whitewater hearings, the administration's continued assertion of unfettered cooperation is getting a trifle old as well. Mr. Gore provided the perfect illustration on Sunday's "Meet the Press." "... every single one of those people [at the Nov. 5, 1993, meeting]," the Vice President told his interlocutors, "has volunteered to testify about everything they did before that meeting, everything they were thinking going into that meeting, and everything that they did after that meeting..." The trouble is of course that what is of particular interest here is exactly what was discussed, what was planned and what instructions were given during that meeting.

In fact, just weeks before the meeting in question, Bruce Lindsey had relayed to the president information about the RTC investigation (information the president may well have passed along to Jim Guy Tucker). Just days after the meeting, U.S. Attorney in Little Rock Paula Casey, a former law student and campaign worker of Bill Clinton's, finally recused herself from the RTC-Madison matter — but not before she had quashed the one referral that might have led to a criminal investigation of the Clintons themselves. And just weeks after the meeting, Neil Eggleston got a copy of the SBA report on David Hale — a report he kept for several days after the Justice Department demanded its return, returning it only after making a copy of a page, the contents of which he testified recently he cannot recall.

Did that meeting have anything to do with those actions? Was it a Whitewater damage-control strategy session? Was the president aware of it? The Senate Whitewater Committee and the American people have every right to know if White House Counsel — paid by the taxpayers to represent the presidency — and other White House staffers — paid by the taxpayers to do the government's business — were engaged in improper activities designed to shield the president and his wife from investigations that might be legitimately headed their way.

A present from the CBO

The arrival of new economic forecasts from the Congressional Budget Office will be the acid-test of whether the Clinton administration has even a shred of integrity.

As far back as his first State of the Union address, President Clinton was singing the praises of the CBO. That, of course, was when the Congressional budget shop was operating under a Democratic Congress. Now that the Republicans are in charge, the Clinton team would have us believe that the CBO has been ruined. There was Vice President Gore on "Meet the Press," claiming with his terminally straight face that what Mr. Clinton had really meant was that the CBO's chief for many years, Alice Rivlin, is the best source of budget numbers: Now that she runs the White House budget shop, that means the Office of Management and Budget calculations are the ones to watch. But none of this is relevant to the fundamental question of whether Mr. Clinton is capable of honoring even the simplest of commitments. To end last month's government shutdown, Mr. Clinton agreed to abide by CBO budget estimates in this month's negotiations. The time for those negotiations is here, and the CBO has now made it easy for the president by estimating away almost a third of the

gap in revenues standing between Republican leaders and the White House.

Republican leaders have signalled a willingness to compromise with the administration to some extent, breaching the gap between their positions with a reduction in tax cuts and an increase in some federal spending. But that negotiating position is based on the premise that the White House will indeed accept the new budget numbers produced by the economic forecasters at the CBO. Mr. Clinton and his advisors, who should be thrilled that they have just received a third of what they have been asking for, will be sorely tempted to think that they can get another third by now demanding that a budget deal be based on splitting the difference between the new CBO figures and the bogus projections the OMB has been spitting out.

The most recent economic figures to be released, including last week's statement of leading economic indicators, have shown that the economy may be on the verge of sputtering. Some market analysts have even begun to see the first signs of an impending recession. Even the new CBO projections may prove to be overly optimistic. Any effort to use figures rosier than those newly presented by the CBO is guaranteed to produce a budget that will never reach balance.

A tearful press conference

Enid Greene Waldholtz finally broke her silence yesterday and many who watched her hour-long performance live on CNN may wish that she hadn't. Sitting alone, dressed all in black with only one small tissue to catch her many tears, she placed herself in front of the cameras and flashbulbs and recounted, blow by blow, her courtship, marriage and eventual abandonment by Joe Waldholtz, the love of her life, the teddy bear no one else knew, the lying con man. And now, her constituents and the rest of America are supposed to believe that she should remain a U.S. congresswoman.

"I loved Joe Waldholtz and trusted him with all my heart. I know now from my experience of the last four weeks that the person I loved and trusted never existed," explained Mrs. Waldholtz. Choking back tears and trying to steady her voice she explained that Joe took care of all the financial business. Joe was the one who filled out the Federal Election Committee reports and filed them — she even told of a particular instance when having read an FEC report and signed it her husband came running back into the room and asked her to sign another form because he had "ruined" the first one and she signed it without reading it she said.

Joe was the one who picked up the messages on their answering machine, "I didn't even know the access code," she said. Mr. Waldholtz was the loving husband who wanted, she claims, to deal with all the petty details of her professional and personal life so that she could spend the time working on the really important things. In short, her version of the story was: Joe did everything and I knew nothing about what he was up to.

Mrs. Waldholtz recounted the details of her life with her husband and regarding every strange occurrence — bounced checks, allegedly stolen credit cards, trust funds always tied up by legal complications — and every questionable business deal she pleaded complete ignorance. Her explanation for every question of fraud facing her husband was that she simply didn't know. Viewers of the press conference — and Mrs. Waldholtz's constituents as well — will want to ask themselves whether the "victim" is in fact telling the truth or whether she is a very fine actress.

Even if we grant her the benefit of the doubt and accept her portrait as a woman deceived by the man she truly loved, it is hard not to conclude that Mrs. Waldholtz is guilty of willful ignorance at the very least. Just as there are two sides to any story, there are two sides of a con game. There is the confidence man and the person who is taken in. Enid Waldholtz would like us to absolve her of any blame because she was so persuasively taken in by a charlatan, but if he took her in, then she allowed herself to be taken in.

Mrs. Waldholtz says she is not planning to resign, but it is clear her constituents have reason not to trust her judgment. And, of course, there may be more to come out of this sad and messy story once Joe Waldholtz cooperates with the prosecutors. And as long as this scandal is brewing, it will obviously be fodder for Democratic demagoguery. Mrs. Waldholtz is already being painted as some kind of poster girl for the Republican revolution, even though in fact few people would have recognized her name before this scandal broke. It would be the honorable thing for her to accept the consequences of what was perpetrated in the name of her campaign and deal with it back in Utah.

DRAFT

We have no objection to White House personnel being asked what they knew about official governmental information when they went into the November 5, 1993, meeting at Williams & Connolly. The Committee is free to assume that everything they knew was communicated to Messrs. Kendall and Engstrom at the meeting. The purpose of the meeting was for former and present counsel to the Clintons to brief newly retained personal counsel for the President and Mrs. Clinton, in light of media reports published during the October 31-November 5, 1993, period. One objective of the meeting was to apportion responsibility for various legal matters between personal and White House counsel, but the purpose of the meeting was not to task, either directly or indirectly, White House personnel to obtain any non-public governmental information from outside the White House. The Committee is free to ask whether, after this meeting, White House officials undertook to obtain such information.

We have no objection to questions which go to the purpose of the meeting (an appropriate purpose being a prerequisite for the assertion of a legal privilege), so long as such questions do not require the disclosure of communications with personal counsel. Nor have we any objection to questions about what White House personnel did after the meeting.

We believe that this framework should afford the Committee the right to acquire the information it seeks without invading privileged communications or relationships.

DRAFT

December 8, 1995

STATEMENT OF DAVID E. KENDALL

The meeting on November 5, 1993, at Williams & Connolly was plainly privileged. It was limited to past and present lawyers for the President and Mrs. Clinton and lawyers from the White House Counsel's Office, and it was held after six days of heavy "Whitewater" publicity. Its purpose was to brief new personal counsel concerning information and issues and to discuss the appropriate division of labor between personal counsel and White House Counsel to enable all counsel to provide legal advice and services. We will submit to the Special Committee a memorandum detailing why the meeting is privileged.

The purpose of the meeting of attorneys at Williams & Connolly on November 5, 1993, was to prepare the new personal attorneys for the President and Mrs. Clinton (Steve Engstrom, of Little Rock, and David E. Kendall, of Washington, D.C.) to discharge their legal duties effectively. Beginning on October 31, 1993, there had been a great many media articles about the so-called "Whitewater" matter. It was apparent that it would be appropriate for the Clintons to retain private counsel to advise them. Many previous chief executives, including President Carter, President Reagan, and President Bush had availed themselves of such legal advice.

The meeting on November 5, 1993, was held at the law offices of Williams & Connolly. Only attorneys attended. In addition to Messrs. Kendall and Engstrom, James Lyons, a Denver attorney in private practice, who had represented the President and Mrs. Clinton in the 1992 Campaign, was present. Also at the meeting was White House personnel director Bruce Lindsey, a former law partner of the President's and a person who had done legal work for the 1990 Clinton gubernatorial campaign and who had helped legally analyze the "Whitewater" issues as they emerged in the fall of 1993. Finally, the White House Counsel, Bernard Nussbaum, and two of his staff members, William Kennedy (who had represented the Clintons with respect to Whitewater matters while he was a partner at the Rose Law Firm), and Neil Eggleston were also present at the meeting.

At the meeting, the new personal counsel received information from the other lawyers present in order to prepare them to represent the President and Mrs. Clinton with respect to the various "Whitewater" matters. Subsequently, Mr. Engstrom had to withdraw from the representation, and Mr. John Tisdale became local counsel.

The President and Mrs. Clinton have shown unprecedented cooperation to the many different "Whitewater" investigations, including that of the Senate Whitewater Committee. The Committee hearings have now dragged into their 30th day. Insofar as the Committee has questions concerning what the White House lawyers knew about various kinds of governmental information prior to the meeting, it may inquire, and it has done so without limitation. It may also inquire what these lawyers did, if anything, after the meeting. It may not, however, inquire into the communications with private counsel during the meeting, without violating the attorney-client privilege and improperly invading the domain of attorney work product.

Like any citizen, the President is entitled to the confidential advice of counsel. Like previous chief executives, the President is entitled to the confidential advice of counsel in the discharge of his duties. The President is sometimes confronted with both official and personal legal questions and some that straddle both arenas. In order to advise the President effectively, both White House counsel and private attorneys need to confer comprehensively and candidly.

