**Calendar No. 285**

104TH CONGRESS, *1st Session* | SENATE | REPORT 104–191

# REFUSAL OF WILLIAM H. KENNEDY, III, TO PRODUCE NOTES SUBPOENAED BY THE SPECIAL COMMITTEE TO INVESTIGATE WHITEWATER DEVELOPMENT CORPORATION AND RELATED MATTERS

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## R E P O R T

OF THE

SPECIAL COMMITTEE TO INVESTIGATE
WHITEWATER DEVELOPMENT CORPORATION
AND RELATED MATTERS

ADMINISTERED BY THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. Res. 199

TOGETHER WITH

MINORITY AND ADDITIONAL VIEWS

DECEMBER 19, 1995.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
29–010 WASHINGTON : 1995

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## SPECIAL COMMITTEE TO INVESTIGATE THE WHITEWATER DEVELOPMENT CORPORATION AND RELATED MATTERS

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DECEMBER 19, 1995.—Ordered to be printed

Mr. D'AMATO, from the Special Committee to Investigate Whitewater Development Corporation and Related Matters, submitting the following

## REPORT

[To accompany S. Res. 199]

together with

## MINORITY AND ADDITIONAL VIEWS

The Special Committee to Investigate Whitewater Development Corporation and Related Matters reports an original resolution to direct the Senate Legal Counsel to bring a civil action to enforce the Committee's subpoena to William H. Kennedy, III, and recommends that the resolution be agreed to.

### PURPOSE

On December 8, 1995, the Committee issued a subpoena *duces tecum* to William H. Kennedy, III, former Associate Counsel to the President and now of counsel to the Rose Law Firm of Little Rock, Arkansas, to produce notes that he took at a meeting held on November 5, 1993, at the law firm of Williams & Connolly. The purpose of this meeting, which was attended by both personal counsel for the President and Mrs. Clinton and by White House officials, was to discuss Whitewater Development Corporation ("Whitewater") and related matters. The meeting occurred at a critical time with regard to the "Washington phase" of the Whitewater matter, and Mr. Kennedy's notes of this meeting may relate to at least six matters of inquiry specified in Senate Resolution 120, including allegations that the White House improperly handled con-

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fidential government information about Whitewater. Nevertheless, Mr. Kennedy, at the instruction of counsel for both the President and Mrs. Clinton and the White House, has refused to comply with the Committee's subpoena for his notes.

This report recommends that the Senate adopt a resolution authorizing the Senate Legal Counsel to bring a civil action to compel Mr. Kennedy to comply with the Committee's subpoena. In accordance with section 705(c) of the Ethics in Government Act of 1978, 2 U.S.C § 288d(c) (1994), this report discusses the following:

(A) the procedure followed by the Committee in issuing its subpoena;

(B) the extent to which Mr. Kennedy has complied with the subpoena;

(C) the objections or privileges to the subpoena raised by counsel for the President and Mrs. Clinton, the White House, and Mr. Kennedy; and

(D) the comparative effectiveness of (i) bringing a civil action, (ii) certifying a criminal action for contempt of Congress, and (iii) initiating a contempt proceeding before the Senate.

To place the Committee's request for civil enforcement of its subpoena in proper context, this report first provides the background of the November 5, 1993 meeting and its relevance to the Committee's investigation.

## BACKGROUND

### A. THE COMMITTEE'S INVESTIGATION AND SUBPOENA AUTHORITY

Acting pursuant to Senate Resolution 120, the Special Committee to Investigate Whitewater Development Corporation and Related Matters ("the Committee") is currently investigating and holding public hearings into a number of matters, including:

(1) whether the White House improperly handled confidential Resolution Trust Corporation ("RTC") information about Madison Guaranty Savings & Loan Association ("Madison") and Whitewater;

(2) whether the Department of Justice improperly handled RTC criminal referrals relating to Madison and Whitewater;

(3) the operations of Madison;

(4) the activities, investments and tax liability of Whitewater, its officers, directors, and shareholders;

(5) the handling by the RTC and other federal regulators of civil or administrative actions against any parties regarding Madison; and

(6) the sources of funding and lending practices of Capital Management Services, and its supervision by the Small Business Administration ("SBA"), including any alleged diversion of funds to Whitewater.

Section 5(b)(1) of Senate Resolution 120 authorizes the Committee to issue subpoenas for the production of documents. Under section 5(b)(10) of the Resolution, the Committee is authorized to report to the Senate recommendations for civil enforcement with respect to the willful failure or refusal of any person to produce any document or other material in compliance with any subpoena.

B. THE NOVEMBER 5, 1993 WHITEWATER DEFENSE MEETING

On November 5, 1993, a meeting was held at the law offices of Williams & Connolly, which had recently been retained by the President and Mrs. Clinton to act as their personal counsel for Whitewater-related matters. Seven persons attended the meeting; three lawyers in private practice and four White House officials:

David Kendall, a partner at the Washington, D.C. law firm of Williams & Connolly and the most recently retained private counsel to the President and Mrs. Clinton on the Whitewater matter.

Stephen Engstrom, a partner at the Little Rock law firm of Wilson, Engstrom, Corum, Dudley & Coulter, who also had been retained by the President and Mrs. Clinton to provide personal legal advice on the Whitewater matter.

James Lyons, a lawyer in private practice in Colorado, who had provided legal advice to then-Governor and Mrs. Clinton on the Whitewater matter during the 1992 presidential campaign.[1]

Then-Counsel to the President Bernard Nussbaum.

Then-Associate Counsel to the President William Kennedy, who while a partner at the Rose Law Firm provided some legal services to the Clintons in 1990-92 in connection with their investment in Whitewater.

Then-Associate Counsel to the President Neil Eggleston.

Then-Director of White House Personnel Bruce Lindsey. The White House claims that Mr. Lindsey, a lawyer, provided legal services to the President with regard to the Whitewater matter while serving as White House Personnel Director. (Williams & Connolly, 12/12/95 Mem. p. 15). As set forth more fully below, however, Mr. Lindsey has testified that he never provided advice to the President regarding Whitewater matters. (Lindsey, 7/21/94 Dep. pp. 39–40).

Kendall organized this meeting, which lasted for more than two hours, during which time Mr. Kennedy took extensive notes.

Mr. Lindsey testified that "[t]he purpose of the meeting was Whitewater Development Corporation." (Lindsey, 11/28/95 Hrg. p. 204). When asked whether the gathering was a legal defense meeting, Mr. Lindsey testified that "that would accurately characterize the meeting." (Lindsey, 11/28/95 Hrg. p. 205). Mr. Kennedy testified that he attended this meeting "to impart information to the Clinton's personal lawyers." (Kennedy, 12/5/95 Hrg. p. 46). He also said that he "was not at the meeting representing anyone." (Kennedy, 12/5/95 Hrg. p. 44).

Both Messrs. Lindsey and Kennedy refused to discuss the substance of the meeting during their testimony before the Committee. (Lindsey, 11/28/95 Hrg. pp. 179-180, 201-211; Kennedy, 12/5/95 Hrg. pp. 42-47, 59-61). For example, Mr. Lindsey refused to answer the question "[w]as there a discussion in that meeting about trying to get information from either the SBA or RTC about what these investigations were doing?" (Lindsey, 11/28/95 Hrg. p. 210). Mr.

[1] The President and Mrs. Clinton have agreed not to assert the attorney-client privilege with regard to any communications that occurred during the 1992 presidential campaign, including communications they may have had with Lyons.

Lindsey initially refused even to confirm who attended the meeting. (Lindsey, 11/28/95 Hrg. pp. 179, 202). Similarly, Mr. Kennedy refused to say whether the information that he imparted at the meeting included information he had obtained in August 1993 from Randy Coleman, the lawyer for former Arkansas Judge David Hale. (Kennedy, 12/5/95 Hrg. p.47). Mr. Hale has alleged that then-Governor Clinton pressured him to make an improper SBA loan to the Clintons' Whitewater partner, Susan McDougal.

White House spokesman Mark Fabiani has stated that the purpose of the meeting was to "pass the torch between the White House lawyers who had been handling Whitewater to the newly hired attorney, David Kendall." (New York Post, 11/29/95 p. 16).

The President and Mrs. Clinton's personal counsel, Mr. Kendall, has offered a more detailed explanation of the purpose of the meeting. According to Mr. Kendall, the meeting was held

> 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 Corporation 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. (Williams & Connolly, 12/12/95 Mem. p. 13).

### C. THE RELEVANCE OF MR. KENNEDY'S NOTES TO THE COMMITTEE'S INVESTIGATION

Mr. Kennedy's notes may be relevant to at least six areas of inquiry outlined above that the Committee is now investigating pursuant to Senate Resolution 120.

This November 5, 1993 meeting occurred at a critical time in the Whitewater matter.[2] On September 29, 1993, Treasury Department General Counsel Jean Hanson had warned White House Counsel Bernard Nussbaum about the existence of several confidential RTC criminal referrals involving Madison, Whitewater, and the Clintons. (S. Rep. 103–433, "Madison Guaranty S&L and the Whitewater Development Corporation, Washington, D.C. Phase, Report of the Committee on Banking, Housing, and Urban Affairs, United States Senate, on the Communications Between Officials of the White House and the U.S. Department of the Treasury or the Resolution Trust Corporation," 103rd Cong., 2d Sess., January 3, 1995 pp. 9–13) (hereinafter "S. Rep. 103–433"). Ms. Hanson told Mr. Nussbaum that the President and Mrs. Clinton were named as potential witnesses to suspected criminal activities in the referrals. (S. Rep. 103–433 p. 11). Ms. Hanson also told Mr. Nussbaum that the referrals referenced possible improper campaign contributions from Madison to a Clinton gubernatorial campaign. (S. Rep. 103–433 p. 11). Mr. Nussbaum has acknowledged that Ms. Hanson pro-

[2] This is the only meeting of private counsel for the Clintons and White House officials of which the Committee is aware. There may be other similar meetings in which the Committee has an investigatory interest.

vided him with non-public information about these referrals. (S. Rep. 103–433 p. 12).

