The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications

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From the beginning of the Clinton Administration, the matters known collectively as Whitewater have almost constantly bedeviled the President and his staff, as well as the private attorneys who represent the President. Within the past two years, the investigations into Whitewater matters have given rise to two prominent controversies involving attempts to review the substance of meetings between the lawyers who represent the President in his official capacity—the members of the Office of the White House Counsel—and those who represent him in his private capacity. One dispute involved a subpoena from a Senate committee, and the other involved a federal grand jury subpoena. The White House resisted both of these subpoenas, invoking the attorney-client privilege and the work-product doctrine. Each of these controversies raised a number of novel legal questions about the President's relationship with the lawyers in the Office of the White House Counsel as well as the relationship between those lawyers and the President's private counsel. Obviously, when the President seeks legal advice from his private lawyers, he (like any other citizen) can assert the attorney-client privilege in order to prevent the disclosure of those communications in a later court proceeding. But does the privilege also apply to communications between the President and lawyers who work for the President on the White House staff and are paid by the taxpayers? Does it matter if the party seeking the notes of such a communication is a congressional committee or a federal grand jury? Is any privilege waived if a non-lawyer member of the White House staff is present at the time of the communication? May the President's communications with White House lawyers be discovered if these lawyers later share them with his private lawyers? Does the work-product doctrine or the executive privilege also apply to any such communications? In addition to the legal questions that were raised, the controversies themselves—as well as the way in which one of them
was resolved—raised certain issues about the practical realities of raising a privilege claim. Do political realities make it impossible for the White House to raise a claim of privilege, no matter how valid that claim may be?

This Article argues that, despite the political pressures involved in any privilege claim by the White House, there are grounds on which the White House could make a strong legal argument in support of its privilege claims. It is argued that the notes of a meeting between the President’s official and private counsel typically are protected by the attorney-client privilege and the work-product doctrine, even if these notes are shared with members of the White House staff. These privileges can be asserted against another branch of the government. In addition, the executive privilege would probably also protect such communications against congressional subpoenas, although the executive privilege would almost certainly have to yield to a grand jury subpoena. Finally, although making such a claim presents certain political perils, the Article argues that there are various steps that the White House could take to improve the political viability of a privilege claim.

The Article begins by examining the attorney-client and work-product privileges. It argues that, while Congress is generally not required to recognize these two privileges, a federal court hearing a civil action to enforce a Senate subpoena should and would enforce a common-law claim of privilege if the court found the claim valid. This leaves the question of whether a claim of privilege relating to a meeting between the President’s official and personal lawyers is, in fact, valid. The Article argues that claims of both attorney-client and work-product privilege relating to such communications typically are valid. This conclusion is based on the fact that the Office of the President, like other government agencies, enjoys a confidential attorney-client relationship with its attorneys, and that these attorneys, like other government attorneys, also enjoy a work-product privilege. These privileges apply to the communications with their client (the Office of the President), as well as the work-product prepared in representing the client, and thus can be asserted against other branches or agencies of the federal government. In matters that are of common interest to the President in both capacities (official and personal), the two sets of attorneys may share communications and work-product without waiving any privilege that pertains to the communications. Similarly, the privilege would typically not be waived if the communication is shared with a non-attorney on the White House staff, because the staffer is an employee of one of the two clients, the Office of the President. An attempt to defeat either privilege based on the crime-fraud exception will not succeed without some independent evidence of wrongdoing at the meeting, while an attempt to defeat the work-product privilege under the “substantial need” exception would also fail, because the notes of the meeting would be “opinion work-product,” and thus not subject to the exception.
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The Article also argues that the executive privilege applies to the notes of such meetings, although the privilege might be overcome. This presumptive privilege applies to communications among senior members of the White House staff (specifically including members of the White House Counsel), as well as to communications solicited by or made to such advisors in order to assist them in advising the President. This last group of communications may include communications by persons not employed by the White House, including the President's private counsel. Nevertheless, this presumptive privilege may be overcome in certain situations. A judicial subpoena, either by a district court for use in a criminal trial or by a grand jury, will trump the presumptive privilege if the party seeking the materials can show that the materials contain evidence central to its purpose and that equivalent evidence may not be acquired elsewhere. In contrast, a congressional subpoena will usually not prevail over this presumptive privilege, unless the body seeking the materials can show that they are critical to an essential function of that body.