The Senate Whitewater Committee has available to it the information it needs to do its job. It has no right to violate the President and Mrs. Clinton's attorney-client relationship.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009. draft	Submission of the White House to Senate Committee (11 pages)	12/10/1995	P5

COLLECTION:

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

FOLDER TITLE:

Whitewater [2]

2009-1006-F
ke693

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]
- 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]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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THE WHITE HOUSE

WASHINGTON

December 14, 1995

Professor Paul Rothstein
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Dear Professor Rothstein:

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

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.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. memo	Phone No. (Partial) (1 page)	12/13/1995	P6/b(6)

COLLECTION:

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

FOLDER TITLE:

Whitewater [2]

2009-1006-F
ke693

RESTRICTION CODES

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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.

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

1. Bill Jeffress -- Miller Cassidy [P6/(b)(6)] [010]
2. Jake Stein -- former independent counsel, now with his own firm [P6/(b)(6)]
3. Chuck Tiefer -- former Solicitor to US House of Reps, now at U of Md Law School
4. Bob Lipshitz -- 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.

TO ELONK - RUSH

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 will be privileged as to all 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.

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The law of attorney-client privilege must acknowledge -- as routine application of such law to the President in fact does acknowledge -- the essential nature of the client.

- A rule preventing the President's public and private counsel from communicating in confidence also would undermine important governmental interests. If governmental attorneys cannot communicate with private counsel, the advice they give to the President, as to his own and his staff's official actions, inevitably will suffer. For example, the public counsel may not be able to provide the best possible advice on such issues as ~~the extent and conditions of~~ cooperation with congressional and other investigations; ~~the~~ invocation of executive privilege; 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.

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Deliver ASAP

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011. draft	Letter from the Counsel's Office re: communication (2 pages)	ca. 12/1995	P5

COLLECTION:

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

FOLDER TITLE:

Whitewater [2]

2009-1006-F
ke693

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THE WHITE HOUSE
WASHINGTON

THE WHITE HOUSE

For Immediate Release

December 13, 1995

Statement by Mark D. Fabiani
Special Associate Counsel to the President

In his objection to the Whitewater Committee's subpoena, the President does not assert executive privilege. The overriding reason the Committee is not entitled to see these notes is that they are protected by the attorney-client privilege that exists between the President and his personal lawyer.

The presence of the President's governmental lawyers at a meeting with his private lawyers, does not destroy this attorney-client privilege because the President also has the right to have confidential communications with his government lawyers. Likewise, the private and governmental lawyers are themselves entitled to communicate confidentially on the President's behalf.

Legal Experts Uncertain on Prospects of Clinton Privilege Claim

By Ruth Marcus and Susan Schmidt
Washington Post Staff Writers

Experts on the attorney-client privilege said yesterday that President Clinton's refusal to turn over notes of a Whitewater meeting to Senate investigators raises novel and complicated legal issues, but disagreed over whether it ultimately could succeed in keeping the documents secret.

In briefs submitted Tuesday to the Senate Whitewater committee, the White House and the Clintons' personal lawyers outlined their claim that a White House lawyer's notes of the November 1993 meeting were protected by attorney-client privilege, the long-standing legal doctrine that shields confidential communications with lawyers.

Both White House and private lawyers attended the session, which the briefs said was designed to provide necessary information to the Clintons' newly retained lawyers at Williams & Connolly and to allocate responsibility between the White House and private lawyers for handling Whitewater-related matters.

The briefs said that was a necessary and legitimate use of the government lawyers and that Clinton was entitled to assume that the communications between his two sets of lawyers would remain private.

They likened the situation to lawyers representing two defendants who have adopted a joint strategy in a criminal case; in those circumstances of "common interest," the lawyers may communicate freely among themselves without worrying about giving up the attorney-client privilege. The

briefs said the White House and outside lawyers could be seen as having two distinct clients with a common goal—the Office of the President and the Clintons personally.

"I believe that even the president ought to have a right to have a confidential conversation with his minister, his doctor, his lawyer," Clinton said in an interview with NBC yesterday.

But Republicans have argued the presence of government lawyers defeated Clinton's claim of privilege. They also have pointed to the presence of presidential adviser Bruce Lindsey, at the time the head of the White House personnel office, to argue that the session was not shielded from disclosure.

The White House says the work was legitimately government-related because of the president's position, but lawyers who have represented the White House in the past questioned how government attorneys could involve themselves in the Clintons' private financial and legal matters.

"Asserting attorney-client privilege is preposterous in my view," said former Bush administration attorney general William P. Barr. He said that while the private lawyers' conversations would have been protected by attorney-client privilege, the presence of the government attorneys destroys that protection because they are not entitled to represent the president in that regard.

Part of the issue turns on what information White House officials transmitted to David E. Kendall, the Williams & Connolly attorney representing Clinton, and the propriety of

how it was obtained. That, in fact, is one of the questions Republicans are trying to answer in obtaining the notes.

The White House has maintained that in the months before the meeting it obtained confidential investigative information to respond to expected media inquiries. The Republicans want to know if that information was turned over to Kendall during the Nov. 5 meeting.

Some legal experts said they agreed with the White House analysis. "I don't think the combination of lawyers makes a difference," said University of Colorado law professor Christopher B. Mueller. "Both as chief executive and as a citizen the president has a right to counsel" and "the fact that he's the president of the United States doesn't mean that he lacks the privilege."

He said Lindsey's presence "complicates matters a little bit, but the best rule is that the privilege applies even when outsiders are present if those outsiders are necessary to the communication process."

The White House and Williams & Connolly briefs argued that Lindsey, a lawyer, was giving legal advice to the president even though he was not on the counsel's staff at the time and that in any case he was an integral participant in the meeting because of his knowledge of Whitewater.

New York University law professor Stephen Gillers, an expert on legal ethics, said he initially had been skeptical of the president's invocation of attorney-client privilege but changed his mind after reading the briefs.

"The oddity here is that Clinton is in both sets of clients, in one way with his presidential hat on and in one way as a

private individual. The lawyers who represent the president have information that the lawyer who represents the Clintons legitimately needs and that's the common interest," he said. "It's true that government lawyers cannot handle the private matters of government officials," Gillers said. "However, perhaps uniquely for the president, private and public, are not distinct categories so while the principle is clear the application is going to be nearly impossible."

American University law professor Paul Rice said the claim was not only appropriate but important for Clinton to make to protect his prerogatives as president.

"Since all of them were lawyers and this is basically a transferring from the public side to the private . . . I think it's a legitimate claim," he said. "Had there been a broader range of people present I would have been more skeptical."

Nancy Moore, a Rutgers University law professor, said the Clintons' argument could encounter resistance from courts, which are often reluctant to expand the use of attorney-client privilege. "The privilege is not always looked favorably upon by courts," she said. "There is a long history of construing it somewhat narrowly, which gives the White House an uphill battle given that the claims they're making are novel claims."

FOR MORE INFORMATION 

For a chronology of events and profiles of the major players in Whitewater, see *Digital Ink*, The Post's on-line service. To learn about *Digital Ink*, call 202-334-4740.

Rubin: U.S. Would Divert Payment to Avoid Default

Retirement Fund to Get IOU for Interest Money Under Plan

By Clay Chandler
Washington Post Staff Writer

Treasury Secretary Robert E. Rubin said yesterday he will divert a \$14.5 billion interest payment due a federal retirement fund to keep the Treasury from defaulting at the end of this month should Congress refuse to increase the debt limit.

Use of the payment, owed to the \$360 billion-plus Civil Service Retirement Fund, will keep the Treasury below the current \$4.9 trillion ceiling on federal borrowing authority "until the end of January and possibly into the first week of February," Rubin said at a hearing of the House Banking Committee.

Ordinarily, the treasury secretary must invest the entire year-end interest payment to the retirement fund in government securities, thus reducing by the amount of the payment the Treasury's statutory borrowing authority. But Rubin said yesterday that, to avert default, he plans to hold the payment in cash temporarily, crediting the retirement fund with a IOU that would not be counted against the statutory limit.

Rubin conceded that the action was unusual but stressed that the law provided for full restoration of any interest to the retirement fund once Congress and the White House reach agreement on a debt limit increase. It was the second time Rubin has juggled the books of the fund to keep the Treasury under the borrowing ceiling.

Rubin's actions angered Republicans, several of whom yesterday renewed charges that his fiscal maneuvering had circumvented spending powers granted Congress by the Constitution.

The House is expected to vote this week on a bill introduced by Ways and Means Committee Chairman Bill Archer (R-Tex.) that prohibits the

treasury secretary from using federal trust funds to ride out a debt limit standoff. Rubin said yesterday that President Clinton would veto that legislation.

Rubin declined to describe what options he is considering to keep the government below the debt limit after February should there be no vote to increase it by then.

"When we approach the next critical date . . . we will provide Congress and the public with information on whether we can get beyond that date and if so how," Rubin said.

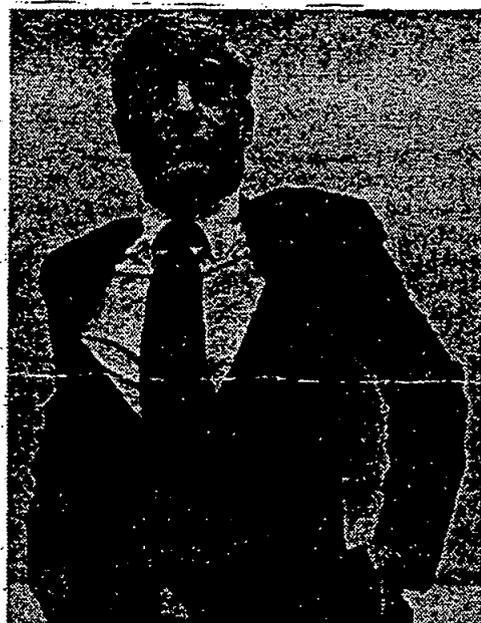
He predicted that he could "find a way" to do so, but also warned that "our capacity to finance the operations of the government through extraordinary measures is limited."

The administration has promised that Treasury will not touch the Social Security trust fund to keep the government below the debt limit.

Other than the two federal trust funds Rubin has already tapped—the Civil Service Retirement Fund and a federal employee savings program known as the G-Fund—Rubin said the treasury secretary "does not have authority to disinvest any of the other 189 government trust funds for debt management purposes."