After his meeting with Ms. Hanson, Mr. Nussbaum instructed Clifford Sloan, an attorney in the White House Counsel's office, to convey Ms. Hanson's information to Mr. Lindsey, who was then the Director of Presidential Personnel; Mr. Sloan did so. (S. Rep. 103–433 pp. 12–13). On or about October 4, 1993, Mr. Lindsey informed President Clinton of the existence of the criminal referrals. (S. Rep. 103–433 p. 18). On October 6, 1993, President Clinton met at the White House with Jim Guy Tucker, the Governor of Arkansas, who was mentioned in the RTC criminal referrals. (S. Rep. 103–433 p. 18).[3] On October 14, 1993, a meeting was held in Mr. Nussbaum's office with senior Treasury and White House officials, including Mr. Lindsey and Mr. Eggleston, to discuss the confidential RTC criminal referrals. (S. Rep. 103–403 pp. 26–34).

On August 17, 1993, Mr. Kennedy was contacted by Mr. Coleman, who told him that Mr. Hale was under investigation by the Federal Bureau of Investigations and expected to be indicted soon in connection with Capital Management Services and the SBA. (Coleman, 11/9/95 Dep. pp. 63–68; Coleman, 12/1/95 Hrg. pp. 11–12). A few days later, Mr. Coleman and Mr. Kennedy had a second conversation in which Mr. Coleman commented that if Heidi Fleiss "was madam to the stars, David Hale was the lender to the political elite in Arkansas." (Coleman, 12/1/95 Hrg. p. 16; see also Coleman, 11/9/95 Dep. p. 70; Kennedy, 11/1/95 Dep. p. 12; Kennedy, 12/5/95 Hrg. p. 9). Coleman told Kennedy that Hale operated a Small Business Investment Company and had made a number of improper loans to politicians. (Kennedy, 11/1/95 Dep. pp. 22–23; Kennedy, 12/5/95 Hrg. pp.16–20). Coleman also said that Hale alleged that President Clinton was involved in these loans. (Kennedy, 11/1/95 Dep. pp. 22–23; Kennedy, 12/5/95 Hrg. pp.16–20). Mr. Kennedy advised Mr. Nussbaum of Hale's allegations against the President. (Kennedy, 11/1/95 Dep. pp. 12–14; Kennedy, 12/5/95 Hrg. pp. 13–15).

Thus, as of November 5, 1993, White House officials, including Messrs. Nussbaum, Eggleston and Lindsey, had received confidential information relating to ten RTC criminal referrals concerning Madison and Whitewater. The White House Counsel's office also was aware of Mr. Hale's allegations against the President. As of this time, the RTC considered the information about the referrals confidential and, in fact, considers the information confidential to the present day. Moreover, as of November 5, the RTC had not officially confirmed the accuracy of any press accounts about the referrals. (Black, 11/7/95 Hrg. pp. 168, 190).

Following the November 5 meeting, White House officials, including persons who attended this meeting, sought to obtain further confidential information about Whitewater. For example, on November 16, 1993, Mr. Eggleston contacted John Spotila, the General Counsel of the SBA, to obtain confidential information about criminal referrals involving Mr. Hale. (Eggleston, 11/4/95 Dep. pp. 61–68; Spotila, 11/6/95 Dep. pp. 52–65). There were substantial ad-

[3] On August 17, 1995, the Independent Counsel indicted Mr. Tucker for certain misconduct identified in these RTC criminal referrals.

ditional contacts between Treasury and White House officials concerning RTC matters in the early part of 1994, including a February 2, 1994, meeting at the White House attended by, among others, Deputy Treasury Secretary Roger Altman, Ms. Hanson, Mr. Nussbaum, and Mr. Eggleston. (S. Rep. 103–433 pp. 64–78).

The Senate has charged this Committee with determining whether White House officials improperly handled confidential RTC information relating to Madison and Whitewater. It would have been improper for White House officials to communicate confidential RTC or other law enforcement information to the Clintons' private lawyers to assist them in defending the Clintons against the RTC or any other potential civil or criminal enforcement actions. The investigations of Madison raised the possibility that the President or Mrs. Clinton personally could be held financially or otherwise liable in connection with the activities of the Rose Law Firm or Whitewater.

During the Banking Committee's hearings in the summer of 1994, the White House claimed that White House officials obtained this confidential RTC information solely to assist them in the official function of responding to press inquiries. Mr. Lindsey told the Committee, however, that the November 5 meeting "was not for the purpose of press inquiries." (Lindsey, 11/28/95 Hrg. p. 204). The Committee must determine whether there was a discussion of confidential RTC information during the November 5 meeting. After confidential law enforcement information was improperly obtained by the White House, this meeting appears to be the first instance when White House lawyers met with the Clintons' private legal counsel to discuss Whitewater. Mr. Kennedy's contemporaneous notes of this meeting are therefore vital to the Committee's inquiry.

## DISCUSSION

### A. THE PROCEDURE FOLLOWED BY THE COMMITTEE IN ISSUING THE SUBPOENA TO MR. KENNEDY

On August 25, 1995, the Committee served a document request to the White House requesting, among other things, any documents in the possession, custody or control of the White House relating to Whitewater.

On October 30, 1995, the Committee issued a subpoena *duces tecum* to the White House directing the production of "certain documents relating to Whitewater Development Corporation." In response, on November 2, 1995, the White House refused to produce a number of documents responsive to the subpoena, including Mr. Kennedy's notes of the November 5, 1993 meeting.[4]

On December 5, 1995, Mr. Kennedy appeared before the Committee. He was questioned about the November 5 meeting, but, at the direction of counsel for both the President and Mrs. Clinton and the White House, refused to answer any questions about the substance of the meeting. (Kennedy, 12/5/95 Hrg. pp. 42–47, 59–61). When asked by Senator Faircloth, "[w]hat was discussed at the

[4] The original notes are now in the possession of Mr. Kennedy's counsel. Both the White House and the President and Mrs. Clinton's personal counsel, Mr. Kendall, also possess copies of Mr. Kennedy's notes. (Kennedy, 12/5/95 Hrg. p. 81). It is not clear to the Committee when Mr. Kennedy provided copies of his notes to the White House or Mr. Kendall.

meeting?," Mr. Kennedy replied that "I have been instructed that the meeting is covered by the attorney-client privilege and I've been instructed to abide by that privilege." (Kennedy, 12/5/95 Hrg. p. 42).

On December 8, 1995, the Committee issued a subpoena *duces tecum* to Mr. Kennedy directing him to "[p]roduce any and all documents, including but not limited to, notes, transcripts, memoranda, or recordings, reflecting, referring or relating to a November 5, 1993 meeting attended by William Kennedy at the offices of Williams & Connolly." The Committee advised Mr. Kennedy that, if he had objections to subpoena, he was invited to submit a legal memorandum to the Committee by December 12, 1995.[5]

B. THE EXTENT TO WHICH MR. KENNEDY HAS COMPLIED WITH THE COMMITTEE'S SUBPOENA

Mr. Kennedy has refused to comply with the Committee's subpoena. On December 12, 1995, the Committee received separate submissions from counsel for Mr. Kennedy, the President and Mrs. Clinton, and the White House raising objections to the Committee's subpoena. Mr. Kennedy's counsel advised the Committee that Mr. Kennedy had been instructed by the President and Mrs. Clinton's personal counsel and by the White House Counsel not to produce to the Committee the subpoenaed notes of the November 5 meeting.

On December 14, 1995, the Chairman of the Committee, pursuant to Senate Resolution 120, convened a meeting of the Committee to rule on the objections raised by Mr. Kennedy's counsel, the President and Mrs. Clinton's personal counsel and the White House counsel. After careful consideration of the arguments, and after receiving the advice of the Committee's counsel, the Chairman overruled the objections to the subpoena. The Committee then voted to order and direct Mr. Kennedy to produce the subpoenaed documents by 9:00 a.m. on December 15, 1995. After Mr. Kennedy failed to comply with this order, the Committee voted on December 15, 1995, to report to the Senate the resolution that accompanies this report.[6]

Counsel to the President and Mrs. Clinton and the White House made two proposals to the Committee regarding disclosure of the Kennedy notes. Under the first proposal, dated December 7, 1995, the Committee would not receive the notes. Moreover, the Committee could examine those who attended the November 5 meeting only about (1) the purpose of the meeting, (2) what they knew before the meeting, and (3) what actions they took after the meeting. The participants could not be questioned about what transpired or

[5] Counsel for Mr. Kennedy subsequently informed the Committee by letter that he was "somewhat uncertain about the status of the subpoena" because it had been delivered to him rather than Mr. Kennedy. The Committee believes that the December 8, 1995 subpoena was validly served on counsel for Mr. Kennedy, who had represented Mr. Kennedy in connection with the Committee's present investigation and had regularly communicated with the Committee on Mr. Kennedy's behalf. In any event, on December 15, 1995, the Committee voted to issue another subpoena, which was personally served on Mr. Kennedy in Little Rock that same day.

[6] On December 18, 1995, the Committee received a letter indicating that Mr. Kennedy had declined to comply with the Committee's December 15 subpoena. That same day, the Chairman of the Committee overruled the objections to the subpoena and ordered and directed Mr. Kennedy to produce the subpoenaed documents by 3:00 p.m. the following day. Mr. Kennedy did not comply with this order.

was said during the meeting, or whether they took any action as a consequence of the meeting. (Williams & Connolly, 12/12/95 Mem. pp.38–40).

The Committee rejected this proposal as unacceptable. Because no basis existed for asserting any privilege with respect to the three lines of questioning listed above, this proposal was not a compromise. Moreover, the Committee would not be allowed to ascertain whether the White House officials who attended the meeting improperly shared confidential RTC information with private counsel for the President and Mrs. Clinton during the November 5 meeting. Although the Committee would be free to ask those who attended the meeting what actions they took afterward, it would not be able to determine if the actions were taken as a result of what was said during the meeting, except through a laborious and uncertain process of excluding all other possibilities. Finally, the Committee seeks the Kennedy notes to refresh the memories of those who attended the meeting. All too often the Committee has been confronted with witnesses with extremely poor recollections of important events.

On December 14, 1995, counsel for the White House proposed that the Kennedy notes be provided to the Committee, subject to the following conditions:

> (1) The Committee would agree that the November 5, 1993 meeting was a privileged meeting;
>
> (2) The Committee would agree that it would not argue, in any forum, as a basis for obtaining information about other counsel meetings or for any other reason, that any privileges or legal positions had been waived by permitting inquiry into the November 5, 1993 meeting;
>
> (3) The Committee would limit its testimonial inquiry about this meeting to the White House officials who attended it;
>
> (4) The Committee would secure the concurrence to these terms of other investigative bodies, including the Independent Counsel, other congressional committees with investigatory or oversight interest in the Madison/Whitewater matter, the Resolution Trust Corporation (and its successor), and the Federal Deposit Insurance Corporation; and
>
> (5) Pursuant to Section 2(c) of S. Res. 120, the Committee would adopt procedures to ensure that any interest the Committee may develop in the other matters covered by the attorney-client privilege for the President will be pursued, if at all, on a bipartisan basis.