Finally, the Article examines the political—rather than legal—constraints on the White House when it contests a subpoena on the grounds that the materials sought are privileged. The Article also looks at the lessons to be learned from similar disputes in the past. It concludes first that privilege claims will be even more difficult to sustain politically than they have been in the past as a result of the ways in which the two recent disputes were resolved. This effect is compounded by the fact that the media is inherently hostile to claims of privilege, regardless of their legal validity. The resolution of these past disputes may also have a perverse effect on the handling of future litigation by the White House, in that it may encourage the President to keep his private legal work with the White House Counsel rather than referring it to his personal lawyers—the very opposite of what his critics argued that he ought to do. It may also deter his attorneys from taking notes at such meetings, the very effect that the work-product doctrine is intended to prevent. Finally, the Article argues that there are a number of strategies that the White House can use in structuring the relationship between the White House Counsel and private counsel that would make claims of privilege to protect this relationship more politically viable. One example of this is the White House’s strategy in the Paula Jones litigation, in which the White House has attempted to minimize the involvement of White House lawyers. Although this strategy seems to have been successful thus far, the ongoing litigation serves to emphasize the likelihood that similar controversies may arise again in the future.

I. THE PAST MEETINGS

The two disputes referred to above arose out of three separate meetings between attorneys from the White House Counsel and a group of private attorneys who represented the President and Mrs. Clinton personally. These
meetings were typical of meetings between the President's private and official counsel and the similarities among these meetings are striking. Moreover, the disputes that ensued over each of the meetings provide a framework within which the possible claims of privilege may be examined. Thus, brief descriptions of the meetings themselves and the ensuing disputes are included.

A. The Kennedy Notes

The first meeting took place on November 5, 1993, in the Washington law office of Williams & Connolly. The general topic of the meeting was the variety of matters referred to collectively as "Whitewater." In the fall of 1993, the Clintons' lead private attorney (Robert Barnett, a partner at Williams & Connolly) found it necessary to withdraw from representing them in Whitewater matters. He recommended that David Kendall, another Williams & Connolly partner, assume his duties, although Kendall was not immediately retained.

Beginning on October 31, 1993, there was a rash of news reports on Whitewater. These indicated that investigations of certain Whitewater matters by various federal entities, including the Resolution Trust Corporation (RTC) and the Small Business Administration (SBA), were proceeding, and that litigation on a number of matters might result. On November 4, the House
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Small Business Committee asked the administrator of the SBA to investigate some of these allegations and to report his findings to the committee, while a Republican member of the House subcommittee that oversees the RTC called for a congressional investigation into the government's handling of Madison.

David Kendall was officially retained on November 4, 1993, although he apparently needed to be briefed on the facts relating to Whitewater. Accord-


On November 2, the Washington Post carried more detailed reports of Hale's allegations. According to the Post, Hale had said that during the mid-1980s, then-Governor Clinton had "pressured him to make SBA-backed loans to help get bad loans off the books." Madison. Michael Isikoff & Howard Schneider, Clintons' Former Real Estate Firm Probed, WASH. POST, Nov. 2, 1993, at A1. The Post also reported that the FBI had seized records that might show that SBA loans had been used to finance a land purchase by the Whitewater Development Corporation. See id. That same day, the New York Times reported that RTC investigators were investigating a possible link between Madison campaign contributions to Clinton and Madison's efforts to get state approval for a stock plan. See Jeff Gerth & Stephen Engelberg, U.S. Investigating Clinton's Links to Arkansas S&L, N.Y. TIMES, Nov. 2, 1993, at A20.