Rubin already has made full use of the \$25 billion held in the G-Fund, and has suggested that he is concerned about legal challenges should he attempt to gain new borrowing authority by drawing more than the \$39.8 billion he has temporarily withdrawn from the retirement fund.

Rubin has justified the withdrawal with an official "finding" that the debt limit impasse might drag on through November 1996. The law states that the Treasury can redeem securities held by the fund only up to the amount that would be needed to pay beneficiaries of the retirement fund



ASSOCIATED PRESS

Treasury Secretary Robert E. Rubin waits to testify before the House Banking Committee.

while a debt limit dispute remains unresolved.

In theory, Rubin could free up new borrowing authority by issuing a new finding, extending his estimate for how long the face-off will continue. But Treasury experts worry about the credibility of such an assessment.

Private analysts say Rubin also is exploring whether he could carve out new borrowing authority in February by selling some of the \$82.6 billion in assets held by the Federal Financing Bank, which serves as an intermediary between financial markets and government entities. Another possible option: selling gold held by the Treasury to the Federal Reserve.

But sources say Rubin himself has reservations about those measures. Rep. Nick Smith (R-Mich.), leader of a coalition of House Republicans who have vowed to block a debt limit increase until President Clinton signs a seven-year balanced-budget deal, yesterday decried those alternatives as "really scary."

Panel Backs Private, Not Federal, Controls on Internet Smut

By Elizabeth Corcoran
Washington Post Staff Writer

A panel of three dozen business, community and education leaders said yesterday that the government "should not be in the business of regulating content on the Information Superhighway."

The group, the National Informa-

tion Infrastructure Advisory Council, was convened by the Commerce Department to advise on ways to bolster the growth of communications technology such as the Internet computer network. As Congress debates portions of a telecommunications bill that would regulate material considered to be "indecent," the council took a stand on the issue.

In a letter to Commerce Secretary Ronald H. Brown, the council said the government "should defer to the use of privately provided filtering, reviewing and rating mechanisms, and parental supervision as the best means of preventing access by minors to inappropriate materials."

The council includes Delano E. Lewis, president of National Public Radio;

Edward McCracken, chairman of Silicon Graphics Inc.; Morton Bahr, president of the Communications Workers of America; John F. Cooke, president of the Disney Channel; La Donna Harris, president of Americans for Indian Opportunity; Esther Dyson, chairman of the Electronic Frontier Foundation, and Bonnie Bracey, a teacher from the Arlington County school system.

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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.

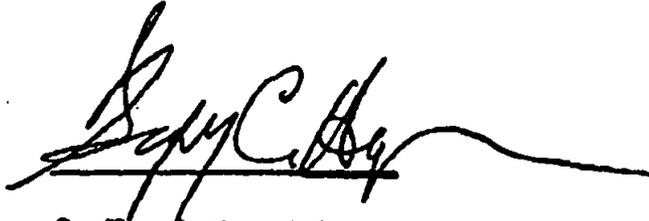
The matters under discussion were of concern to the President in each capacity as client. In my opinion, the situation is therefore the same as if lawyers for two different clients were in conference about a matter that was of concern to both clients. In that situation, in my opinion the attorney-client 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.



Geoffrey C. Hazard, Jr.

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.

SUBMISSION OF WILLIAMS & CONNOLLY
TO THE SPECIAL SENATE COMMITTEE REGARDING
WHITEWATER AND RELATED MATTERS

I. INTRODUCTION.

On December 8, 1995, the Special Committee to Investigate Whitewater Development Corporation and Related Matters served a subpoena on William H. Kennedy, III, former Assistant White House Counsel, for documents in his possession relating to a meeting he attended on November 5, 1993, at the law offices of Williams & Connolly, personal counsel to the President and Mrs. Clinton on so-called "Whitewater" matters. Mr. Kennedy has respectfully declined to comply with this subpoena on privilege grounds. In the transmittal letter accompanying the subpoena, the Chairman invited Mr. Kennedy "to submit . . . a legal memorandum which sets forth the basis for your refusal to comply with the subpoena." Because Mr. Kennedy's response to the subpoena is pursuant to the instructions of this law firm and of the White House Counsel's Office, both entities are submitting separate memoranda stating the reasons why privilege applies to the documents sought by this subpoena.

Two points cannot be overemphasized: first, the issue here is not the subpoenaed notes. The issue is the confidentiality of the President and Mrs. Clinton's relationship with their personal lawyer. If they make the notes public, partisan investigators will next claim that they have waived the

confidentiality of that entire relationship. That risk alone creates the need to maintain the confidentiality of the notes.

Second, a President must be able to receive confidential legal advice about any personal matter including personal matters that might affect his public duties. The President and the Presidency, although distinct conceptually, are at times inseparable practically. On matters of common interest, the lawyers for each -- White House counsel and personal counsel -- must be able to talk frankly in confidence, and delineate areas of responsibility, just as the President must be able to talk in confidence to both. Without such exchanges, neither lawyer could obtain the full picture necessary to offer sound advice, and neither could be effective in his or her role. The President could not receive the legal advice he needs to conduct his public and personal business. Moreover, the last decade has, for better or for worse, been a time when public policy differences have been improperly referred to the criminal process rather than resolved by the give and take of political debate, when motives are impugned and the specter of wrongdoing is raised at every turn, and when bareknuckle tactics rather than civility are the order of the day.^{1/} Today, when politics is too often

^{1/} As Senator Simon noted at the Special Committee's hearing on December 11, 1995, in the current issue of Newsweek, it is reported that this Committee is targeting Mrs. Clinton's chief of staff, Ms. Margaret Williams, as a proxy for Mrs. Clinton herself. "'We're going to crush her [Ms. Williams],' says one committee staffer." Turque & Isikoff, Lost in Whitewater, Newsweek Dec. 18, 1995, at 39.

practiced as a blood sport, a President, like any other elected official and like any citizen, deserves the full right to legal counsel, for he may be beset by overzealous or partisan investigators whose motive is not simply to uncover the truth but rather to do him political damage.

These simple points alone compel the decision to resist the Special Committee's subpoena.

* * *

For the reasons set forth in this memorandum, the November 5, 1993, meeting is plainly protected by both the attorney-client privilege and the attorney work-product doctrine. This was a meeting of present and past personal counsel for the President and Mrs. Clinton and of attorneys doing legal work in the White House. The purpose of the meeting was to brief new personal counsel and members of the White House Counsel's Office on "Whitewater" matters and to agree upon an appropriate division of responsibility for "Whitewater" legal duties between personal and White House counsel. Indeed, as the following legal analysis demonstrates, the meeting is so clearly protected in so many different ways that the Special Committee's attempt to invade the privileged relationship is puzzling, particularly in view of the numerous permissible ways in which the Special Committee may gather relevant information concerning the meeting, which the Special Committee's counsel have not even attempted to date.

The President and Mrs. Clinton have afforded comprehensive and unprecedented cooperation in every investigation into "Whitewater" matters. They have voluntarily produced tens of thousands of pages of documents to this Committee, the RTC, and the Independent Counsel. They have each testified three times under oath for the Independent Counsel, they have answered voluminous interrogatories for the RTC, and Mrs. Clinton has provided information under oath to both the FDIC and this Committee.

For this Committee, however, it appears that no degree of cooperation is sufficient. As the hearings drag beyond their thirtieth day and face low ratings and flagging public interest, the Committee majority is plainly attempting to manufacture a controversy so that it can allege (finally) a failure of cooperation by the Clintons. It appears that the majority has made a conscious and concerted decision to spark this battle over the exercise of a privilege which, however well established as a matter of law, will provide a specious occasion to cry "Cover-up!" Whatever partisan and political advantage there may be to this grandstanding, as a matter of law this unprecedented attempt is wholly devoid of merit.

II. BACKGROUND TO THE NOVEMBER 5, 1993 MEETING.

Starting on October 31, 1993, and in the days immediately following, there was a torrent of press discussion of

the many matters now known collectively as "Whitewater." A review of these press accounts establishes that, by the date of the meeting, there had been unprecedented public disclosure of the on-going federal investigations. It was clear by November 5 that there would be an appropriate role for both personal and White House counsel.

On October 31, 1993, The Washington Post reported that the Resolution Trust Corporation had "asked federal prosecutors in Little Rock to open a criminal investigation into whether a failed Arkansas savings and loan [Madison Guaranty] used depositors' funds during the mid-80s to benefit local politicians, including a reelection campaign of then-governor Bill Clinton." Susan Schmidt, U.S. Is Asked to Probe Failed Arkansas S&L, The Washington Post, at A1. Citing "government sources familiar with the probe," the Post article presented a detailed picture of the RTC referrals. Id.^{2/} It reported that the RTC had referred "about 10 matters arising from transactions at" Madison to United States Attorney Paula Casey approximately three weeks earlier, and that the referrals included "questions

^{2/} The article also demonstrated a familiarity with the referral decision-making process, reporting that "[t]here was protracted debate within the RTC about whether Madison transactions involving the Clintons should be included in documents sent to Casey, because the investigation focuses primarily on the handling of S&L funds by Madison officials The RTC's investigators who are based in Kansas City were prepared to forward the information earlier this fall, but the decision to send the referrals on was not made until early October, the sources said." Id. at A14.

about whether a series of checks written on Madison accounts ended up in Clinton's campaign fund." Id.^{3/}

The Washington Post story was only the first of a series of articles in the Post and other newspapers disclosing in an extraordinary way reams of details about on-going federal investigative efforts. On November 1, 1993, The Wall Street Journal confirmed the existence of an investigation into Madison Guaranty and publicized a second parallel federal investigation by federal prosecutors and the Small Business Administration regarding a former judge, David Hale, who was involved in the collapse of Capital Management Services, Inc., an SBA-funded small business investment company (SBIC). Bruce Ingersoll and

^{3/} More specifically, the article stated that "the RTC has asked Casey to determine whether checks to the Clinton campaign were paid from overdrawn accounts with the authorization of Madison's owner, James B. McDougal, or whether Madison loans intended for other purposes were used for campaign contributions." Id. at A14. "RTC investigators have examined irregular Madison transactions that took place in April 1985 and have attempted to find out who endorsed and deposited a series of checks made out to Clinton or the gubernatorial campaign, one source familiar with the probe said." Id. The article noted that the campaign fund was maintained at an Arkansas bank, the Bank of Cherry Valley. As to the allegations concerning President Clinton, the article reported that "the sources said there is no indication Clinton had personal knowledge of or involvement in the transactions." Id. at A1. The story further divulged that, according to government sources, the RTC in its own investigation had gone "to extraordinary lengths to trace real estate transactions involving Whitewater Development Corporation" -- in which the Clintons and McDougals were partners -- and that these transactions were among the matters referred to the U.S. Attorney. Id. at A14. The RTC also had reportedly requested further federal investigation of Governor Jim Guy Tucker's involvement with Madison Guaranty Savings & Loan. Id. at A1.