After reviewing this proposal, the Committee announced that it would not object to conditions two and three and indeed had offered to agree to those terms previously. But the Committee refused to enter into an agreement requiring it to engage in the time-consuming process of bargaining with other investigatory agencies, including the Independent Counsel, over the terms of a non-waiver agreement. Although the Committee would have agreed to enter into such a non-waiver agreement on its own behalf, the Committee has no intention of interposing itself between the White House and

other investigators. Nor does it have a right to do so. Indeed, grand jury secrecy restrictions forbid the Committee's participation in discussions over subpoenas to the White House. Moreover, the Committee was not, for the reasons set forth below, willing to agree that the November 5 meeting was a privileged meeting.

In sum, Mr. Kennedy has not complied with the subpoena issued by the Committee. He has not turned over his notes of the November 5 meeting, and neither proposal put forward by the White House or the Clintons' personal counsel is acceptable to the Committee.

### C. OBJECTIONS TO THE SUBPOENA

Counsel to the President and Mrs. Clinton and the White House have interposed three objections to the Committee's subpoena for Mr. Kennedy's notes: (i) the attorney-client privilege; (ii) the common interest doctrine, which has been raised in conjunction with the attorney-client privilege; and (iii) the work product doctrine.

Significantly, the President has not asserted any claim of executive privilege with regard to Mr. Kennedy's notes. See, e.g., *United States* v. *Nixon*, 418 U.S. 683 (1974). Although the submission by the White House Counsel's office discusses this privilege, it expressly states that "the White House has refrained from asserting executive privilege before the Committee." (White House, 12/12/95 Mem. pp. 17-18). For that reason, the Committee neither considered nor ruled upon an executive privilege claim.

#### *1. Production of documents pursuant to congressional subpoena, by itself, does not result in a waiver of the attorney-client privilege*

Counsel for the President and Mrs. Clinton and the White House have expressed the concern that disclosure of the Kennedy notes would result in a broad waiver of the attorney-client privilege. (Williams & Connolly, 12/12/95 Mem. pp. 35–36; White House, 12/12/95 Mem p.21). This concern is wholly unfounded.

Because the attorney-client privilege belongs to the client, only the client may waive the privilege. Waiver is "described as intentional relinquishment of a known right." 1 McCormick on Evidence 341 n.4 (John W. Strong ed., 4th ed. (1992) (citing *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). In the context of the attorney-client privilege, "voluntary disclosure, regardless of knowledge of the existence of the privilege, deprives a subsequent claim of privilege . . . of any significance." *Id.*

If a party produces privileged material in response to a subpoena, without interposing any objections, such production is generally deemed voluntary and a waiver of the privilege. See, e.g., *Westinghouse Elec. Corp.* v. *Republic of the Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991); *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221–22 (D.C. Cir. 1981). In contrast, courts have recognized that disclosure of documents in response to a court order is compelled, not voluntary, and, therefore, that such disclosure does not function as a waiver against future assertions of privilege. In *Westinghouse Electric Corp.*, 951 F.2d at 1427 n.14, for example, the Third Circuit stated that, if the party that first invoked, but then withdrew its assertion of, the privilege, instead "continued to object to the subpoena and produced the documents only after being or-

dered to do so, we would not consider its disclosure of those documents to be voluntary."[7]

A court is likely to treat disclosure under compulsion of a congressional order as involuntary and, therefore, not effecting a waiver. First, a court order and a congressional order stand on a similar jurisprudential footing: each is an order of a competent tribunal with plenary jurisdiction to rule on the privilege assertion. See S. Res. 120, 104th Cong. § 5(b)(1) (1995) ("If a return on a subpoena . . . for the production of documentary . . . evidence is . . . accompanied by an objection, the chairman (in consultation with the ranking member) may convene a meeting or hearing . . . to rule on the objection."). The District of Columbia Circuit has stated that an attorney-client privilege assertion is waived by disclosure in all instances "[s]hort of court-compelled disclosure . . . or other equally extraordinary circumstances." *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989). Compliance with a congressional order certainly is surely an "equally extraordinary circumstance[ ]" of the type contemplated by the court.

Second, in these circumstances, an order from a congressional committee is no less compulsory than an order from a court. The Committee formally overruled the objections based on attorney-client privilege and work product doctrine and "ordered and directed" Mr. Kennedy to comply with the subpoena. The terms of the Committee's order on its face render compliance compulsory, not voluntary. Indeed, it is difficult to imagine how compliance with the Committee's order could be understood to be voluntary in any meaningful sense of the term.

Third, the involuntariness of compliance with the Committee's order is clear from consideration of the potential consequences of defiance of the order. Mr. Kennedy's disobedience of the Committee's order subjected him to a serious risk of punishment. In addition to (or instead of) civil enforcement, the Senate could certify to the United States Attorney, or, in this case, most likely the Independent Counsel, Mr. Kennedy's contumacy, for presentation to a grand jury for criminal indictment for contempt of Congress under 2 U.S.C. §§ 192, 194. Alternatively, Mr. Kennedy could be tried for contempt before the bar of the Senate, as was the Senate's early practice for disobedient witnesses.

Finally, the Senate's power to compel production of documents to obtain information relevant to Congress's legislative and oversight responsibilities is inherent in Congress's constitutional power to legislate. Disclosure to the Congress in the course of investigations of the Executive Branch is not necessarily a waiver. Two circuits have expressly recognized in the context of public requests for information under the Freedom of Information Act ("FOIA") that, in light of Congress's superior rights to information, disclosure to Congress of arguably privileged materials does not result in a waiver of any privilege under FOIA. *Florida House of Representatives* v. *U.S. Dep't of Commerce,* 961 F.2d 941 (11th Cir.), cert. dismissed,

[7] This difference between initial compliance in response to a subpoena and compliance under a subsequent order is recognized in the American Bar Association's Model Code of Professional Responsibility, which provides: "A lawyer may reveal: . . . [c]onfidences or secrets when . . . required by law or court order." Model Code of Professional Responsibility DR 4–101(C)(2) (1980).

113 S. Ct. 446 (1992); *Murphy* v. *Dep't of the Army*, 613 F.2d 1151 (D.C. Cir. 1979). In *Florida House of Representatives*, for example, the Eleventh Circuit concluded that because the FOIA exemption for "deliberative process" may not be exercised against Congress, efforts to resist such a subpoena on grounds of privilege would be fruitless. Because the subpoena could not be successfully resisted, the court reasoned, providing the material to Congress would not trigger a waiver of the privilege. 961 F.2d at 946.

In sum, the concern expressed by counsel to the President and Mrs. Clinton and the White House that compliance with the Committee's subpoena will result in a waiver of the attorney-client privilege of the President and Mrs. Clinton has no foundation in the law. We turn now to consideration of the objections raised against the Committee's subpoena.

*2. The attorney-client privilege does not shield the Kennedy notes from disclosure to this committee*

The primary objection to the Committee's subpoena interposed by the President and Mrs. Clinton is the attorney-client privilege. In conjunction with that objection, the Clintons have also raised the so-called "common interest" or "joint defense" doctrine. The Committee is firmly of the view that the attorney-client privilege cannot shield Mr. Kennedy's notes from disclosure to the Committee.

It is within the sound discretion of Congress to decide whether to accept a claim of attorney-client privilege. See Morton Rosenberg, "Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry," CRS Report No. 95–464A, at 43 (April 7, 1995). Unlike some other testimonial privileges, such as the privilege against compulsory self-incrimination, see U.S. Const. Amend. V, the attorney-client privilege itself is not rooted in the Constitution. See *Maness* v. *Meyers*, 419 U.S. 449, 466 n.15 (1975); *Cluchette* v. *Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). Rather, the attorney-client privilege is a product of the common law and is observed in federal courts by virtue of the Federal Rules of Evidence. See Fed. R. Evid. 501.

In deciding questions of privilege, committees of Congress have consistently recognized their plenary authority to rule on any claim of non-constitutional privilege. See Proceedings Against Ralph Bernstein and Joseph Bernstein, H. Rep. No. 99–462, 99th Cong., 2d Sess. 13, 14 (1986); Hearings, International Uranium Cartel, Before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 60, 123 (1977). The Constitution affirmatively grants each house of Congress the authority to establish its own rules of procedure. See U.S. Const., Art. I, § 5, cl. 2. The conclusion that recognition of privileges is a matter of congressional discretion is consistent, moreover, with both traditional English parliamentary procedure and the Congress' historical practice. See *Rosenberg, supra*, at 44–49.

Although this Committee has honored valid claims of attorney-client privilege in the course of its investigation, it need not recognize such claims of privilege in the same manner as would a court of law. A congressional committee must make its own determina-

tion regarding the propriety of recognizing the privilege in the course of a congressional investigation taking into account the Senate's constitutionally-based responsibility to oversee the activities of the Executive Branch.[8] In this instance, it is the Committee's considered judgment that the President and Mrs. Clintons' claim of privilege is not well taken.

*a. The President and Mrs. Clinton did not attend the November 5, 1993, meeting or communicate with any of the participants during the meeting*

The attorney-client privilege applies to confidential communications of the client to his or her attorney in connection with the lawyer's provision of legal advice. See, e.g., 8 Wigmore, Evidence, § 2292, at 554 (McNaughton rev. ed. 1961); *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–359 (D. Mass. 1950) (Wyzanski, J.). "The privilege does not extend, however, beyond the substance of the client's confidential communication to the attorney." *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977). The only communications protected by the privilege, then, are those that will disclose what the client said in confidence to the lawyer.

Moreover, not everything that a lawyer learns in confidence is protected by the attorney-client privilege. For example, what a lawyer learns from someone other than the lawyer's client, even in the course of representation of that client, is not protected by the privilege. Thus, "the protective cloak of the privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947).

In this case, the clients—the President and Mrs. Clinton—were not present at the November 5 meeting. Moreover, Mr. Kennedy testified that none of the participants communicated with the President during the meeting, whether by phone, facsimile, or otherwise, and that no writing was prepared for or received by the President while the meeting took place. (Kennedy, 12/5/95 Hrg. pp. 63–64). The Committee has received no indication that anyone communicated with Mrs. Clinton during the meeting.