On November 3, the Washington Post reported the investigation of possible conflicts of interest in the Rose Law Firm's representation of the FDIC when the FDIC took over Madison Guaranty and attempted to recover some of Madison's losses from an accounting firm. The Post reported that the Rose firm had represented Madison before state regulators. See Susan Schmidt, Regulators Say They Were Unaware of Clinton Law Firm's S&L Ties, WASH. POST, Nov. 3, 1993, at A4.

On November 4, the Post reported in great detail the federal investigation into Arkansas Governor Jim Guy Tucker's finances, including his relationship with Madison and with Hale's investment company. See Howard Schneider, Gov. Tucker's Finances Become Probe Focus, WASH. POST, Nov. 4, 1993, at A5. The Washington Times reported that federal investigators were examining the connections between the Whitewater Corporation and Madison as well as an alleged $35,000 loan from Madison to Clinton's campaign and the Rose Law Firm's fee arrangement with Madison. See Jerry Seper, What Were the Clinton Stakes in Land Scheme?, WASH. TIMES, Nov. 4, 1993, at A1. The next day, the Washington Times reported that federal investigators were focusing on the Rose Law Firm's relationship with Madison. Specifically, they were considering allegations that Governor Clinton and Jim McDougal personally arranged for Mrs. Clinton to represent Madison, and that the governor would pick up the checks himself, as well as allegations that Mrs. Clinton's fee was paid out of a "secret bank account." See Jerry Seper, Probe of S&L Chief Touches on Hillary's Legal Fee, WASH. TIMES, Nov. 5, 1993, at A1.


6. See Seper, supra note 5. Representative Toby Roth was a member of the House Banking, Finance, and Urban Affairs Subcommittee on Oversight and Investigations. See id.

7. Both the White House and Kendall stated in their briefs that the primary purpose of the meeting was to brief Kendall on the various aspects of Whitewater. See Submission of Williams & Connolly to
ing to the White House, the November 5 meeting was the result of an effort to inform Kendall of what other lawyers who had worked on the Whitewater issue knew of the facts and to divide up any responsibilities shared by the two groups of lawyers. The meeting was attended by three attorneys from the White House Counsel’s Office, three attorneys in private practice who had worked for the Clintons personally on Whitewater matters, and Bruce Lindsey, a White House official who is an attorney but was not working in the White House Counsel at the time. William Kennedy, one of the White House attorneys, took notes at the meeting.

Both the meeting and the notes went unnoticed for nearly two years. In 1995, a Senate Special Committee was created to investigate Whitewater. In the fall of 1995, the Committee discovered the existence of the Kennedy notes, and in November it voted to subpoena the notes. On December 12, the White House formally refused to comply, arguing that the notes were protected by the attorney-client privilege and work-product doctrine. After the full Senate voted to seek court enforcement of the subpoena, the parties—including the White House, the Senate Committee, the House Banking Committee, and the Independent Counsel (the latter two of which were also investigating Whitewater)—reached a settlement. Under the terms of the compromise, the White House would produce the notes, and the other bodies would agree that

the Special Senate Committee Regarding Whitewater and Related Matters, at 13 (Dec. 12, 1995) [hereinafter Williams & Connolly Brief]; White House Brief, supra note 3, at 8.

8. See Williams & Connolly Brief, supra note 7, at 13; White House Brief, supra note 3, at 3, 8.

9. The private lawyers who attended were Kendall, who would be the lead private counsel on Whitewater matters; Steven Engstrom, who was retained to assist Kendall and serve as local counsel in Little Rock for Whitewater matters; James Lyons, a Denver attorney who had provided legal advice to and prepared a report for the Clintons regarding Whitewater during the 1992 campaign; Bernard Nussbaum, then the White House Counsel; Neil Eggleston, then an Associate White House Counsel; William Kennedy, then an Associate White House Counsel; and Bruce Lindsey, who at the time had the title of Assistant to the President and Director of Presidential Personnel. See Williams & Connolly Brief, supra note 7, at 13-15; White House Brief, supra note 3, at 8-9. Lindsey had also been Bill Clinton’s law partner in Arkansas.