Paul Barrett, U.S. Investigating S&L Chief's '85 Check to Clinton, SBA-Backed Loan to Friend, The Wall Street Journal, at A3. The Journal reported an investigation of alleged defrauding of the SBA by Hale's company, which it said had lent money to a firm owned by Mr. McDougal's wife, Susan. The article also stated that Mr. Hale had attempted to "stave off his indictment" by providing investigators with information about Madison Guaranty's "possible misuse of funds for political purposes." Id. News of the federal investigations also was carried by newspapers abroad. Martin Walker, Clintons' Associate to be Investigated, The Guardian, at 11.

On November 2, 1993, both The Washington Post and The New York Times carried stories providing additional facts about the federal investigations. The Post reported that the FBI had raided the offices of Mr. Hale's firm the previous summer and had "seized documents that included records of a \$300,000 loan to a public relations company headed by Susan McDougal, a partner in Whitewater." Michael Isikoff and Howard Schneider, Clintons' Former Real Estate Firm Probed, The Washington Post, at A1. The New York Times described an alleged close business and professional relationship between then-Governor Clinton and Mr. McDougal and reported that RTC investigators were interested in a potential link between campaign contributions made by Madison Guaranty to then-Governor Clinton and efforts by Madison to get state bank regulators to approve a stock plan. Jeff Gerth and

Stephen Engelberg, U.S. Investigating Clinton's Links to Arkansas S.&L., The New York Times, at A20.^{4/}

The stories continued the next day. The Washington Post ran an article on November 3, 1993, detailing what it described as a possible conflict of interest in the Rose Law Firm's representation of the FDIC, which had taken over Madison Guaranty, an institution which, the Post reported, the law firm had previously represented in 1985 when the S&L sought state regulatory approval for a plan to raise new capital. The representation was in a lawsuit against the S&L's former accounting firm. Susan Schmidt, Regulators Say They Were Unaware

^{4/} Specifically, the Times article reported that "two Federal agencies have been trying to find out whether more than \$250,000 in business loans was improperly diverted from Madison in April 1985 to several sources, including Mr. Clinton's re-election campaign for governor." Id. According to the article, "[t]he officials said the campaign received \$12,000 in cashier's checks from Madison, some of which appeared to have been paid for by the business loans." Id. But, the article reported, "the President is neither the subject nor a target of the investigation, which is still in its early stages." Id. In addition, the Times story reported on interviews given by Mr. Hale in which he alleged that the \$300,000 loan made by his company to Susan McDougal was to be used to "conceal questionable transactions by Madison, including indirect help for the Clintons." Id. According to the cited Hale interviews, Madison Guaranty financed a land deal for Mr. Hale "in February 1986 in which he was paid hundreds of thousands of dollars more than the property was worth," and which permitted him to make the \$300,000 loan to Mrs. McDougal. Mr. Hale alleged that then-Governor Clinton "personally pressed him to make the \$300,000.00 loan." Id. The article additionally described allegations "that Madison was helping Whitewater," and that "the company had frequent sizable overdrafts on its account at Madison." Id.

of Clinton Law Firm's S&L Ties, The Washington Post, at A4.^{5/}

The Arkansas Democrat Gazette reported that a July 1993 FBI raid on Mr. Hale's office disclosed documents detailing a \$300,000 loan to Susan McDougal, some of the proceeds of which "were used to finance a large purchase of rural property from the International Paper Co. by Whitewater in October 1986." Noel Oman, "Old Story," Clinton Says of Links to McDougal, Arkansas Democrat Gazette, at 11A. The article additionally recounted that Hale was indicted that September on charges that he and two colleagues "defrauded the SBA by illegally funneling \$800,000 in and out of Capital Management to secure a \$900,000 SBA loan." Richard Keil, Clintons Clear of S&L Inquiry, White House Insists, Arkansas Democrat Gazette, at 13A.

Additional stories were published November 4, 1993, the day before the meeting among counsel at Williams & Connolly. The Washington Post reported in detail on federal investigations into Arkansas Governor Jim Guy Tucker's relationships with Madison and Capital Management Services. Howard Schneider, Governor Tucker's

^{5/} The Post reported that the lead attorney for the Rose Law Firm's FDIC representation, Webster Hubbell, had informed the FDIC that his father-in-law, Seth Ward, had been an executive of Madison's real estate investment company and had failed to repay substantial loans to Madison. The article concluded with the assertion that "Hillary Clinton was one of the lawyers who represented Madison in 1985 when the failing S&L sought approval for a recapitalization plan from the state securities commissioner while her husband was governor." Id. Madison was also described as having made "loans to prominent Democrats including Mr. Fulbright and Jim Guy Tucker, a Little Rock lawyer who is now Governor of Arkansas." Id.

Finances Become Probe Focus, The Washington Post, at A3. The Washington Times reported that the federal inquiry into Madison loans included an inquiry into an alleged "\$35,000 loan to Mr. Clinton to help settle 1984 campaign debts." Jerry Seper, What Were the Clinton Stakes in Land Scheme?, The Washington Times, at A1. It further stated that federal investigators were looking into what it described as "\$2000 a month in legal fees from Mr. McDougal [that Mrs. Clinton received] to represent Madison Guaranty." Id. at A20.^{6/}

Finally, on November 5, 1993, the day of the meeting, The Washington Times published another lengthy and detailed account of the "federal fraud investigation" of Mr. McDougal. Jerry Seper, Probe of S&L Chief Touches on Hillary's Legal Fee, The Washington Times, at A1. The article stated that investigators were looking into a \$30,000 payment made to Mrs. Clinton for legal work over a 15-month period and included the allegation that Mr. Clinton and Mr. McDougal "personally agreed to the payments" and that Mr. Clinton "picked up the checks." Id. The article further claimed that "the probe also is aimed at

^{6/} The article reprinted a 1988 letter from Mrs. Clinton to Jim McDougal requesting a power of attorney to "manage and conduct all matters related to Whitewater Development. And it provided additional details about the David Hale issue that the SBA was investigating, and about Mr Hale's allegations about Mr. Clinton. Specifically, it recounted Mr. Hale's charge that then-Governor Clinton requested Hale's help in February 1986 at the State Capitol and a second time in March 1986 at Mr. McDougal's office.

determining if the monthly retainer was paid to Mrs. Clinton through a secret bank account." Id.^{1/}

In short, by the day of the meeting at Williams & Connolly, the details of the RTC referral and investigations by the U.S. Attorney and the SBA had been extensively publicized, and many of the allegations, facts, and issues surrounding the broadly defined "Whitewater" matter were well known. The torrent of unusually detailed reporting about the RTC referral and the federal investigations in the week leading up to the November 5th meeting^{2/} was vastly more specific than any information conveyed

^{1/} The article then detailed at considerable length certain correspondence in the mid-1980's between attorneys at the Rose Law Firm and Charles F. Handley and Beverly Bassett Schaffer of the Arkansas Securities Department in connection with a Madison Guaranty matter.

^{2/} The 1994 Senate Committee on Banking, Housing and Urban Affairs Hearing on the Whitewater Matter established that the RTC was extremely prone to "leaking" confidential information. It was thus not surprising that the press was able to obtain so much inside information about criminal referrals that the RTC had made or was in the process of making. In response to a question from Senator Shelby, Deputy CEO of the RTC Jack Ryan responded, "Well, that's the problem, I think, Senator, is that the RTC does leak [The referral information] was supposed to be confidential and the RTC has a responsibility to keep that information confidential as well. And the RTC breached that responsibility." Hearing T., at 61-62 (Aug. 1, 1994). In response to a question from Senator Murray, Mr. Ryan responded:

The responsibility for maintaining the confidentiality of that information, of any information, investigative or otherwise, that could damage a case that the RTC is bringing, is a responsibility first and foremost of the RTC itself, it seems to me, and we haven't been very good about keeping those matters confidential. It's almost a certainty around

(continued...)

by the RTC to the Treasury Department and the White House in the September and October 1993 "Treasury/White House contacts" meetings, which the Senate Banking Committee explored in the

^{8/}(...continued)

the RTC that any matter that has any kind of public interest at all is leaked to the press prematurely [W]e're quite concerned about it. I think partly it's the nature of the RTC. We have 60 -- 6500 employees, many of whom are going to be out of a job come the end of next year when the RTC goes out of business, so there's not much of an incentive for institutional loyalty. There's not much concern by the employees of the RTC about doing something that might affect their employment there, and we've had a lot of premature leaks of very sensitive information.

Id. at 122-123. Senator Murray asked Steven Katsanos, Director of Communications for the RTC, "how . . . the New York Times receive[d] information about criminal referrals regarding Madison," and Mr. Katsanos responded:

I have no idea. I would like to have to concur with my colleagues here, and I'd have to reflect that when I was a reporter, I would have loved to have had the job of covering the RTC. It is, because of the staff here, because of the people within the RTC, one of the easiest agencies to cover. One reporter once referred to it as not a very challenging agency -- it's like shooting dead fish floating in a barrel of water. It's an exceptionally easy agency to cover. . . . You can get information from RTC staff, from RTC contractors. You can get information from Congressional staff and that's unique to the RTC. It's just since it is such a visible organization with such a controversial job with so many different players involved, it's a simple job as far as a reporter is concerned.