There can be no privilege protecting Mr. Kennedy's notes from disclosure to this Committee unless the notes reflect the substance of a confidential communication of the President or Mrs. Clinton. Cf. *American Standard, Inc.* v. *Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1988) (attorney's written legal opinion held not privileged because "it did not reveal, directly or indirectly, the substance of any confidential communication"). Given that President Clinton did not attend the November 5 meeting and did not communicate with anyone during the course of the meeting, it is unlikely that the Kennedy notes reflect much, if anything, in the way of President Clinton's confidential communications. Moreover, to the extent that the notes reveal information about Whitewater obtained from per-

[8] Even in a judicial setting, "[t]he party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication." *Ralls* v. *United States*, 52 F.3d 223, 225 (9th Cir. 1995). Moreover, "[b]ecause the attorney-client privilege obstructs the truth-finding process, it is construed narrowly." *Westinghouse Elec. Corp.*, 951 F.2d at 1423.

sons other than the President or Mrs. Clinton, they cannot be privileged.

In sum, based upon the facts before the Committee about the November 5 meeting, the President and Mrs. Clinton have not satisfied the Committee that the Kennedy notes are protected from disclosure to the Committee by the attorney-client privilege.

*b. The presence of government lawyers at the November 5 meeting bars any claim of attorney-client privilege for Mr. Kennedy's notes*

Because the November 5 meeting was attended by four government attorneys—Messrs. Nussbaum, Kennedy and Eggleston of the White House Counsel's office, and by Mr. Lindsey, then the White House Personnel Director—the attorney-client privilege does not protect communications with those attorneys.

*i. Government attorneys may not represent the President on private legal matters*

The White House lawyers present at the November 5 meeting could not represent the President and Mrs. Clinton in connection with their private legal matters. When he was appointed Special Counsel to the President by President Clinton Lloyd Cutler explained the proper sphere of the White House Counsel's representation of the President: "When it comes to a President's private affairs, particularly private affairs that occurred before he took office, those should be handled by his own personal private counsel, and in my view not by the White House Counsel." (The White House, Remarks by the President in Appointment of Lloyd Cutler for Special Counsel to the President, March 8, 1994).

The provision of legal services by government lawyers relating to the President's personal matters would be contrary to the "Standards of Ethical Conduct" promulgated by the Office of Government Ethics ("OGE"). The Standards of Ethical Conduct, which were issued pursuant to Executive Order 12674 and apply to all Executive Branch employees, establish that it is a misuse of government position to make "[u]se of public office for private gain." 5 C.F.R. § 2635.701(a). More specifically, a government employee "shall not use his public office for his own private gain, . . . or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity." 5 C.F.R. § 2635.702. See also Office of Government Ethics, Report to the Secretary of the Treasury pp. 2–4 (July 31, 1994).

It is also contrary to the OGE's Standards of Ethical Conduct for a public employee to misuse nonpublic information. See 5 C.F.R. § 2635.703 ("An employee shall not . . . allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure."). A similar regulation promulgated by the Executive Office of the President provides: "For the purpose of furthering a private interest, an employee shall not . . . directly or indirectly, use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public." 3 C.F.R. § 100.735–18.

The underlying issues related to Whitewater and Madison arose prior to the inauguration of President Clinton. The only Whitewater issues arising *after* the inauguration of the President involve the improper contacts between the White House and various other government agencies that were investigating Madison and Whitewater, including the Department of the Treasury, the RTC, and the SBA. If such contacts had not taken place, there would be no investigation into events occurring after the President's inauguration. The White House Counsel's office cannot bootstrap its improper handling of information about Whitewater and Madison into a justification for its participation in underlying Whitewater matters.

*ii. No "official" attorney-client privilege may be asserted against a congressional subpoena*

Even assuming there was an official interest of the presidency at stake in underlying Whitewater matters discussed at the November 5 meeting, no "official" attorney-client privilege can shield communications by government lawyers from disclosure to a congressional committee.

The acceptance of an absolute attorney-client privilege to shield all communications within the Executive Branch at which any one of its numerous attorneys is present would give the Executive Branch the power substantially to impair the Congress's ability to perform its constitutional responsibility to "probe[] into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins* v. *United States*, 354 U.S. 178, 184 (1957).

The submissions to the Committee by counsel for the White House and the President and Mrs. Clinton fail to provide any support for the existence of an official governmental attorney-client privilege against the Congress. In prior instances in which committees of the Senate or the House have chosen to respect properly supported claims of attorney-client privilege, as far as the Committee has been able to determine, the privilege was asserted in each case on behalf of a private individual or organization, not by another branch of the government.

The precedents that White House and personal counsel have cited in support of their assertion of a governmental attorney-client privilege have all been cases in which a government agency has asserted the privilege in the context of either civil litigation, or a FOIA action, against a private party. See, e.g., *Green* v. *Internal Revenue Service*, 556 F. Supp. 79, 85 (N.D. Ind. 1982); *Jupiter Painting Contracting Co.* v. *United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980). None of the cases cited supports the invocation of the attorney-client privilege in a matter involving Congress.

The opinion of the Office of Legal Counsel of the Department of Justice ("OLC") relied upon by counsel for the White House and the President and Mrs. Clinton actually refutes the assertion of the attorney-client privilege in the context of a congressional inquiry. Although quoting from a passage of the OLC opinion generally stating the applicability of attorney-client privilege for government agencies, the submissions by counsel for the White House and the President and Mrs. Clinton tellingly omit the portion of the opinion

that directly recognizes that there is no such privilege in the specific context of a congressional subpoena:

> The attorney-client privilege is a common law evidentiary privilege which has been codified in Rule 501 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure for use in civil litigation and discovery. *While the Rules are not applicable to congressional subpoenas, the interests implicated by the attorney-client privilege are subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege.*

6 Op. Off. of Legal Counsel 481, 494 n.24 (1982) (emphasis added); accord 10 Op. Off. of Legal Counsel 91, 104 (1986) ("Although the attorney-client privilege may be invoked by the government in litigation and under the Freedom of Information Act separately from any 'deliberative process' privilege, *it is not generally considered to be distinct from the executive privilege in any dispute between the executive and legislative branches.*") (footnote omitted and emphasis added).

The White House has, of course, expressly stated that it has not asserted, and is not asserting, executive privilege with regard to the Kennedy notes. And executive privilege is understood to be only a qualified privilege and may be required to yield in the face of a showing of need for the performance of constitutional duties by another branch. See *United States* v. *Nixon,* 418 U.S. at 705–713. Accordingly, having disclaimed reliance on executive privilege (the only governmental privilege that, according to the OLC, could even be arguably applied to shield Mr. Kennedy's notes from congressional scrutiny), the White House may not properly base any instruction to Mr. Kennedy not to produce his notes on an assertion of a supposed official attorney-client privilege by the Executive Branch against the Congress.

*iii. No "common interest" exists between the President and Mrs. Clinton's private interests and the interests of the United States*

The Committee rejects the argument of counsel for the President and Mrs. Clinton and the White House that the communications made during the November 5 meeting are privileged, notwithstanding the presence of two sets of lawyers representing different clients, on grounds that the lawyers representing the President's official interests, and those representing his private interests, shared a common interest. (Williams & Connolly, 12/12/95 Memo. pp. 26–31; White House, 12/12/95 Mem. pp. 15–17). Although the Committee does not rule out the possibility that the common interest or joint defense theory might apply to government attorneys, cf. *United States* v. *AT&T,* 642 F.2d 1285 (D.C. Cir. 1980) (recognizing that government lawyers and private lawyers may share a common interest with respect to work product), the Clintons' private interests were simply not in common with the government's official interests in these matters.

The Clintons' private interest was to avoid any liability to the public arising out of the failure of Madison Guaranty, the Rose Law Firm's representation of Madison in certain questionable transactions, the Clintons' investment in Whitewater, or any tax deficiency. The Clintons' interest was thus directly antagonistic to the government's interest in attempting to determine whether such liability exists and if so to pursue appropriate remedies for that liability.

In sum, the presence of four government lawyers at the November 5 meeting, whose allegiance and duty runs to the United States and not to the personal legal interests of the President and Mrs. Clinton, bars application of the attorney-client privilege.

*c. The presence of Bruce Lindsey at the November 5 meeting precludes the assertion of the attorney-client privilege*

Standing alone, the presence of Bruce Lindsey at the November 5 meeting makes untenable any assertion of attorney-client privilege. Although Mr. Lindsey is a lawyer, on November 5, 1993, he was not serving the President in a legal capacity. Thus, because there was no attorney-client relationship between Mr. Lindsey and Bill Clinton on November 5, 1993, his presence at the meeting destroyed any privilege.

"A communication is not privileged simply because one of the parties to it is a lawyer." *United States* v. *Townsley*, 843 F.2d 1070, 1086 (8th Cir. 1988) (internal quotation marks and citations omitted). Rather, the attorney-client privilege can apply only where the client "seeks confidential advice from a lawyer in his or her capacity as such." *Holland* v. *Island Creek Corp.*, 885 F. Supp. 4, 8 (D.D.C. 1995).

The Committee concludes that Mr. Lindsey was not acting in a lawyer's capacity when he attended the November 5 meeting. As of November 1993, Bruce Lindsey held three titles: Assistant to the President, Senior Advisor, and Director of the Office of Presidential Personnel. (Lindsey, 12/28/95 Hrg. p. 203; Lindsey, Dep. 7/12/95 p. 11). He was not at that time a member of the White House Counsel's office. Accordingly, Mr. Lindsey's formal duties were not legal ones.

Although the President and Mrs. Clinton assert that "Mr. Lindsey had done legal work for the Office of the President analyzing various 'Whitewater' issues as they emerged in the fall of 1993" (Williams & Connolly, 12/12/95 Mem. p. 15), this claim is completely contradicted by Mr. Lindsey's own sworn testimony. Mr. Lindsey has testified that during 1993 the only official actions that he took relating to Whitewater involved responding to press inquiries. (S. Hrg. 103–889, "Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation—Washington, DC Phase, Before the Committee on Banking, Housing and Urban Affairs, United States Senate," 103rd Cong., 2d Sess., Aug. 4, 1994 pp. 357–358). When asked a series of questions about his duties in the fall of 1993, Mr. Lindsey failed to identify any legal responsibilities. (Lindsey, 7/21/93 Dep. pp. 20–23). Mr. Lindsey further testified that what Whitewater-related duties he did have at that time

did not involve giving advice to the President: "There was no advice involved in this." (Lindsey, 7/21/93 Dep. p. 39).[9]

*d. The November 5 meeting is not privileged because the propriety of the meeting itself is the subject of the committee's investigation*

The attorney-client privilege does not apply "when the communication between the client and his lawyer furthers a crime, fraud, *or other misconduct*." *United States* v. *White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (emphasis added); see also *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (same); 8 Wigmore, Evidence § 2298, at 573. "Precedent and authority also recognize that not just technical crimes or frauds are excluded from the attorney-client privilege. . . . We believe that the principle served by both the attorney-client privilege and the crime-fraud exception is that communications in furtherance of some sufficiently malignant purpose will not be protected." *In re St. Johnsbury Trucking Co.*, 184 B.R. 444, 456 (D. Vt. Bankr. 1995).