10. After the 1994 elections, the newly Republican-controlled Senate created the Senate Special Committee to Investigate Whitewater Development Corporation and Related Matters [hereinafter Whitewater Committee], which would conduct an inquiry into the growing assortment of affairs termed “Whitewater.” See S. Res. 120, 104th Cong., 1st Sess. (1995) (establishing the Committee).

The Whitewater Committee had a Republican majority, and was chaired by Senator Alfonse D’Amato. It began by requesting from the White House documents relating to the investigation. No later than the second meeting of the Committee, Senator D’Amato was claiming that the White House was not complying with its requests for documents, perhaps in an attempt to create publicity for the Senate hearings. In any case, there was a brief increase in the visibility of the hearings. See, e.g., Stephen Labaton, G.O.P. Senators Demand All Files on Whitewater; Unedited Papers Sought; D’Amato Hints He Will Go to Court, Raising a Prospect of Constitutional Clash, N.Y. TIMES, July 20, 1995, at A1. Nevertheless, the attention soon ebbed, and the hearings continued through the summer and fall of 1995 in relative obscurity.

11. The White House and Kendall each filed briefs with the Whitewater Committee that stated their reasons for not complying. See Susan Schmidt, White House Rejects Subpoena, WASH. POST, Dec. 13, 1995, at A1. Both argued that if they were to turn over the notes, such disclosure might constitute subject-matter waiver of the privilege, leaving the Clintons with no privilege whatsoever in their relationship with Kendall. See id.
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the release of the notes did not constitute a waiver of attorney-client privilege or the work-product doctrine by the White House or the Clintons. While the dispute was settled, the question of whether the notes were actually privileged was never resolved by any court.

B. The Sherburne-Nemetz Notes

The second dispute arose over notes taken at two separate meetings attended by lawyers from the White House Counsel and the Clintons' private lawyers. The meetings also concerned topics included in Whitewater inquiries. One focus of the investigations by the Senate Whitewater Committee and the Independent Counsel was the conduct of Mrs. Clinton and other White House officials during the immediate hours and days after the 1994 death of Deputy White House Counsel Vincent Foster, Jr. Investigators were considering whether the White House officials had removed any files from Foster's office before the FBI and U.S. Park Police could search it, and whether they had done so at Mrs. Clinton's request. A second area of inquiry was the mysterious appearance in the White House of Rose Law Firm billing records. The Department of Justice had subpoenaed the billing records relating to Mrs. Clinton's representation of Madison Guaranty, but they had not been located until a secretary found them in the White House in January 1996. Investigators were looking into whether there had been any attempt to hide the records up until that point.

On July 11, 1995, Mrs. Clinton, David Kendall, Jane Sherburne (then Special Counsel to the President), and Miriam Nemetz (then Associate Counsel

14. Both the Senate Whitewater Committee and the Independent Counsel investigations examined the conduct of White House Officials during the hours and days after Foster's death. The evening of the death, White House Counsel Bernard Nussbaum and another white house aide searched the office for a suicide note; Margaret Williams, the chief of staff to the First Lady, was also in the office at some point that night. One white house guard testified that he saw Ms. Williams remove documents from Foster's office that night. See Ellen Joan Pollock, Guard Tells Senate Whitewater Panel He Saw Files Taken from Foster's Office, WALL ST. J., July 27, 1995, at A12. Other activities in the days following the suicide were eventually investigated by the Senate Committee and Independent Counsel as well.
15. Both the Justice Department and the Senate Committee had subpoenaed the billing records relating to Mrs. Clinton's representation of Madison Guaranty while she was at the Rose Law Firm. (The Justice Department subpoena had been issued in December, 1993, and preceded the appointment of the Independent Counsel). The records had never been produced, because no one could find them. On January 4, however, the Clintons' personal assistant discovered the billing records in her office. The White House said that it could not offer any explanation for the appearance of the files. See Susan Schmidt, White House Locates "Missing" Law Firm Records, WASH. POST, Jan. 6, 1996, at A1. The assistant later explained that she had discovered them in August 1995, but did not realize what they were. In January 1996, she rediscovered them and recognized that they were under subpoena. She then produced them. See Susan Schmidt, Aide Says Lost Law Firm Records Reappeared in Clintons' Quarters, WASH. POST, Jan. 19, 1996, at A1.
to the President), met to discuss Mrs. Clinton’s activities following the death of Vincent Foster.16 Ms. Nemetz took notes at the meeting.17 On January 26, 1996, Mrs. Clinton appeared before a grand jury under a subpoena by the Independent Counsel.18 Her testimony apparently focused on the appearance of the billing records, although she did say that she testified about other matters as well.19 During breaks in her testimony, and immediately afterward, Mrs. Clinton, Ms. Sherburne, Mr. Kendall, Nicole Seligman (a partner of Mr. Kendall’s), and, at times, John Quinn (then Counsel to the President), met to discuss the discovery of the billing records.20 Ms. Sherburne took notes at these meetings.21