Id. at 125-126.

summer of 1994. See Appendix A. Given the thorough airing of the RTC referral and the federal investigations in the press summarized above, whatever limited confidential information concerning the RTC referral may have been given to Treasury or the White House had been published in the press by the time of the Williams & Connolly meeting.

III. THE MEETING AND WHO ATTENDED IT.

The November 5 meeting occurred after the avalanche of publicity described in the previous section, and it had a number of purposes: to provide new private counsel with a briefing about "Whitewater" issues from counsel for the Clintons who had been involved with those matters, to brief the White House Counsel's office and new personal counsel on the knowledge of James M. Lyons, personal attorney for the Clintons who had conducted an investigation of Whitewater Development Company in the 1992 Presidential Campaign, to analyze the pending issues, and, finally, to discuss a division of labor between personal and White House counsel for handling future Whitewater issues. All of these purposes served the larger purpose of providing legal advice to the President on the conduct of his public and private business.

The meeting was set up by David E. Kendall with Bernard Nussbaum, White House Counsel. It was held at Kendall's law firm, lasted more than two hours, and was limited to past and present personal lawyers for the President and Mrs. Clinton and

lawyers in the White House Counsel's Office doing legal work on the emerging Whitewater matters. Communications at the meeting were held in strict confidence. Seven lawyers attended.

Mr. Kendall, a partner at the Washington, D.C., law firm of Williams & Connolly, had been retained to represent the Clintons with respect to Whitewater matters the day before, on November 4, 1993. Stephen Engstrom, a partner at the Little Rock law firm of Wilson, Engstrom, Corum, Dudley & Coulter, had traveled to Washington, D.C., to attend the meeting. He had been retained to serve as local counsel for the Clintons a few days prior to the meeting.^{2/}

Also present were three attorneys from the White House Counsel's Office: White House Counsel Bernard Nussbaum, Associate White House Counsel William H. Kennedy, III, and Associate White House Counsel Neil Eggleston. Mr. Kennedy had also represented the Clintons in the 1990-1991 period, when he undertook an investigation of the status of the Clintons' investment in Whitewater Development Company. This representation had continued in 1992, when Mr. Kennedy had advised the Clinton Campaign about the Whitewater investment. He then represented the President in his official capacity when he joined the White House Counsel's Office in 1993.

^{2/} Because of a potential conflict, Mr. Engstrom withdrew from the Whitewater representation later in November, 1993, and was replaced as local counsel by John Tisdale, Esq., of the Wright, Lindsey & Jennings firm in Little Rock. Mr. Engstrom presently represents the President in civil litigation.

James M. Lyons, Esq., a partner in the Denver, Colorado, law firm of Rothgerber, Appel, Powers & Johnson, had also traveled to Washington, D.C., to attend the meeting. During the 1992 Presidential campaign, he had served as personal counsel to the Clintons with respect to a number of different matters, and had undertaken to do an extensive review of the Whitewater investment, with the Denver forensic accounting firm of Patten, McCarthy & Associates, Inc. Mr. Lyons continued to represent the Clintons personally in November 1993.

Finally, Bruce Lindsey, Esq., a former law partner of President Clinton's, a former counsel both to then-Governor Clinton personally and his 1990 and 1992 political campaigns, and White House personnel director in November 1993, attended the meeting. Although not part of the White House Counsel's Office, Mr. Lindsey also had done legal work for the Office of the President analyzing various "Whitewater" issues as they emerged in the fall of 1993 and working through counsel in Arkansas to research state law legal issues. He continued in that role after the November 5 meeting.

Because the purpose of the meeting was to learn the facts, develop legal analyses, and apportion responsibilities in order to enable both personal and White House counsel to provide competent, appropriate, and effective legal advice and services, the meeting was plainly privileged.

IV. THE DISCUSSION THAT TOOK PLACE AMONG THE ATTORNEYS PRESENT AT THE NOVEMBER 5, 1993 MEETING, AND ALL DOCUMENTS REFLECTING THAT DISCUSSION, ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE, THE COMMON-INTEREST PRIVILEGE, AND THE WORK-PRODUCT DOCTRINE.

A. The Meeting Was Protected by the Attorney-Client Privilege.

The attorney-client privilege, which originated in Roman and canon law, "is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)). The purpose of the privilege is "to encourage full and frank communications between attorneys and their clients," and "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Upjohn, 449 U.S. at 389-91.^{10/}

The November 5 meeting at Williams & Connolly falls squarely within this privilege. Seven lawyers, all personal counsel for President and Mrs. Clinton or lawyers in the White House, attended the meeting. Each was present in his capacity as

^{10/} As the Supreme Court also stated, "The privilege 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." 449 U.S. at 389; see also Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (attorney-client 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.").

a lawyer, and the President and Mrs. Clinton understood themselves to have a privileged relationship with each lawyer. The meeting was held for the purpose of sharing information as necessary and appropriate to provide legal advice, analyzing the information, and dividing responsibility among the lawyers for handling Whitewater-related matters on behalf of the Clintons. This lawyers' meeting was held with the expectation of confidentiality, and it is privileged.

1. The Attorney-Client Privilege.

Certain basic and indisputable rules about the attorney-client privilege establish this point.

First, the attorney-client privilege protects confidential communications between an attorney and his or her client "made for the purpose of furnishing or obtaining professional legal advice and assistance." In re LTV Securities Litigation, 89 F.R.D. 595, 600 (N.D. Tex. 1981). The privilege applies in both directions: to communications from the client to the attorney, and to communications from the attorney to the client. Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956); Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd without op., 734 F.2d 18 (7th Cir. 1984). It applies with equal force to conversations and correspondence among a client's attorneys, whether or not the

client is present during the conversation or receives a copy of the correspondence.^{11/}

Second, what is protected by the privilege is the communications themselves within the confidential setting. "The protection of the privilege extends only to communications and not to facts," Upjohn, 449 U.S. at 395 (quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)), and investigators are free to question individuals who communicate with counsel about unprivileged facts known to them. But arguments that the information may more conveniently be obtained from the privileged communication are unavailing, because "such considerations of convenience do not overcome the policies served by the attorney-client privilege." Id. at 396.

^{11/} See, e.g., Natta v. Zletz, 418 F.2d 633, 637 (7th Cir. 1969) ("correspondence between house and outside counsel . . . clearly fall within the ambit of the attorney-client privilege") (collecting cases); Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. City of Chicago, No. 76 C 1982, slip. op. (N.D. Ill. Apr. 27, 1981) (attorney-client privilege extends to meeting between "attorneys discussing the giving of legal advice or assistance in anticipation of pending litigation"); Green, 556 F. Supp. at 85 (attorney-client privilege "applies equally to inter-attorney communications"); Foseco Int'l, Ltd. v. Fireline, Inc., 546 F. Supp. 22, 25 (N.D. Ohio 1982) ("the Court finds that the communications between Foseco's U.S. patent counsel and local counsel in Washington, D.C. were confidential communications and, therefore, subject to the attorney-client privilege"); In re D.H. Overmyer Telecasting Co., 470 F. Supp. 1250, 1254-55 (S.D.N.Y. 1979) (conversations between in-house and outside counsel protected by attorney-client privilege); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 36 (D. Md. 1974) (confidential communications between in-house and outside counsel, as well as between two outside lawyers representing the same client, fall within scope of attorney-client privilege) (collecting cases).

For this reason, even if the information discussed is in the public domain, the fact of communicating about it with or among counsel is privileged. In Lohman v. Superior Court, 81 Cal. App. 3d 90 (1978), for example, the court explained,

if the client discloses certain facts to a third person and subsequently advises his lawyer of those same facts in the form of a confidential communication, there has been no waiver since, obviously, the client has not disclosed to the third person the confidential communication to the attorney, i.e., had not disclosed that certain information had been communicated to the attorney.

Id. at 97. And by necessity, the attorney-client privilege extends as well to written materials reflecting the substance of an attorney-client communication.^{12/}

Third, the attorney-client privilege also covers communications between agents of a client and the client's attorney, again, as long as the communication was intended to be confidential. "[I]f the purpose of the communication is to facilitate the rendering of legal services by the attorney, the

^{12/} See Green, 556 F. Supp. at 85 (privilege applies to "an attorney's notes containing information derived from communications to him from a client. That information is entitled to the same degree of protections from disclosure as the actual communication itself."); accord Natta, 418 F.2d at 637 n.3 ("insofar as inter-attorney communications or an attorney's notes contain information which would otherwise be privileged as communications to him from a client, that information should be entitled to the same degree of protection from disclosure. To hold otherwise merely penalizes those attorneys who write or consult with additional counsel representing the same client for the same purpose. As such it would make a mockery of both the privilege and the realities of current legal assistance."); Smith v. MCI Telecommunications Corp., 124 F.R.D. 665, 687 (D. Kan. 1989).

privilege may also cover communications between the client and his attorney's representative, between the client's representative and the attorney, and between the attorney and his representative." Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 518 (S.D.N.Y. 1992).^{13/} Courts define the term "agent" broadly to encompass a range of individuals, from expert consultants to relatives to insurance agents, whose presence is necessary to the purpose of the meeting and to the rendering of advice. See, e.g., Kevlick v. Goldtein, 724 F.2d 844, 849 (1st Cir. 1984) (client's father); United States v. Bigos, 459 F.2d 639, 643 (1st Cir.) (client's father), cert. denied sub nom.,

^{13/} This is particularly true in the governmental context. As the Office of Legal Counsel explained in a 1982 opinion letter,

it is likely that, in most instances, the "client" in the context of communications between the President and the Attorney General, and their respective aides, would include a broad scope of White House advisers in the Office of the President. The "functional" analysis suggested by Upjohn focuses on whether the privilege would encourage the communication of relevant and helpful information from advisers most familiar with the matters on which legal assistance is sought, as well as whether the privilege is necessary to protect and encourage the communication of frank and candid advice to those responsible for executing the recommended course of action. A corollary to this expanded concept of the "client," which reflects the realities of the governmental setting, is that the "attorney" whose communications are subject to the attorney-client privilege may, in fact, be several attorneys responsible for advising the "client"

6 Op. O.L.C. 481, 496 (Aug. 2, 1982).

Raimondi v. United States, 409 U.S. 847 (1972); Benedict v. Amaducci, No. 92 Civ 5239 (KMW), 1995 U.S. Dist. LEXIS 573, *3-*4 (S.D.N.Y. Jan. 18, 1995) (consultant); Foseco Int'l, Ltd. v. Fireline, Inc., 546 F. Supp. 22, 25 (N.D. Ohio 1982) (patent agent); Miller v. Haulmark Transport Systems, 104 F.R.D. 442, 445 (E.D. Pa. 1984) (insurance agent); Harkobusic v. General American Transp. Corp., 31 F.R.D. 264, 265 (W.D. Pa. 1962) (brother-in-law).