The Committee believes that no claim of privilege should be recognized with respect to the November 5 meeting because the communications made in connection with that meeting are themselves at issue in this investigation. This Committee is investigating whether the White House improperly handled confidential information regarding Whitewater-related matters. As noted earlier, several of those who attended the November 5 meeting had recently come into possession of confidential information which would have been improper to reveal to the Clintons' personal counsel. The Committee is entitled to probe what use, if any, was made of this confidential information at the November 5 meeting.

*e. The President and Mrs. Clinton have waived any privilege that applied to the November 5 meeting*

In any event, President and Mrs. Clinton cannot assert the attorney-client privilege with respect to the November 5 meeting because any such privilege has been waived. White House spokesperson Mark Fabiani has made statements to the press in which he characterized the November 5 meeting and discussed the subject matter of the meeting.

It is well established that the voluntary disclosure of a privileged communication to a third party has the effect of waiving the privilege, not only as to what was actually revealed but to all communications relating to the same subject matter. See, e.g., *In re Sealed Case*, 877 F.2d 976, 980–981 (D.C. Cir. 1989). The rationale for the rule is simple: it would be unfair and potentially misleading to allow a party selectively to divulge part of a privileged communication while withholding the rest. As Dean Wigmore has explained:

> [W]hen [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold

[9] Counsel for the President and Mrs. Clinton assert that at the November 5 meeting Mr. Lindsey was acting not only as a lawyer but also a client. (Williams & Connolly, 12/12/95 Mem. p. 31 n.20). Mr. Lindsey himself, however, testified that with respect to the November 5 meeting the client was the President. (Lindsey, 11/28/95 Hrg. p. 179).

> the remainder. It is therefore designed to prevent the client from using the attorney-client privilege offensively, as an additional weapon. 8 Wigmore, Evidence, § 2327, at 636.

Here, the White House has disclosed sufficient information about the substance of the November 5 meeting so as to require disclosure of the remainder. According to the Associated Press, White House spokesperson Mark Fabiani has said that "the discussion [at the November 5 meeting] did not include any suggestion that the aides gather more information about an ongoing criminal investigation of Arkansas judge David Hale," and that "the meeting did not cover a decision made the day before by Clinton appointed U.S. attorney in Little Rock to remove herself from Whitewater criminal investigations, including the Hale case." (The News & Observer, 11/29/95 p. A6). The Associated Press also has reported that "Fabiani said his information was based on notes that Kennedy took at the meeting. (The News & Observer, 11/29/95 p. A6). And the Wall Street Journal has reported that "White House officials insist that the meeting was a routine consultation necessitated by the Clinton's retaining new attorneys and that the White House didn't pass along *any significant* confidential information from Government files about Whitewater or the business dealings of former municipal judge David Hale." (Wall Street Journal, 12/6/95 p. B8) (emphasis added). The White House cannot both "spin" what happened at the meeting and invoke the privilege.

*3. The work product doctrine does not shield the Kennedy notes from disclosure to the committee*

In addition to asserting the attorney-client privilege, the President and Mrs. Clinton contend that the so-called "work product" doctrine protects the Kennedy notes from disclosure to the Committee. The work product doctrine shields from disclosure in some instances work prepared by an attorney in anticipation of litigation. See *Hickman* v. *Taylor, supra.* "The party seeking to assert the attorney-client privilege or the work product doctrine as a bar to discovery has the burden of establishing that either or both is applicable." *Barclaysamerican Corp.* v. *Kane,* 746 F.2d 653, 656 (10th Cir. 1984).

The notes in question are the work product of Mr. Kennedy. There is no evidence, however, that Mr. Kennedy was acting in anticipation of litigation during November 5 meeting. Quite to the contrary, Mr. Kennedy has testified that he was not representing anyone at the meeting. (Kennedy, 11/28/95 Hrg. pp. 44, 46).

Moreover, "the work product doctrine is clearly a qualified privilege which may be defeated by a showing of good cause." *Central Nat'l Ins. Co.* v. *Medical Protection Co.,* 107 F.R.D. 393, 395 (E.D. Mo. 1985) (citing *Hickman*); accord *Armstrong* v. *Trico Marine, Inc.,* No 89–4309, U.S. Dist. Lexis 2434, *3 (E.D. La. Feb. 26, 1992). Indeed, when first recognizing the work product doctrine, the Supreme Court specifically stated that "we do not mean to say that all materials obtained or prepared . . . with an eye toward litigation are necessarily free from discovery in all cases." *Hickman,* 329 U.S. at 511.

The Committee has determined that it must have access to Mr. Kennedy's notes of the November 5 meeting if it is to discharge responsibly its constitutional oversight function. In the Committee's view, this constitutes sufficient cause to override any claim based upon the work product doctrine.

D. COMPARATIVE EFFECTIVENESS OF A CIVIL ACTION OR A CERTIFICATION TO THE UNITED STATES ATTORNEY FOR CRIMINAL PROSECUTION

The Committee has considered the comparative effectiveness of a civil action to enforce the Committee's subpoena compared to an immediate referral to the United States Attorney for a criminal prosecution.[10]

In a civil action under 28 U.S.C. § 1365 (1994), the Committee would apply, upon authorization of the Senate, to the United States District Court for the District of Columbia for an order requiring the witness to produce the subpoenaed documents. If the district court determines that the witness has no valid reason to refuse to produce the subpoenaed documents, the court would direct the witness to produce them. Disobedience of that order would subject the witness to sanctions to induce compliance. The witness could free himself of the sanctions by producing the subpoenaed documents. Sanctions could not continue beyond the Senate's need for the subpoenaed documents.

The civil enforcement statute excludes from its coverage actions against "an officer or employee of the Federal Government acting within his official capacity." 28 U.S.C. § 1365(a) (1994). The legislative history of this provision explains that this limitation "should be construed narrowly. Therefore, a subpena against Federal government officers or employees *not acting within the scope of their official duties* is not excluded from the coverage of this jurisdictional statute." Public Officials Integrity Act of 1977, S. Rep. No. 170, 95th Cong., 1st Sess. 92 (1977) (emphasis added).

The Committee has concluded that section 1365(a) does not bar an action against Mr. Kennedy, who is now a private citizen. Section 1365(a) was enacted so that disputes between the Legislative and Executive Branches implicating separation of powers concerns would be resolved extra-judicially. President Clinton, however, has not invoked executive privilege with respect to the Kennedy notes but only the attorney-client privilege. In any event, Mr. Kennedy was not acting within his official capacity during the November 5 meeting. Mr. Kennedy testified that "I was not at that meeting representing anyone." (Kennedy, 12/5/95 Hrg. p. 44; see also *id.* at 46).

The fact that Mr. Kennedy kept his notes of the November 5 meeting after he left government service further supports the Committee's view that he was not acting within the scope of his official activities.

In a criminal referral under 2 U.S.C. §§ 192, 194 (1994), the Senate would direct the President pro tempore to certify to the United States Attorney for the District of Columbia the facts concerning the witness' refusal to produce the subpoenaed documents. The

[10] The Senate has not used in decades its power to try a recalcitrant witness before the bar of the Senate, as the available judicial remedies have proven adequate.

United States Attorney would then present the matter to a grand jury, which could indict the witness for contempt of Congress. If convicted, the witness could receive a sentence of up to a year in prison and a $100,000 fine.

The Committee recommends that the Senate bring a civil action to compel Mr. Kennedy to comply with the Committee's subpoena. The Committee's objective is to obtain Mr. Kennedy's notes of the November 5 meeting and any other documents he may possess responsive to the Committee's subpoena. Civil enforcement will likely satisfy that objective since failure to comply with the subpoena would result in the imposition of a coercive sanction. At the same time, the Committee understands that, in refusing to comply with the Committee's subpoena, Mr. Kennedy has been acting upon the instruction of counsel for the President and Mrs. Clinton and the White House. The Committee is not inclined at this time to seek criminal punishment of Mr. Kennedy for the decisions of others.

Accordingly, the Committee recommends that the Senate authorize a civil enforcement proceeding to compel Mr. Kennedy to comply with the Committee's subpoena.

## COMMITTEE'S ROLLCALL VOTE

In compliance with paragraph 7 (b) and (c) of rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote of the Special Committee to Investigate Whitewater Development Corporation and Related Matters to report the original resolution favorably was as follows:

| YEAS | NAYS |
|---|---|
| Mr. D'Amato | Mr. Sarbanes |
| Mr. Shelby | Mr. Dodd |
| Mr. Bond | Mr. Kerry |
| Mr. Mack | Mr. Bryan |
| Mr. Faircloth | Mrs. Boxer |
| Mr. Bennett | Ms. Moseley-Braun |
| Mr. Grams | Mrs. Murray |
| Mr. Domenici | Mr. Simon |
| Mr. Hatch | |
| Mr. Murkowski | |

# MINORITY VIEWS

## Special Committee to Investigate Whitewater Development Corporation and Related Matters

### I. INTRODUCTION

The President's lawyers have made a well founded assertion, supported by respected legal authorities, that the November 5, 1993 meeting at Williams & Connolly was protected by the attorney-client privilege. If the President's lawyers are correct in their assertion, then the production of William Kennedy's notes of the meeting to the Special Committee could result in a general waiver of the Clintons' attorney-client privilege that might go far beyond the discussions at the November 5, 1993 meeting.

The President's lawyers have made several constructive proposals to resolve the conflict over Kennedy's notes. The two most recent proposals made by the White House have included offers to produce Kennedy's notes to the Special Committee as soon as steps are taken to protect the Clintons from a general waiver of the attorney-client privilege.

The Special Committee has agreed that the production of Kennedy's notes should not act as a general waiver of the attorney-client privilege. The only remaining hurdle to production of the notes is agreement by the Independent Counsel, the House, and other investigative entities that production of the notes would not constitute a general waiver.