On January 21, 1996, the Independent Counsel served the White House with a grand jury subpoena requiring production of “[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present)” which pertained to any of several Whitewater-related topics.22 The White House identified nine sets of notes that were responsive to the subpoena, but refused to produce them, citing the executive privilege, attorney-client privilege, and work-product doctrine. The Independent Counsel filed a motion to compel production of two of the nine sets of the notes—the two sets discussed in the preceding paragraph—in the United States District Court for the Eastern District of Arkansas. The White House relied exclusively on its claims of attorney-client and work-product privileges, and Mrs. Clinton entered an appearance and asserted her personal attorney-client privilege. Judge Wright of that court denied the motion to compel, finding that the notes were protected by the attorney-client and work-product privileges.23

The Independent Counsel appealed to the Eighth Circuit. The Eighth Circuit reversed the district court’s ruling in a 2-1 decision, holding that neither the attorney-client privilege nor the work-product doctrine applied to the notes at issue. In short, it held that the attorney-client privilege did not protect conversations between a government lawyer and a government official from discovery by a grand jury;24 that the common-interest doctrine could not

17. See id.
19. See id.
20. See In re Grand Jury Subpoena, 112 F.3d at 914.
21. See id.
22. Id. at 913.
23. When this issue went to press, the district court’s opinion remained under seal. However, the district court’s conclusions are discussed in the Eighth Circuit opinion. See id. The Eighth Circuit’s decision was originally filed under seal as well. However, at the request of the White House and Mrs. Clinton, the court unsealed its decision as well as the parties’ briefs. See id. at 914.
24. See id. at 920-21.
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apply to the meetings in question because the institution of the White House and Mrs. Clinton in her personal capacity had no common interests; and that the White House could not assert the work-product doctrine because its attorneys were not preparing for litigation. The White House filed a petition for certiorari, which the Solicitor General supported. The Supreme Court denied the petition.

C. Common Elements of the Meetings

These two disputes arise out of three meetings with very similar facts. Each involved the notes taken at a meeting which was attended by attorneys from the White House Counsel, attorneys who represented the Clintons in their private capacity, and a senior White House official. In the case of the Kennedy notes, that senior official was Bruce Lindsey; in the case of the Sherburne-Nemetz notes, that official was Mrs. Clinton.

There are certain differences between the disputes over these two sets of notes. The most significant of these may be the parties seeking each set of the notes. The Kennedy notes were subpoenaed by the Senate Whitewater Committee, and the Sherburne-Nemetz notes were subpoenaed by a federal grand jury at the request of the Independent Counsel. Another difference was that the question of the status of the Kennedy notes was never resolved by—or presented to—the courts, whereas the dispute over the Sherburne-Nemetz notes was the subject of opinions in the district court and the Eighth Circuit (as well as a dissent in the Eighth Circuit), and the notes were eventually held not to be privileged.