Nor must the client be present at a meeting between his agents and his lawyer for the communications during the meeting to be protected by the attorney-client privilege. Thus, for example, in Foseco International, Ltd. v. Fireline, Inc., 546 F. Supp. 22 (N.D. Ohio 1982), the court held that a meeting between the plaintiff's patent agent and the plaintiff's lawyer fell within the scope of the attorney-client privilege, even though the plaintiff was not present at the meeting. As the court explained,

these communications are in essence communications between the client and the client's attorney. The British patent agent acted at the direction and control of the plaintiff. Further, through the agency of its patent agent, the plaintiff sought from the U.S. patent counsel legal advice and assistance concerning a U.S. patent application proceeding. Had the communications been made between the plaintiff and its U.S. counsel, the privilege would have attached.

The Court finds that, given the purpose of the attorney-client privilege to encourage full and frank communication between attorneys and their clients, the communications made between [plaintiff], through its patent agent, and its U.S. patent counsel are privileged. The

communications involved in this case were made in furtherance of the rendition of professional legal services to the client and were reasonably necessary for adequate legal assistance.

Id. at 26.^{14/}

Fourth, the determination whether there exists an attorney-client relationship depends on the understanding of the client. "The professional relationship for purposes of the privilege hinges upon the belief that one is consulting a lawyer and his intention to seek legal advice." Wylie v. Marley Co., 891 F.2d 1463, 1471 (10th Cir. 1989). Accordingly, the attorney-client privilege applies to confidential communications between an individual and a person he reasonably believes to be his attorney, even if the attorney ultimately elects not to represent

^{14/} See also Benedict, 1995 U.S. Dist. LEXIS 573, at *3-4 (conversations between plaintiffs' counsel and consultant retained by plaintiffs to prepare them for prospect of litigation and assist with litigation "are protected by the attorney-client privilege, because [the consultant] was acting as plaintiffs' representative during those consultations."); Farmaceutisk Laboratorium Ferring A/S v. Reid Rowell, Inc., 864 F. Supp. 1273, 1274 (N.D. Ga. 1994) (independent consultant was so meaningfully associated with corporation that it could be considered insider for purposes of privilege); American Colloid Co. v. Old Republic Ins. Co., 1993 U.S. Dist LEXIS 7619, *2-3 (N.D. Ill. June 4, 1993) (communications between plaintiff's agents and plaintiff's counsel are privileged); Carte Blanche PTE, Ltd. v. Diners Club Int'l, Inc., 130 F.R.D. 28, 33-34 (S.D.N.Y. 1990) (correspondence between client's agent and client's counsel protected by attorney-client privilege), subsequent opinions rev'd on other grounds, 2 F.3d 24 (2d Cir. 1993).

the client, and even if the attorney is not a member of the bar.^{15/}

Finally, it is important to note that the attorney-client privilege affords absolute protection to privileged communications. As the Ninth Circuit explained in Admiral Insurance Co. v. United States District Court, 881 F.2d 1486 (9th Cir. 1989),

the principal difference between the attorney-client privilege and the work-product doctrine, in terms of the protections each provides, is that the privilege cannot be overcome by a showing of need, whereas a showing of need may justify discovery of an attorney's work product.

Id. at 1494 (quotation omitted). The attorney-client privilege cannot be vitiated by a claim that the information sought is unavailable from any other source. Id. at 1495. "Such an exception would either destroy the privilege or render it so tenuous and uncertain that it would be 'little better than no privilege at all.'" Id. (quotation omitted).

^{15/} See United States v. Mullen & Co., 776 F. Supp. 620, 621 (D. Mass. 1991) ("the attorney-client privilege may apply to confidential communications made to an accountant when the client is under the mistaken, but reasonable, belief that the professional from whom legal advice is sought is in fact an attorney."); United States v. Tyler, 745 F. Supp. 423, 425-26 (W.D. Mich. 1990); United States v. Boffa, 513 F. Supp. 517, 523 (D. Del. 1981).

2. The Attorney-Client Privilege Covers the November 5, 1993 Meeting.

a. Meeting Among Counsel.

With these basic principles in mind, the analysis is straightforward and the answer clear. Every person present at the November 5, 1993 meeting was a lawyer whom the President and Mrs. Clinton understood to be representing them in either their personal or official capacities. Messrs. Kendall, Engstrom, and Lyons were private attorneys acting as personal legal counsel for the Clintons at the time of the meeting. Messrs. Kennedy, Eggleston, and Nussbaum worked in the Office of White House Counsel and represented the Office of the President, including the President and First Lady in their official capacities, at that time. Mr. Lindsey was an attorney who had represented Mr. Clinton in the past; as of November 1993 he was working in the White House Personnel Office and also assisting the President (in his official capacity) on Whitewater, gathering information, determining how to respond to press calls, and providing legal advice and analysis to the Office of the President concerning matters occurring in Arkansas before 1993.

Every attorney present at the November 5, 1993 meeting intended that the discussion that took place remain confidential. The President and Mrs. Clinton also expected, and fully intended, that the conversation that took place among the counsel at the meeting remain privileged and confidential. Indeed, attendance at the meeting was limited to these lawyers for this very reason.

The discussion at the meeting concerned information and analysis necessary to the ability of private and White House counsel to represent the Clintons effectively in connection with Whitewater-related matters. The meeting facilitated the rendering of legal services to the Clintons by both private and White House counsel, and the communications that took place during the meeting without question "were made in furtherance of the rendition of professional legal services to the client and were reasonably necessary for adequate legal assistance."

Foseco, 546 F. Supp. at 26.

Since the November 5 meeting among counsel for the President and Mrs. Clinton was held for the purpose of enabling counsel to provide legal advice to them, the conversation that took place falls at the heart of the attorney-client privilege. See Natta, 418 F.2d at 637; Chicago Lawyers' Committee, No. 76C1982, slip. op. (N.D. Ill. Apr. 27, 1981); Green, 556 F. Supp. at 85; Foseco, 546 F. Supp. at 25; In re D.H. Overmyer Telecasting Co., 470 F. Supp. 1250, 1254-55 (S.D.N.Y. 1979); Burlington Indus., 65 F.R.D. at 36. Notes taken by counsel during the meeting, which reflect the substance of the discussion during the meeting, are necessarily protected as well. See Natta, 418 F.2d at 637 n.3; Green, 556 F. Supp. at 85.

b. Meeting Among Client's Agents and Counsel.

Mr. Lindsey was acting as the Clintons' lawyer at the meeting; but even if he had not been, as some on the Special

Committee have suggested, his presence would in no respect have vitiated the attorney-client privilege. Mr. Lindsey was not only a lawyer but also a counselor to and agent of the President. Mr. Lindsey imparted information required by both personal and White House counsel in order to effectively represent the President, and he received information and advice necessary for him to assist the Office of the President in its functioning. It is well-settled that agents of a client may meet with counsel in furtherance of the attorney-client relationship. See Foseco, 546 F. Supp. at 25; Benedict, 1995 U.S. Dist. LEXIS at *3-4; Farmaceutisk Laboratorium Ferring, 864 F. Supp. at 1274; American Colloid Co., 1993 U.S. Dist LEXIS 7619 at *2-3; Carte Blanche, 130 F.R.D. at 33-34. Because Mr. Lindsey participated in the meeting with the expectation (shared by all present) that the discussion would remain confidential, and because he was able to provide information and analysis essential to the purpose of the meeting, his presence was completely consistent with the privilege. Under this scenario as well, the meeting was plainly privileged.

B. The 1993 Meeting Was Protected by the "Common Interest" Privilege.

1. The Common Interest Privilege.

The meeting was also protected by the "common interest" privilege, which enables counsel for clients with a common interest "to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving

either privilege."^{16/} The privilege encompasses notes and memoranda of statements made at meetings among counsel and their clients with a common interest, as well as the statements themselves. In re Grand Jury Subpoena Dated Nov. 16, 1974, 406 F. Supp. 381, 384-94 (S.D.N.Y. 1975). The rationale for this well-accepted privilege is readily apparent:

Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244, 249 (4th Cir. 1990). See also 2 Stephen A. Saltzberg, et al., Federal Rules of Evidence Manual 599 (6th ed. 1994) ("Saltzberg") ("In many cases it is necessary for clients to pool information in order to obtain effective representation. So, to encourage information-pooling, the common interest rule treats all involved

^{16/} Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992); see also Waller v. Financial Corp. of America, 828 F.2d 579, 583 n.7 (9th Cir. 1987) ("communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for purposes of a common defense") (quoting United States v. McPartlin, 595 F.2d 1321, 1326 (7th Cir. 1979), cert. denied, 444 U.S. 833 (1979)); In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 389 (S.D.N.Y. 1975) ("the attorney-client privilege covers communications to a prospective or actual co-defendant's attorney when those communications are engendered solely in the interests of a joint defense effort.").

attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued.").

Thus, the common interest privilege may be asserted with respect to communications among counsel for different parties if "(1) the disclosure is made due to actual or anticipated litigation or other adversarial proceedings; (2) for the purposes of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties."^{17/} If these circumstances are present, the communications are protected. Indeed, the privilege covers communications not only among counsel for clients with common interests but also between an individual and an attorney for a different party with a common interest.^{18/}

^{17/} Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995); see also United States v. Bay State Ambulance & Hosp. Rental Service, 874 F.2d 20, 28 (1st Cir. 1989); In re Beville, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986); In re LTV Sec. Litig., 89 F.R.D. at 604. It is not necessary for actual litigation to have commenced at the time of the meeting for the privilege to be applicable. United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991).