We believe that these concerns about a general waiver of the attorney-client privilege are meritorious and that the Senate should make additional efforts to accommodate them before sending the matter to federal court.

It always should be borne in mind that when the Executive and Legislative Branches fail to resolve a dispute between them and instead submit their disagreement to the courts for resolution, an enormous power is vested in the Judicial Branch to write rules that will govern the relationship between the elected branches. In any particular case there may be an advantage gained for one or the other elected branches through a judicial ruling. However, there also are considerable risks in calling on the courts to prescribe rules to govern the extent of the vital tool of congressional investigatory power.

Thus, while the Committee might prevail, every Senator who votes on this resolution must recognize that an adverse precedent could be established that would make it more difficult for all congressional committees to conduct important oversight and other investigatory functions. Since a mutually acceptable resolution is close at hand, we strongly urge the Senate not to precipitate unnecessary litigation by passing this resolution.

## II. THE NOVEMBER 5, 1993 LAWYERS' MEETING

On November 4, 1993, President and Mrs. Clinton retained attorney David Kendall of the law firm of Williams & Connolly to represent them in their personal capacities in all matters related to Whitewater. On November 5, 1993, in an effort to familiarize himself with Whitewater and to determine an appropriate division of labor between private and government counsel, Mr. Kendall convened a meeting at his law offices attended by several of the Clintons' past personal attorneys and by White House attorneys representing the President in his official capacity.

The following attorneys attended the November 5, 1993 meeting at the offices of Williams & Connolly: (1) Kendall; (2) Stephen Engstrom, a lawyer in private practice in Little Rock who had been retained by the Clintons to represent them on Whitewater-related matters; (3) James Lyons, a lawyer in private practice in Denver who had provided legal services to the Clintons relating to Whitewater since 1992; (4) White House Counsel Bernard Nussbaum; (5) Associate White House Counsel Neil Eggleston; (6) Associate White House Counsel William Kennedy, who had represented the Clintons in a matter related to Whitewater before joining the White House staff; and (7) Bruce Lindsey, a senior lawyer on the White House staff who had represented President Clinton personally before January 20, 1993 and who had analyzed legal aspects of Whitewater-related issues as they emerged in the fall of 1993. No non-lawyers attended.

In a legal memorandum submitted to the Special Committee on December 12, 1995, the White House described the dual private and public purposes of the November 5, 1993 lawyers' meeting as follows:

> 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 attorneys, who would address the personal legal aspects of the matter.

Several legal scholars who have examined the November 5, 1993 meeting have concluded that a valid claim of privilege has been asserted. For example, University of Pennsylvania law professor Geoffrey C. Hazard, Jr., a specialist in legal ethics and the attorney-client privilege, provided a legal opinion that communications between White House lawyers and the President's private lawyers

are protected by the attorney-client privilege.[1] Professor Hazard reasoned 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." Professor Hazard added that the President has "two legal capacities, that is, the capacity ex officio—in his office as President—and the capacity as an individual." Thus, there are "two 'clients,'" and the matters discussed at the meeting "were of concern to the President in each capacity as client." Since the lawyers for the two different clients conferred about matters of mutual concern to each client, "the attorney-client privilege is not lost by either client."

Other legal experts agree with Professor Hazard's analysis. New York University law school professor Stephen Gillers stated the following:

> 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. It's true that government lawyers cannot handle the private matters of government officials. 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.[2]

University of Colorado law professor Christopher Mueller stated that "[b]oth 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."[3]

## III. White House Proposals to Resolve the Conflict

The Special Committee has informed the White House that its two principal investigative interests regarding the November 5, 1993 meeting are (1) determining whether White House officials transmitted confidential government information concerning Madison Guaranty or Whitewater to the Clintons' private lawyers, and (2) determining whether the private lawyers directed or encouraged the White House officials to use their government offices to obtain governmental information relating to Whitewater.

With the Special Committee's interests in mind, Kendall met with Senators D'Amato and Sarbanes on December 7, 1995 and proposed a framework intended to enable the Committee to obtain the information necessary to satisfy its legitimate investigative needs without invading the Clintons' attorney-client privilege. Specifically, Kendall proposed that the Committee take the following investigative steps: (1) ask every White House official present at the November 5, 1993 meeting what he knew about relevant official government information at the beginning of the meeting; (2)

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[1] December 14, 1995 letter from Geoffrey C. Hazard, Jr. to John M. Quinn. A copy of this letter is attached as Exhibit A to this report.

[2] Id.

[3] R. Marcus and S. Schmidt, "Legal Experts Uncertain on Prospects of Clinton Privilege Claim," Washington Post, Dec. 14, 1995 at A13.

assume that the White House officials present at the meeting communicated to the private lawyers everything they knew about such information; (3) ask the White House officials general questions about the purposes of the meeting; (4) test the responses it receives about the meeting's purposes by asking what steps White House officials took following the meeting; and (5) ask the White House officials why they took whatever steps they took following the meeting, including whether they took these steps as a result of anything that occurred at the meeting. The Majority rejected Kendall's proposal, claiming that it did not permit sufficient inquiry into the content of the November 5, 1993 meeting.

The White House made a new proposal on December 14, 1995 that included an offer to produce Kennedy's notes to the Special Committee. In a letter from Special Counsel to the President Jane Sherburne, the White House offered to produce the notes if the Committee would accept certain conditions intended to protect against a general waiver of the attorney-client privilege. The conditions proposed by the White House were: (1) the Committee would acknowledge that the November 5, 1993 meeting was privileged; (2) the Committee would agree not to take the position in any forum that the production of the notes constituted a general waiver of the attorney-client privilege; (3) the Committee would agree to limit its testimonial inquiry regarding the meeting to the White House officials present; (4) the Committee would obtain the concurrence in these terms of the Independent Counsel and other relevant investigative entities; and (5) the Committee would adopt a rule requiring that any future effort to obtain attorney-client privileged material from the White House be undertaken on a bipartisan basis. The Majority agreed to conditions (2) and (3) but rejected conditions (1), (4) and (5).

The White House made a third proposal on December 18, 1995, in response to statements by the Chairman of the Special Committee indicating a willingness to contact the Independent Counsel to urge that he, too, agree not to argue that production of the Kennedy notes would constitute a general waiver of the attorney-client privilege. The White House letter made clear that its principal concern remained the waiver issue. Accordingly, the White House offered to modify condition (1) to require simply that the Committee acknowledge that a reasonable claim of privilege had been asserted, and the White House offered to drop condition (5) altogether.

As to condition (4), the December 18, 1995 White House letter indicated that counsel for the President were in the process of seeking to secure the participation of the Independent Counsel and other investigative entities in non-waiver agreements. The White House letter then stated: "We would like to meet with you as soon as possible to determine how we can best work with the Committee to secure promptly such agreements."

The Majority's Special Counsel wrote back to the White House later on December 18, 1995 and rejected the White House's proposal. The Majority's letter indicated that the Committee would not "interpos[e] itself between the White House and other investigators" by assisting the White House in securing non-waiver agree-

ments. The Majority also refused to acknowledge that a reasonable claim of privilege had been asserted.

## IV. Legitimate Privilege Issues Have Been Raised

The White House and Williams & Connolly have presented legitimate and cogent arguments, summarized below, that the November 5, 1993 meeting is protected by several well-established privileges: the attorney-client privilege; the common interest doctrine; and the work product doctrine.[4] These protections apply equally to discussions during the meeting and to Mr. Kennedy's notes memorializing those discussions.

### 1. THE ATTORNEY-CLIENT PRIVILEGE.

The Supreme Court has stated that the attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law."[5] The purposes of the privilege are "to encourage full and frank communications between attorneys and their clients" and "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."[6] The privilege applies in both directions: to communications from the client to the attorney and to communications from the attorney to the client.[7] Moreover, the privilege applies with equal force among a client's attorneys, whether or not the client is present during the conversation.[8] It is well-settled that the attorney-client privilege extends to written materials reflecting the substance of an attorney-client communication.[9]

In this instance, every person present at the November 5, 1993 meeting was an attorney who represented the Clintons in either their personal or their official capacities. Kendall, Engstrom and Lyons were acting as personal legal counsel for the Clintons at the time of the meeting. Nussbaum, Kennedy and Eggleston served in the White House Counsel's Office and represented the Clintons in their official capacities. Lindsey had previously represented Mr. Clinton and at the time of the meeting was assisting the President in his official capacity by gathering information and providing legal advice on Whitewater-related matters. All seven attorneys intended

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[4] The memoranda submitted by the White House and Williams & Connolly are attached as Exhibits B and C, respectively.

[5] *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, *Evidence* Sec. 2290 (McNaughton rev. 1961)).

[6] *Id.* at 389–91.

[7] *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

[8] 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"); *Green* v. *IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (attorney-client privilege "applies equally to inter-attorney communications"), *aff'd without op.*, 734 F.2d 18 (7th Cir. 1984); *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").

[9] See *Green* v. *IRS*, 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"); *Natta* v. *Zletz*, 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.").

the communications at the November 5, 1993 meeting to remain confidential. Moreover, the meeting was essential in order to allow the attorneys to provide effective legal representation to the Clintons and to allow the attorneys to apportion official and private tasks as appropriate. Because this meeting was held for the purpose of enabling them to provide legal assistance to the Clintons, a court could reasonably be expected to hold that the communications at the meeting fall within the ambit of the attorney-client privilege.

Even if Lindsey was not acting as Mr. Clinton's lawyer at the meeting, as the Majority has asserted, his presence did not vitiate the privilege because he served as a counselor to and agent of the President. Specifically, Lindsey imparted information necessary to enable both personal and White House counsel to represent the President effectively, and he received information and advice necessary for him to assist the proper functions of the Office of the President. Courts have held that a client's agent such as Lindsey may meet with counsel in furtherance of the attorney-client relationship.[10]

2. THE COMMON INTEREST DOCTRINE.

The common interest doctrine enables counsel for clients with common interests "to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege."[11] The November 5, 1993 meeting entailed all of the elements necessary for a valid assertion of the common interest privilege. All of the attorneys represented the Clintons in either their private or their official capacities. All shared the common interest of representing the Clintons—both personally and officially—with respect to Whitewater-related matters. Finally, the attorneys met in private at the law offices of the Clintons' personal counsel and considered their conversation to be confidential.[12] The presence of White House attorneys at the meeting does not vitiate the privilege, since private and government attorneys may share a common interest.[13]

Leading legal experts in the field have supported the assertion of privilege here. Professor Hazard has reviewed the events of November 5, 1993 and concluded that: "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."[14] Professor Gillers, in concluding that the meeting was privileged, noted that "[t]he lawyers who represent the President have

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[10] See, e.g., *Foseco Int'l Ltd.* v. *Fireline, Inc.*, 546 F. Supp. at 25; *Farmaceutisk Laboratorium Ferring A/S* v. *Reid Rowell, Inc.*, 864 F. Supp. 1273, 1274 (N.D. Ga. 1994).