Despite the differences between these two instances, the common elements are striking. It seems clear that meetings between the President's private counsel and attorneys from the White House Counsel—attorneys who represent the White House and the President in his official capacity—are not unusual. Indeed, because the White House Counsel traditionally represents the President only in his official capacity, the President and the White House Counsel make a concerted effort to separate the legal matters that involve the President in his private capacity from those that involve the President only in his official capacity. The former are referred to private counsel, and the latter are referred

25. See id. at 922-23.
26. See id. at 924-25.
29. The D.C. Circuit has held that the First Lady is a "de facto officer or employee" of the federal government, akin to a White House aide. See Association of Am. Physicians and Surgeons v. Clinton, 997 F.2d 898, 904-05 (D.C. Cir. 1993).
30. The observations about the function of the White House Counsel in its interaction with the President's private counsel are based on conversations with senior members of the Clinton White House staff. They agreed to discuss these matters on the condition that they not be identified or quoted directly.
to the White House Counsel. Some consultation between the two is often required, however. This is because, when a legal matter first arises, the President will consult the White House Counsel. This initial consultation is simply a result of the fact that the White House Counsel is literally down the hall from the President, and thus more accessible to him than private counsel. Typically, the President and White House Counsel attorneys discuss the matter, and decide whether to refer it to outside counsel, while providing any additional assistance that the outside counsel requires. This last task usually falls to the White House Counsel both because the President simply does not have time to take care of these matters, and because the White House Counsel has played a role in deciding whether the matter should be referred to outside counsel.

After this initial period of consultation and referral, additional communications between the White House Counsel and private counsel are usually required. This may be the result of two factors. First, the White House Counsel serves as a sort of gatekeeper between the private counsel and the President. Because it is next to impossible for the private counsel to speak to the President when he needs to do so, he will often communicate through the White House Counsel, who has greater access to the President. Additionally, the White House Counsel and private counsel may cooperate in representing the President in matters that they deem to relate to the President in both his personal and official capacities. In these matters, the White House Counsel and private counsel typically carry out their respective duties: representing the President in his official and private capacities. Whitewater was such a matter.

The predictability with which meetings between the two sets of attorneys occur and are attended by other members of the White House staff gives rise to the question of whether such meetings are protected by any privilege when the notes of the meetings are sought by a federal grand jury, a committee of Congress, or any other body with investigatory powers. Moreover, even if the communications are privileged as a matter of law, there are the distinct questions of whether a privilege claim, no matter how valid legally, can be sustained politically, and if so, how.

II. LEGAL ANALYSIS

Despite any political constraints, the first question is whether there are legally valid grounds on which to base the President's claims of privilege. Arguments in support of the claims are somewhat complicated. Certain aspects of the claims (such as whether government lawyers have a confidential relationship with their client) are clearly supported by caselaw, while other aspects deal with questions on which there is less authority. Nevertheless, even on these latter points, persuasive arguments in support of the privilege claims may be made. In any case, this Article argues that the privilege claims are
legally valid, and that, given this validity, the President should not hesitate to assert these privileges when appropriate. Indeed, it seems certain that an ultimately successful assertion of a valid privilege would make it easier politically (as well as legally) for future Presidents to do the same.

There are three types of privileges that might apply to such communications and meetings. The attorney-client and work-product privileges are discussed first, because they are likely to be stronger and because they are the privileges that were at the heart of the two recent disputes. The third privilege, the executive privilege, is then discussed as well.

A. Attorney-Client and Work-Product Claims

The logical place to begin in examining the privileges that may be claimed over such communications is with the privileges that the White House has asserted in the recent two disputes over such meetings: the attorney-client and work-product privileges. Because both are common-law privileges with similar elements and exceptions, they may be analyzed together.

1. Applicability of Privilege Claims

As discussed above, the disputes over the Kennedy notes and the Sherburne-Nemetz notes arose in different contexts: the Kennedy notes were sought by a Senate committee, and the Sherburne-Nemetz notes were sought by a federal grand jury. In the latter instance, it is clear that both privileges, if valid, can be asserted against a federal grand jury. However, it is less clear whether either of these privileges may be asserted against the Congress (that is, whether the privileges provide a valid basis on which to resist a congressional subpoena), no matter how sound the basis for the claims. Thus, before discussing the validity of the claims, a preliminary issue that must be resolved is whether an otherwise valid claim of attorney-client privilege or work-product doctrine may be asserted against the Congress or one of its committees. Legal authorities and historical precedent both support the conclusion that witnesses before Congress or its committees do not have a right to most common-law privileges that the courts recognize. While committees will frequently agree to recognize a privilege, they do so only at their discretion. Nevertheless, in attempting to use the courts to enforce a subpoena, Congress is in an entirely different situation. While witnesses might not have a right to common-law privileges when appearing before Congress, witnesses probably do have a right to common-law privileges when responding to a