^{18/} See Schwimmer, 892 F.2d at 244 (it is not necessary for attorney representing the communicating party to be present when the communication is made to the other party's attorney); McPartlin, 595 F.2d at 1335 (applying common interest rule to communications between client and agent for attorney of person with common interest); Saltzberg at 600 ("The fact that clients are present at a consultation in the common interest certainly should not preclude the application of the common interest rule, so long as the statements are otherwise intended to remain confidential and are made for purposes of obtaining legal advice in the common interest."):

Of course, no two individuals' or entities' interests will be totally congruent, and it is not necessary for every party's interest to be identical for the common interest privilege to apply; rather, the parties must have a "common purpose." United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979), cert. denied, 444 U.S. 833 (1979). The question of whether the parties share a 'common interest' "must be evaluated as of the time that the confidential information is disclosed." Holland, 885 F. Supp. at 6.

2. The Common-Interest Privilege Covers the November 5, 1993 Meeting.

All of the elements necessary for the proper assertion of a common interest privilege were present during the November 1993 meeting at Williams & Connolly. All of the attorneys present intended that their conversation remain confidential. As a result of the reports regarding RTC referrals, all of the attorneys anticipated the possibility of adversarial proceedings at the time the meeting took place. Finally, all counsel present represented clients with common interests and purposes -- i.e., the President and Mrs. Clinton in their official and personal capacities.^{19/}

^{19/} The attorney-client privilege applies to confidential communications between government attorneys and their clients in the same manner in which it applies to communications between private counsel and their clients. See Green, 556 F. Supp. at 85 (attorney-client privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel") (collecting cases); SEC v. World-Wide Coin

(continued...)

As the submission of the White House establishes, it is critical for the lawyers in the White House to coordinate and consult with private counsel for the President and First Lady in order to fulfill their professional obligations. It is equally essential for personal counsel to talk with White House lawyers, in order to fully understand the facts and circumstances pertinent to their representation. It cannot be disputed that the President and the Presidency have a common interest; while it is conceivable that that interest could diverge -- indeed, that is one reason for separate official and personal counsel -- the possibility of a future divergence in no respect undermines the privilege. And it is settled that private and government counsel may share a common interest. In United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1300-1301 (D.C. Cir. 1980), for example, the court applied the "common interest" privilege to materials shared between a private company, MCI, and the government, and held that MCI did not waive the work-product privilege by sharing documents with the government in aid of a common purpose. Thus, the common interest privilege is applicable to the November 5, 1993, meeting and protects from disclosure the substance of the communications that took place during the meeting, as well as

¹²⁷ (...continued)

Investments, Ltd., 92 F.R.D. 65, 67 (N.D. Ga. 1981) (attorney-client privilege applied to communications between SEC lawyers and staff); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("Courts generally have accepted that attorney-client privilege applies in the governmental context").

notes and other documents reflecting the substance of those communications.

And again, even if Mr. Lindsey had not been acting in his capacity as counsel for the President at the November 5, 1993 meeting, his presence at the meeting would not vitiate the common interest privilege. Just as an agent's presence at a meeting with counsel does not void the privilege, see McPartlin, 595 F.2d at 1336, the presence of an appropriate agent at a joint defense meeting would not undermine the applicability of the privilege.^{20/}

C. Documents Reflecting the Discussion that Took Place at the November 5, 1993 Meeting Are Protected by the Work-Product Doctrine.

The subpoenaed notes are also protected separately under the work product doctrine.

^{20/} Moreover, in addition to serving as counsel to the President and Mrs. Clinton at the November 5, 1993 meeting, Mr. Lindsey also may be viewed as a "client" for purposes of the meeting under the functional definition of that term set forth in the Office of Legal Counsel's August 2, 1982 opinion letter. See note 13, supra. As a White House official working on Whitewater-related issues, Mr. Lindsey was extremely familiar with "the matters on which legal assistance was sought," 6 Op. O.L.C. at 496, and his presence at the meeting was necessary both to transmit information to other White House and personal counsel and to receive information required in order to fulfill his official responsibilities with respect to Whitewater. Accordingly, Mr. Lindsey falls squarely within the definition of "client" elucidated in the Office of Legal Counsel's opinion letter, and his presence at the meeting is for this reason as well fully consistent with the assertion of the common interest privilege.

1. The Work Product Doctrine.

"The work product doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-client privilege." In re Grand Jury, 106 F.R.D. 255, 257 (D.N.H. 1985). It is "broader than the attorney-client privilege; it protects materials prepared by the attorney, whether or not disclosed to the client, and it protects material prepared by agents for the attorney." In re Grand Jury Proceedings, 601 F.2d 162, 171 (5th Cir. 1979) (citations omitted).

Unlike the attorney-client privilege, which "is not limited to communications made in the context of litigation, or even a specific dispute," Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980),^{21/} the work-product doctrine "protects the work of the attorney done in preparation for litigation," In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994). However, litigation need only be contemplated at the time the work is performed for the doctrine to apply, see Holland, 885 F. Supp. at 7, and the term "litigation" is defined broadly to encompass the defense of administrative and other federal investigations.^{22/}

^{21/} See also Flynn v. Church of Scientology Int'l, 116 F.R.D. 1, 3 (D. Mass. 1986) ("one who consults a lawyer with a view to obtaining professional legal services from him is regarded as a client for purposes of the attorney-client privilege.").

^{22/} See, e.g., In re Grand Jury Proceedings (Doe), 867 F.2d 539 (9th Cir. 1989) (applying work-product doctrine in context of grand jury investigation); In re Sealed Case, 676 F.2d 793 (D.C. (continued...))

As the Supreme Court observed in Hickman v. Taylor, 329 U.S. 495 (1947), the work-product doctrine is critical to a lawyer's ability to render professional services to his client:

it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 510-11.

Although "factual" work-product may be discoverable upon a showing of substantial need for the information sought, the protection afforded to "opinion" work-product -- which reflects counsel's subjective beliefs, impressions, and strategies regarding a case -- is nearly absolute. As the D.C. Circuit explained in In re Sealed Case, 676 F.2d 793, 809-10 (D.C. Cir. 1982), "to the extent that work product reveals the

^{22/} (...continued)

Cir. 1982) (applying work-product doctrine to documents created by counsel rendering legal advice in connection with SEC and IRS investigations).

opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification." Accord Upjohn, 449 U.S. at 401 (opinion work product "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship").

2. Notes Counsel During the Meeting Are Protected by the Work Product Doctrine.

The subpoenaed notes fall directly within this protection. In addition to reflecting the substance of communications at the meeting, the notes Mr. Kennedy took during the November 5, 1993 meeting also reflect the thoughts, impressions, and strategies of the lawyers present. Each lawyer at the meeting brought different knowledge and expertise, each was there because of a common interest, and the questions asked, analyses offered, and conclusions reached all reflected the particular focus and input of these particular lawyers. That is the core of work product, and the notes are squarely protected from disclosure by the opinion prong of work-product doctrine as well as the attorney-client privilege. They are, in short, "doubly non-discoverable." MCI, 124 F.R.D. at 687.

V. THE PRIVILEGE SHOULD BE HONORED HERE.

For a President, an assertion of privilege is extremely difficult. Such a claim, no matter how legitimate, inevitably leads partisan opponents to cry "stonewall." That is a

predictable and irresistibly convenient political ploy. To date, the Special Committee, like the Independent Counsel, the RTC, and the House of Representatives, has received extraordinary cooperation from the President in its investigative efforts. But now, confronted with an increasingly popular President and public disinterest in Whitewater, the Special Committee majority is pushing its demands for access unreasonably into the privileged relationship with personal counsel.

In light of this effort, the easiest course would be simply to disclose one more document, to join the tens of thousands of confidential White House and personal documents already made available to the Senate. But this time the demand of the Special Committee majority, and its claim of "stonewalling," are deeply unfair and, under the circumstances, require that a line be drawn to protect an important legal right: the President and Mrs. Clinton's privilege to consult confidentially with their private counsel, and that counsel's need to work with White House lawyers in order to provide informed advice. It is the appropriate line to draw for at least two reasons: (1) because the right to consult in confidence with one's own lawyer is a right every citizen enjoys and respects, and (2) because the information the committee says it needs is otherwise available to it.

(1) Regarding the right to consult with counsel, at stake here is the confidentiality of the Clintons' on-going legal

representation. As every lawyer well knows, counsel must be scrupulous not to allow even the smallest intrusion into the attorney-client relationship. Once there is any such intrusion, no matter if only a single disclosed document, adversaries can be counted upon to demand more. They would argue that there has been a waiver of the privilege with respect to all communications on the same subject matter and with the same counsel. There can be no doubt that the various investigators would do just that, and a court would have to decide, ultimately, the scope of the waiver, if any. Thus, any disclosure of communications, like the subpoenaed notes, that are a part of that personal legal relationship, no matter how narrow, necessarily places the Clintons' basic right and ability to talk to their lawyers in confidence at unacceptable risk. A lawyer and a client who believe a communication was privileged must protect it if they are to protect their relationship.

(2) Regarding the need for information, the Special Committee majority has failed to state a credible need for the information in the document. The majority has refused to avail itself of testimony available to it, by which it could try to obtain the information it purports to need without the unprecedented incursion on the lawyer-client relationship that it now demands. Its refusal to do so can only be attributed to its preference for the rhetoric of a fight.

The Committee cites a need for the document in order to know what confidential governmental information, if any, was transmitted to the Clintons' personal lawyers at that meeting, and what confidential information, if any, was collected in light of that meeting. There are numerous flaws in this argument.