[11] *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").

[12] 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).

[13] *United States* v. *American Telephone and Telegraph, Co.*, 642 F.2d 1285, 1300-01 (D.C. Cir. 1980) (applying the common interest privilege to materials shared between MCI and the government).

[14] December 14, 1995 Hazard letter (Exhibit A) at p. 2.

information that the lawyer who represents the Clintons needs, and that's the common interest."[15]

### 3. THE WORK PRODUCT DOCTRINE

The work product doctrine 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."[16] The work product doctrine protects "the work of the attorney done in preparation for litigation."[17] Litigation need only be contemplated at the time the work is performed,[18] and the term litigation is defined broadly to encompass administrative and federal investigations.[19] Furthermore, work product which reveals counsel's "opinions, judgments, and thought processes" receives a "higher level of protection, and a party seeking discovery must show extraordinary justification" to obtain such materials.[20]

Under these standards, the President's lawyers appear to have made a legitimate assertion of the attorney work product privilege. Kennedy's notes presumably contain the mental impressions and opinions of the seven lawyers who met in confidence to discuss the legal aspects of Whitewater-related matters that had been raised in news articles published in late October and early November 1993. Equally important, the Committee has not demonstrated the requisite extraordinary need for the notes, particularly in view of the fact that Kendall and the White House have offered the Committee the opportunity to discover why the meeting was called, what was known prior to the meeting, who was present at the meeting, and what was done after the meeting was held.

## V. PRODUCTION OF THE KENNEDY NOTES COULD CONSTITUTE A GENERAL WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

As discussed above, the White House Counsel's Office has informed the Special Committee that the Kennedy notes of the November 5, 1993 lawyers' meeting at Williams & Connolly will be furnished if adequate precautions are taken to protect against a general waiver of the attorney-client privilege. Thus, the principal issue remaining is the risk that producing the Kennedy notes to the Special Committee might be construed as a general waiver of the attorney-client privilege for all communications relating to the subject matter of the meeting.

The Majority has asserted that production of the notes to the Committee would not constitute a waiver because the Committee has sought to compel production of the notes, and because a compelled production does not constitute a waiver. The Majority has provided some case law, discussed below, to support its argument.

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[15] R. Marcus and S. Schmidt, "Legal Experts Uncertain on Prospects of Clinton Privilege Claim," Washington Post, Dec. 14, 1995 at A13.

[16] *In re Grand Jury Proceedings,* 601 F.2d 162, 171 (5th Cir. 1979) (citations omitted).

[17] *In re Grand Jury Proceedings,* 33 F.3d 342, 348 (4th Cir. 1994).

[18] See *Holland* v. *Island Creek Corp.,* 885 F. Supp. 4, 7 (D.D.C. 1995).

[19] *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982) (applying work-product doctrine to documents created by counsel rendering legal advice in connection with SEC and IRS investigations).

[20] *In re Sealed Case,* 676 F.2d 793, 809-10 (D.C. Cir. 1982); *accord Upjohn Co.* v. *United States,* 440 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").

The problem with the Majority's argument is that it is only that—an argument. It does not ensure that a general waiver of the attorney-client privilege will not result if the notes are produced to the Special Committee.

It is not surprising that when the issue is possible waiver of the attorney-client privilege and the client is the President of the United States, in either his official capacity or his personal capacity, careful lawyers are reluctant to accept something less than certainty. That is why the President's lawyers have agreed to produce the notes only under conditions that would in effect give them the assurance they must have on this important issue. The authorities offered by the Majority leave open the very real concerns identified by the President's lawyers.

1. PRODUCTION OF KENNEDY'S NOTES COULD CONSTITUTE A WAIVER

The attorney-client privilege differs from a constitutional privilege, which can be waived only by a knowing and voluntary relinquishment of the right. The attorney-client privilege, in contrast, can be waived "either by mistake or design." [21] Waiver of the attorney-client privilege most commonly occurs when the contents of a confidential communication are disclosed to a person outside the privileged relationship.[22] Moreover, once privileged communications concerning a particular matter are divulged, the privilege generally is deemed waived for all communications concerning the same issue or subject matter.[23]

It is this far-reaching aspect element of the law of attorney-client privilege—"subject matter waiver"—that creates the difficulty the Special Committee is facing here. Production of the Kennedy notes could be construed as a waiver of the attorney-client privilege as to all communications on the subject matter of the meeting. Potentially, such a waiver would encompass all communications between the President and his lawyers at any time up to the present that pertain to the subject matter of the November 5, 1993 meeting.

2. THE AUTHORITIES CITED BY THE MAJORITY DO NOT RESOLVE THE WAIVER ISSUE

Majority staff has cited a few cases for the proposition that production of the notes to the Special Committee is "compelled" and therefore would not constitute a waiver. The Majority relies heavily upon a footnote in a 1991 Third Circuit case.[24] The footnote in *Westinghouse* indicates that the documents at issue in that case were produced voluntarily—and the production therefore constituted a waiver—because Westinghouse originally moved to quash the grand jury subpoena calling for the documents, but later withdrew the motion to quash and produced the documents pursuant to a confidentiality agreement.[25]

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[21] United States Department of Justice, Criminal Division, "Federal Grand Jury Practice Manual," p. 324 (January 1993).

[22] American Bar Association Section of Litigation, "The Attorney-Client Privilege and the Work-Product Doctrine," at p. 62 (2d ed. 1989) (hereinafter "ABA Monograph").

[23] Id., citing *In re Sealed Case*, 877 F.2d 976, 980–981 (D.C. Cir. 1989) and *Hercules Inc.* v. *Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977).

[24] *Westinghouse Electric Corp.* v. *Republic of the Philippines*, 951 F.2d 1414, 1427 n. 14 (3rd Cir. 1991) (hereinafter *Westinghouse*).

[25] *Id.*

The Majority's reliance on the *Westinghouse* footnote is not well-founded. *Westinghouse* could just as easily be read to stand for the proposition that ceasing to contest the Special Committee's subpoena and surrendering the Kennedy notes now, before a federal judge rules on the claim of privilege, would be a "voluntary" disclosure and thus would constitute a waiver. Whether one argument or the other is the better one does not matter; what matters is that the *Westinghouse* case does not provide the President's lawyers sufficient assurance that producing the notes will not be construed as a waiver.

The other leading case cited by the Majority[26] also fails to provide any certainty on the waiver issue. In fact, the holding of *In re Sealed Case* may be to the contrary, since the court ruled that even an inadvertent disclosure waives the attorney-client privilege.[27] The statement of the court in that case could apply equally well to the issue faced by the President's lawyers here:

> Short of court-compelled disclosure . . . or other equally extraordinary circumstances, we will not distinguish between various degrees of "voluntariness" in waivers of the attorney-client privilege.[28]

Rather than providing comfort to the President's lawyers, the decision in *In re Sealed Case* suggests that the President's lawyers would risk a finding of waiver if they surrendered the Kennedy notes to the Special Committee before a court ordered production.

The Majority has cited only one case which suggests that production of documents to Congress does not sustain a finding of waiver.[29] In that case, *Florida House,* the court concluded that because the information at issue, census data, was provided to a House of Representatives subcommittee "under the threat of Congress's power of subpoena" there was no waiver. Careful analysis of the case suggests that it is not dispositive of the waiver issue, however.

The privilege asserted in *Florida House* was not the attorney-client privilege, but rather a "deliberative" privilege afforded to government agencies under the Freedom of Information Act (the "FOIA"). The attorney-client privilege is a special legal doctrine, based on unique policy objectives, and therefore precedents involving other privileges are not dispositive when analyzing attorney-client privilege issues. In *Florida House* the court obviously was concerned with preserving the deliberative privilege for the Department of Commerce, so it is not surprising that the court concluded that the Department's provision of census information to the House Subcommittee with oversight authority for the census did not waive the deliberative privilege. That holding does not control in an attorney-client privilege dispute where the confidences of a client (much less the President of the United States) are at issue. In any event, *In re Sealed Case* (not *Florida House*) would be the governing authority in litigation arising in the United States District Court for the District of Columbia.

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[26] *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989).
[27] *Id.*
[28] *Id.* (citations omitted).
[29] *Florida House of Representatives* v. *Dept. of Commerce,* 961 F.2d 941 (11th Cir. 1992) (hereinafter *Florida House*)

The foregoing analysis demonstrates both the complexity of the issues presented here and the very real risk that a subject matter waiver will occur if the Kennedy notes are produced to the Committee without satisfaction of the conditions proposed by the White House.

## VI. Rather Than Sending This Matter to the Courts, the Committee Should Make Further Efforts to Negotiate a Resolution of This Dispute Based on a Careful Balancing of the Interests Involved

This dispute has escalated needlessly. The White House has offered to provide the Kennedy notes to the Committee and to permit four of the participants in the November 5, 1993 meeting to testify before the Committee. Rather than proceeding to the courts at this time, the Senate should make further efforts to obtain this information in a manner that protects against an unintended, general waiver of the attorney-client privilege.

### 1. CONGRESS HISTORICALLY HAS RESPECTED THE ATTORNEY-CLIENT PRIVILEGE

Congress has long respected the attorney-client privilege. Indeed, the Congress first acknowledged the confidentiality of attorney-client discussions in 1857.[30] A century later, in the aftermath of the McCarthy hearings, the Senate considered a rule that would have expressly recognized the testimonial privileges that traditionally are protected in litigation. The Senate ultimately decided that the rule was unnecessary:

> With few exceptions, it has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, *lawyer and client*, and husband and wife. Controversy does not appear to have arisen in this connection.[31]

As recently as 1990, Senate Majority Leader George Mitchell stated that: "[a]s a matter of actual experience . . . Senate committees have customarily honored the [attorney-client] privilege where it has been validly asserted."[32]

Even in politically charged investigations, the Senate has respected the attorney-client privilege. During the Iran-Contra investigation, for example, Gen. Richard Secord and Lt. Col. Oliver North successfully asserted the attorney-client privilege in refusing to answer questions posed to them by the Senate Counsel.[33] Similarly, during proceedings against Judge Alcee Hastings, the impeachment trial committee considered Judge Hastings' claim of at-

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[30] Jonathan P. Rich, Note, "The Attorney-Client Privilege in Congressional Investigations," 88 Colum. L. Rev. 145, 152-55 (1988) ("Attorney-Client Privilege in Congressional Investigations").