31. See, e.g., In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 829 (9th Cir. 1994) (attorney-client privilege); In re Sealed Case, 29 F.3d 715, 717-18 (D.C. Cir. 1994) (work product); In re Six Grand Jury Witnesses, 979 F.2d 939, 943-44 (2d Cir. 1992) (attorney-client privilege and work product); In re Grand Jury Proceedings (GJ90-2), 946 F.2d 746, 748 (11th Cir. 1991) (attorney-client privilege).
subpoena issued by the courts.

There is substantial historical evidence that Congress and its committees do, in fact, recognize common-law privileges, including the attorney-client and work-product privileges. In the nineteenth century, during an investigation of the Credit Mobilier scandal, an attorney for the Union Pacific Railroad was jailed in the Capitol for refusing to turn over documents for which he claimed an attorney-client privilege. In 1934, then-Senator and Chairman Hugo Black refused to recognize the attorney-client privilege for papers held by an attorney for the subject of an investigation. More recently, in the 1970s and 1980s, the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce repeatedly rejected claims of attorney-client privilege on the grounds that the attorney-client privilege had never applied before the House of Commons or the United States Congress. In 1986, the House Foreign Affairs Committee examining the business activities of Ferdinand Marcos rejected a claim of privilege and required two of Marcos's personal attorneys to produce certain documents. In the Iran-Contra Hearings, the Select Committee recognized the attorney-client privilege for several individuals, but insisted it was not required to do so.

A report by the Congressional Research Service ("the CRS Report") supports the validity of these practices. This report concludes that, in view of "Congress' inherent constitutional prerogative to investigate . . . the acceptance of a claim of attorney-client or work-product privilege rests in the sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation." This conclusion is based on two primary justifications. First, the goals of the legislative and adjudicatory processes are different. A congressional committee "is not empowered to adjudicate the liberty or property interests of a witness." Therefore, the reasons for which courts recognize the privilege, including the


34. See diGenova, supra note 32; see also CRS Report, supra note 32, at 45 (discussing House Committee on Energy and Commerce).

35. See diGenova, supra note 32; see also 141 CONG. REC. S18,962 (daily ed. Dec. 20, 1995) (statement of Sen. Hatch) (referring to the Marcos hearings); CRS Report, supra note 32, at 45-46 (same).

36. See diGenova, supra note 32.

37. See CRS Report, supra note 32, at 43-49 (concluding that Congress is free to recognize or not recognize common-law privileges, including the attorney-client and work-product privileges, at its discretion).

38. Id. at 43.

39. Id. at 48.
"necessity to protect the individual interest in the adversary process," are less likely to exist in the context of a legislative investigation.40

Second, the doctrine of separation of powers dictates against the imposition of common-law privileges on Congress.41 Congress should not be required to recognize the non-constitutional common-law privileges that the courts use to govern proceedings in the judiciary. Indeed, to require Congress to recognize non-constitutional common-law privileges would be to "permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each house of Congress to determine its own rules."42 Like the courts, Congress is free to make its own determinations on questions of which non-constitutional rights to grant witnesses, including, for instance, whether the benefits of recognizing the attorney-client privilege in a given situation outweigh the costs. While Congress would have to recognize constitutional privileges, neither the attorney-client nor the work-product privileges is a matter of constitutional right,43 and therefore each applies to Congress only at the discretion of Congress itself.44

The complication arises when the Senate itself attempts to enforce a subpoena. There are two methods of enforcing a subpoena that are available to both houses of Congress.45 First, a house of Congress may bring those refusing to comply with a subpoena before that house, and try that person for contempt. Under this power, a party convicted of contempt may be imprisoned in the Capitol Guardhouse, although that imprisonment may not last beyond the end of the legislative session in which the trial took place.46 Second, there is a criminal statute under which persons who refuse to appear or to produce documents upon congressional request may be prosecuted.47 However, only