The very premise of the inquiry is wrong. Any so-called confidential governmental information obtained prior to November 5 by any of the participants at that meeting was in the press, and by no means "confidential" any longer, by the time of the meeting. The sworn testimony of White House participants in the November 5 meeting, like that of individuals in the RTC and elsewhere with whom they spoke, establishes what information White House officials had learned by mid-October 1993 about on-going federal investigations. Notably, that testimony also demonstrates that much of what they knew they learned from the press, not from government officials. But whatever the sources, the press accounts beginning on October 31, 1993 about the Resolution Trust Company referrals, the SBA investigation, Madison Guaranty, David Hale, the Rose Law Firm, and Seth Ward, put an enormous amount of detail about the pending investigations on the public record. Whereas White House Counsel had heard vague references to RTC referrals and "Madison," the news stories recounted the activities of the various investigators in minute detail. This flood of public reporting totally undermines even

the premise that the meeting participants had any "confidential" governmental information to share.

The present conflict is wholly unnecessary because the Special Committee has available to it the means to obtain the information it legitimately seeks without invading the attorney-client privilege. For whatever reason, it has provoked this confrontation without exhausting available alternatives. For whatever reason, the majority is more concerned with precipitating a legal fight than with actually trying to obtain information in an appropriate way. On December 7, 1995, White House and personal counsel for the President presented what was essentially a three-step framework for resolving the impasse.

We emphasized that no objection would be interposed to questions concerning what White House personnel knew about official governmental information when they went into the November 5, 1993, meeting (as previously demonstrated, the information available from White House-Treasury "contacts" in the September-October period was already in the press by November 5). Indeed, as a result of the President's willingness to allow the Senate extensive questioning of his attorneys who were present at the meeting, the Committee already knows (or has available to it) what information the White House participants had with them going into that meeting. The Special Committee is free to assume (although we make no such representation) that everything known

by the lawyers from the White House who attended the meeting was communicated to Messrs. Kendall and Engstrom.

We explained that counsel for the Special Committee is free to pose general questions about the purpose of the meeting. An appropriate purpose is a prerequisite for the assertion of a legal privilege, and there would be no objection to questions that go to purpose, so long as they do not require disclosure of communications at the meeting. The Special Committee has declined to ask such questions, yet an examination upon this subject would elicit relevant information without requiring disclosure of privileged communications at the meeting.

We stated that counsel for the Special Committee is entirely free to test the responses it receives regarding the purpose of the meeting by asking what the White House personnel did after the meeting. The Committee may even ask why certain steps were taken. Indeed, it may even ask whether the steps were taken as a result of the meeting, so that the witness and counsel could determine whether the question might be answered without disclosing communications at that meeting. This step-by-step, question-by-question process is commonplace in litigation, and indeed compelled by the recognized need to protect confidential lawyer communications.

As counsel for the Special Committee is well aware, whenever a privilege is invoked in litigation, it is often possible to receive answers to a great many questions so long as

privileged communications are not divulged. While this may be a painstaking process, requiring the witness and counsel to consider after each question whether the witness may answer without disclosing privileged communications, it is possible to move forward and acquire a great deal of information without violating the privilege, if in fact answers to the questions posed would not invade the privilege. In its rush for a confrontation, the Special Committee majority has not availed itself of this time-tested way of both obtaining information and defining the exact bounds of the asserted privilege.

The President's lawyers have proposed proceeding as we have described because that process could very well provide the Special Committee with the information it needs, while at the same time preserving the privilege and avoiding a constitutional confrontation. That plainly is the wisest course, and we urge the Committee to consider this approach seriously before demanding an intrusion into this protected relationship.

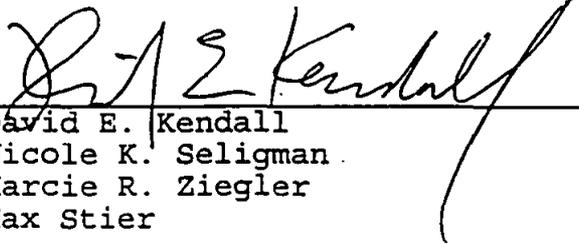
CONCLUSION

For the foregoing reasons, we respectfully submit that the Special Committee should respect the assertions of privilege of William H. Kennedy, III, Esq.

Respectfully submitted,

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APPENDIX A

THIS COMMITTEE'S FINDINGS AS TO
TREASURY/WHITE HOUSE CONTACTS

According to both the majority and minority views in the Senate report on Treasury/White House "contacts,"^{1/} those meetings focused generally on the existence of the criminal referrals, not their specifics. And what details were known were more often than not gleaned from press inquiries. See, e.g., Committee Report at 31 ("Mr. Gearan testified that he understood that all of the information under discussion had been transmitted to the Treasury by reporters.").

For example, at the October 14, 1993, White House meeting,^{2/} the second of the Treasury/White House "contacts" and the last to take place before the Williams & Connolly meeting, "[a]ll of the meeting's attendees testified that Mr. DeVore began the meeting and related what he had been told by Mr. Gerth of the New York Times." Id. at 27.^{3/} "According to Mr. DeVore, Mr. Gerth told him that the RTC was investigating Madison and that

^{1/} See generally Report of the Committee on Banking, Housing, and Urban Affairs on the Communications between Officials of the White House and the U.S. Department of the Treasury or the Resolution Trust Corporation, S. Rep. No. 433 Vol. II, 103d Cong., 2d Sess. (1994) ("Committee Report").

^{2/} The meeting attendees were Mr. DeVore, Ms. Hanson, Mr. Steiner, Mr. Eggleston, Mr. Gearan, Mr. Lindsey, Mr. Nussbaum and Mr. Sloan. Id. at 26.

^{3/} For the purpose of understanding the extent to which any confidential information was discussed at this meeting, the testimony of the witnesses is consistent and uncontroverted. "The differences in the witnesses' recollections center on: (i) who told the group about which press inquiries; (ii) who told the group the referrals had been made; and (iii) whether any advice was sought or given with respect to how Mr. DeVore should respond to press inquiries on the referrals." Id. at 27.

part of the investigation centered on a 1985 fundraiser for then Governor Clinton and contributions made by checks drawn on Madison and deposited in another bank." Id. at 23. Mr. DeVore also testified that "Mr. Gerth sought his help in determining who had contributed the checks or who had endorsed the checks" and "mentioned Governor Tucker." Id.

Bruce Lindsey, a lawyer in the White House a former law partner of the President and a lawyer for then-Governor Clinton, who was analyzing legal issues in the "Whitewater" questions emerging in the fall of 1993, testified that the "'major part' of the meeting consisted of Mr. DeVore describing several inquiries he had received and focusing in on one of those inquiries." Id. at 28. The Committee Report concluded that "Mr. Lindsey's description of the meeting, particularly Mr. DeVore's recounting of press inquiries, is supported by his notes" Id. at 29. Those notes list reporter names and then brief notations on the inquiries. For example, "Madison Guaranty" and "1985-Rose Law Firm" are written under the name of "Sue Schmidt," a reporter for The Washington Post. Not surprisingly, the information contained in the notes associated with the various reporters resurfaced in greater detail in the news stories written by those reporters that were published prior to the November 5 meeting.

Similarly, according to the Committee Report, "Mr. Gearan testified that he understood that all of the information under discussion had been transmitted to the Treasury by reporters." Id. at 31. His notes also contained reporters'

names associated with a variety of statements concerning the RTC referral. Once again, the information contained in the inquiries as set out in Mr. Gearan's notes represented the kernels of later news stories.

Ms. Hanson apparently was the sole attendee at the meeting who testified that the information she provided on the referral had not come from press inquiries but rather from the RTC. See id. at 34. Ms. Hanson testified that she "told the group that the referrals mentioned the Clintons 'solely as possible witnesses' and that at least one referral related to a possible conspiracy to divert funds among a Clinton gubernatorial campaign, McDougal, and Peacock." Id. at 33.

Communications to the White House prior to the October 14th meeting were even less detailed. On September 29, 1993, at the first White House-Treasury "contact" on Whitewater issues, Ms. Hanson had alerted Mr. Nussbaum to the existence of the RTC referral and the possibility of press leaks. According to Mr. Nussbaum's uncontroverted testimony, "Ms. Hanson told him that these referrals involved the activities of an Arkansas savings and loan association, which she may or may not have identified as Madison[, and] . . . that one of the referrals involved the possibility of improper campaign contributions from the savings and loan to the Clinton gubernatorial campaign." Id. at 11.^{4/}

^{4/} Mr. Nussbaum also gave sworn testimony that "he believed that White House officials did not require further information from the Treasury to respond to press inquiries," and "he did not ask for copies of the referrals or for more information about the referrals because it was not necessary." Id. at 13.

Joining the Hanson/Nussbaum discussion a few minutes later, Associate White House Counsel Clifford Sloan testified that "Ms. Hanson told him and Mr. Nussbaum that there had been eight or nine referrals, that the referrals mentioned the Clintons as witnesses, that the referrals mentioned a Clinton gubernatorial campaign more extensively, that Mr. Altman had sent Mr. Nussbaum some material on this matter, and [had stated] that 'there might be' press inquiries." Id. at 12. "Mr. Sloan's impression was that the referrals had already been made or were a 'fait accompli,'" and that the conversation lasted approximately five minutes. Id. The information shared by Ms. Hanson was published and expanded upon in news stories published in the week prior to the November 5 meeting.

According to the Committee Report, information about the RTC referral was transmitted from Ms. Hanson to Mr. Sloan (and then on to others in the White House) on two additional occasions before the October 14th meeting.^{5/} Ms. Hanson made telephone calls to Mr. Sloan on September 30th and on October 7th. "Mr. Sloan testified that she generally passed along to him questions which were being asked by reporters from the Washington Post and New York Times" and that his notes were consistent with that recollection. Id. at 15-16.

The notes taken on September 30th refer among other things to "9 referrals," "Whitewater Co. -- re: Clinton

^{5/} Ms. Hanson called Mr. Sloan a third time "to tell him that the press people had set up a meeting between White House and Treasury officials on October 14, 1993." Id. at 22.

principals" and "Jim Guy Tucker." Id. at 16. The more lengthy notes from October 7th, organized by the reporter making the inquiries, contain additional names including "Seth Ward" and the "Rose Law Firm." Id. at 21. Like the notes of press inquiries from the October 14th meeting, Mr. Sloan's notes look like the rough outlines of future news stories that they were.