[31] Rules of Procedure for Senate Investigating Committees, 83d Cong., 2d Sess. 27 (Comm. Print 1955), *quoted in*, T. Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, John Marshall Law Rev. 309, 316 (1988) (emphasis added).

[32] 136 Cong. Rec. S7613 (daily ed. June 7, 1990)(Sen. Mitchell).

[33] "Iran-Contra Investigation: Joint Hearings Before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition," 100th Cong., 1st Sess. 199 (1987) (Secord); N.Y. Times, July 10, 1987, at A8, col.4 (North).

torney-client privilege in ruling that testimony would not be received into evidence.[34]

The Senate's most recent experience with the attorney-client privilege arose during its disciplinary proceedings against Senator Bob Packwood. Prior to the controversy over Senator Packwood's diaries, the Select Committee on Ethics considered Senator Packwood's assertion that certain documents (other than the diaries) were covered by the attorney-client or work-product privileges. To resolve that claim, the Ethics Committee appointed a former jurist (Kenneth W. Starr) as a hearing examiner to make recommendations to the Committee and accepted his recommendation that the privilege be sustained.[35]

With respect to the diaries, the Committee agreed "to protect Senator Packwood's privacy concerns by allowing him to mask information dealing with attorney-client and physician-patient privileged matters, and information dealing with personal, private family matters."[36] The Committee's hearing examiner (Judge Starr) reviewed Senator Packwood's assertions of attorney-client privilege. The Committee abided by all of the examiner's determinations and did not call upon the court to adjudicate any of the attorney-client privilege claims.

2. THE CLINTONS' ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE DESERVES THE SAME RESPECT THAT THE COMMITTEE HAS AFFORDED TO WITNESSES IN THIS INVESTIGATION

As noted above, the Special Committee has honored the attorney-client privilege on several occasions throughout its proceedings. During the hearing testimony of Thomas Castleton, for example, Chairman D'Amato confirmed that Castleton need not testify about conversations with his attorney.[37] Similarly, Chairman D'Amato limited questioning of Randall Coleman by Minority counsel regarding an interview his client, David Hale, granted to a reporter for The New York Times, during which Coleman was present.[38] President and Mrs. Clinton deserve no less protection than was afforded to witnesses who have appeared before the Committee.

In determining whether to recognize attorney-client privilege claims, the Congress traditionally has weighed "the legislative need for disclosure against any possible resulting injury."[39] As discussed below, the balance in this instance favors respecting the attorney-client privilege and rejecting the Resolution put forth by the Special Committee.

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[34] "Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings: Hearings Before the Senate Impeachment Trial Comm.," pt. 2A, 101st Cong., 1st Sess. 64 (1989).

[35] "Select Committee on Ethics: Documents Related to the Investigation of Senator Robert Packwood," S. Rpt. No. 30, vol. 9, 104th Cong., 1st Sess. 37 (1995).

[36] S. Rep. No. 164, 103d Cong., 1st Sess. 2 (1993). See also *Senate Select Committee on Ethics* v. *Packwood*, 845 F. Supp. 17, 19 (D.D.C. 1994).

[37] Aug. 3, 1995 Hrg. at p. 31.

[38] Dec. 1, 1995 Hrg. at p. 45.

[39] Hearings, "International Uranium Cartel," Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Vol. 1, 123 (1977).

3. THE SENATE SHOULD AVOID A NEEDLESS CONSTITUTIONAL CONFRONTATION BY PURSUING A NEGOTIATED RESOLUTION TO THIS DISPUTE

Congressional attempts to inquire into privileged executive branch communications are rare, and with good reason. By definition, such efforts provoke constitutional confrontations.

Moreover, Congress' efforts to invade privileged executive branch communications have met with little success. The courts have resisted adjudicating congressional attempts to inquire into privileged communications. For example, the United States District Court for the District of Columbia (the same court that would hear the current dispute) refused to determine whether Reagan Administration E.P.A. Administrator Anne Gorsuch properly withheld documents subpoenaed by a committee of the House of Representatives. Instead, the court "encourage[d] the two branches to settle their differences without further judicial involvement."[40]

Only once in the history of the nation have the courts required the disclosure of confidential Presidential communications; and even then, the courts ordered disclosure to a grand jury while denying disclosure to the Congress.[41] In the words of then-Assistant Attorney General Antonin Scalia, it would be "erroneous" to interpret that singular event "as an indication that the Supreme Court is either willing or able to adjudicate the issue of privilege when it arises in the context of a Legislative-Executive dispute."[42]

The United States Court of Appeals for the District of Columbia Circuit has long held that presidential communications are "presumptively privileged."[43] Accordingly, a congressional committee seeking to inquire into presidential communications bears a heavy burden to demonstrate that it has a proper basis to do so. That burden can be met "only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations . . . ."[44] Moreover, the Committee must prove that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions."[45]

Where, as here, the competing constitutional interests of the legislative and executive branches are implicated, the courts have balanced alternative interests and proposals to determine "which would better reconcile the competing constitutional interests."[46] In this regard, the United States Court of Appeals for the District of Columbia Circuit has stated that "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the con-

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[40] *United States* v. *House of Representatives,* 556 F. Supp. 150, 152 (D.D.C. 1983).

[41] *United States* v. *Nixon,* 418 U.S. 683, 712, n.19 (1974) (noting that the compelling need arising out of the criminal process merited a breach of executive privilege, and observing that the same need was not present in a congressional inquiry).

[42] Statement of Antonin Scalia, Hearings on S. 2170 before the Subcomm. on Intergovernmental Relations, Senate Comm. on Govt Operations, 94th Cong., 1st Sess. 116 (Oct. 23, 1975).

[43] *Nixon* v. *Sirica,* 487 F.2d 700, 705 (D.C. Cir. 1973).

[44] *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974).

[45] *Id.* at 731.

[46] *United States* v. *American Telephone and Telegraph Co. (ATT I),* 551 F.2d 384, 394 (D.C. Cir. 1976).

flicting branches in the particular fact situation."[47] As former Attorney General William French Smith noted:

> The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.[48]

Thus, even if the Special Committee had demonstrated a compelling need for the privileged information, the Senate still should balance that need for the information against the competing interests identified by Williams & Connolly and the White House. Such a balance weighs heavily against the course pursued by the Special Committee.

Although the Kennedy notes may be relevant to the Committee's inquiry, the Committee's need for the notes is not sufficiently compelling to justify a federal court action to enforce the subpoena. As noted previously, the White House has offered to make Kennedy's notes available to the Committee if certain conditions are met. The Committee has not explained why accommodating those conditions would interfere with the Committee's investigation. Therefore, the Committee has not demonstrated the requisite compelling need to invade privileged presidential communications.

## VII. CONCLUSION

For more than a century, the Senate has recognized and respected the attorney-client relationship. Senate action that needlessly forces a waiver of the privilege would deprive the President and Mrs. Clinton of the right to communicate in confidence with their counsel—a basic right afforded to all Americans. Because the information the Committee seeks is available to it without forcing a constitutional conflict, the Senate should not move forward to seek enforcement of the Committee's subpoena to William Kennedy.

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JOHN F. KERRY.
RICHARD H. BRYAN.
BARBARA BOXER.
CAROL MOSELEY-BRAUN.
PATTY MURRAY.
PAUL SIMON.

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[47] *United States* v. *American Telephone and Telegraph Co. (ATT II)*, 567 F.2d 121, 127 (D.C. Cir. 1977).

[48] Opinion of the Attorney General for the President, "Assertion of Executive Privilege in Response to a Congressional Subpoena", 5 Op. O.L.C. 27, 31 (1981) (Smith Opinion).

**EXHIBIT A**

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December 14, 1995

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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 the occurred before the President assumed office but which had significance after he took office. The governmental lawyers was 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.

**EXHIBIT B**

THE WHITE HOUSE

WASHINGTON

December 12, 1995

By Hand Delivery

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

Gentlemen:

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

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

Sincerely yours,

Jane C. Sherburne
Special Counsel to the President

Enclosure

THE WHITE HOUSE

WASHINGTON

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

**December 12, 1995**

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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, <u>even</u> 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.

- Barnard 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-

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[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

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[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

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> 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

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[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

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[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

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[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

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[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.

**EXHIBIT C**

**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

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[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

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[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.[1]

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

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[1] 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.[1].

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

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[1] 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

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[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.[5/]

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

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[5/] 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

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[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

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[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.

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[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

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[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.

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[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

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[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).[11] 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. Goldstein, 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.,

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[11] 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

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[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).

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[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

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[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]

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[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 Bevill, 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.[12]

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[12] 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

[illegible] (...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.[19]

**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.

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[19] 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]

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[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

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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 <u>knew</u> 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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December 12, 1995

**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

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[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.[1/]

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[1/] 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.[1/] 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

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[1/] 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.

v

## ADDITIONAL VIEWS OF SENATOR JOHN KERRY

In Committee, I voted against this Resolution. But that opposition does not suggest that I believe the notes of William Kennedy should not or could not be made available to the Committee in order to complete its investigation of the failure of Madison Guaranty.

For the past few weeks, there have been bona fide offers on the table that could have been pursued in order to obtain these notes. I believe that this confrontation with the White House is unnecessary and could have been avoided. Legal scholars tell me that the issue of attorney-client privilege in this regard is of such precedent-setting importance that if disputes surrounding privilege cannot be resolved between the parties involved, they deserve a judicial hearing. The ramifications of this Resolution extend far beyond the purview of the Senate Banking Committee or the entire United States Senate. They extend to the office of the presidency and to all public officeholders who are represented in myriad legal matters by private counsel as well as official government attorneys.

My opposition to the Resolution, however, should not suggest that I am filled with confidence by every witness who has appeared here. My opposition should not be misconstrued to suggest that I believe the White House has facilitated an efficient flow of information to this Committee at all times.

Therefore, while my vote is no on the confrontational procedure the Majority is pursuing, I am very eager to obtain all relevant information to this investigation, including the notes of William Kennedy. That is our common duty and the responsibility. But it is not our duty to engage in confrontational partisan politics—and I believe the proper course is to reject this Resolution.

JOHN KERRY.

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