40. Id.
41. See id.
42. Id.
43. See, e.g., United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (stating that the attorney-client privilege is not a constitutional right); Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985) (same). The work-product doctrine is similarly a creation of the courts, see Hickman v. Taylor, 329 U.S. 495 (1947), and thus another example of a non-constitutional common-law privilege.
44. "The precedents of the Senate and the House of Representatives, which are founded on Congress' inherent constitutional prerogative to investigate, establish that the acceptance of a claim of attorney-client or work product privilege rests in the sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation." CRS Report, supra note 32, at 43; see also In re Provident Life & Accident Co., CIV-1-90-219 (E.D. Tenn. June 13, 1990) (holding that materials were covered by attorney-client privilege, but that the privilege "is not of constitutional dimensions, [and] is certainly not binding on the Congress of the United States") (quoted in CRS Report, supra note 32, at 47).
the executive branch may bring prosecutions under this statute.\textsuperscript{48}

Nevertheless, the houses of Congress have often been reluctant to use either of these methods.\textsuperscript{49} Under the former method, it seems clear that the party would be unable to argue that the subpoenaed documents are privileged, because Congress is not required to recognize the privilege. The latter method is probably irrelevant to this Article because the enforcement of congressional subpoenas is left to the executive branch, and the Department of Justice is unlikely to prosecute the White House for contempt of Congress.

There is a third method of enforcement which is available to the Senate and its committees. Under 28 U.S.C. § 1365, the Senate or any of its committees may bring a civil action in the United States District Court for the District of Columbia to enforce any subpoena issued by the Senate or its committees.\textsuperscript{50} The district court may then issue an order requiring compliance with the subpoena, and any party refusing to comply with that order may be held in contempt.\textsuperscript{51} The statute apparently requires the court to try that person for contempt, and the proceeding "shall be summary in manner."\textsuperscript{52} This method of enforcement seems to be the method preferred by the Senate; indeed, it was created out of dissatisfaction with the other two methods.\textsuperscript{53} It was also the method that the Senate Whitewater Committee had planned to use to enforce its subpoena for the Kennedy notes.\textsuperscript{54}

There are several problems with the attempt to use section 1365 to enforce a subpoena against the White House for materials that it claims are privileged. First, the statute itself provides that it does not apply to actions to enforce subpoenas issued "to an officer or employee of the Federal Government acting within his official capacity."\textsuperscript{55} The committee report that accompanied

\textsuperscript{48} See 2 U.S.C. § 194 (1994) (leaving prosecution under section 192 to "the appropriate United States attorney"); S. REP. No. 95-170, at 20, 41 (1977), \emph{reprinted in} 1978 U.S.C.C.A.N. 4236, 4257. Although the language of section 194 might appear to require the United States attorney to bring prosecutions under section 192 upon referral by Congress, this power has been interpreted as being permissive.


\textsuperscript{51} See 28 U.S.C. § 1365.

\textsuperscript{52} Id.

\textsuperscript{53} See S. REP. No. 95-170, at 16-17, 20-21, 41 (1977), \emph{reprinted in} 1978 U.S.C.C.A.N. 4232-33, 4236-37, 4257. It is unclear why the House has never sought this power. The Senate passed a bill which gave the power to both houses, although the House never considered the issue. The conference report for Pub. L. No. 95-521, which included 28 U.S.C. § 1365, said only that "[t]he appropriate committees in the House also have not considered the Senate's proposal to confer jurisdiction on the courts to enforce subpoenas [sic] of House and Senate committees. The Senate has twice voted to confer such jurisdiction on the courts and desires at this time to confer jurisdiction on the courts to enforce Senate subpoenas [sic]." H.R. CONF. REP. No. 95-1756, at 80 (1977), \emph{reprinted in} 1978 U.S.C.C.A.N. 4396.

\textsuperscript{54} The Whitewater Committee and the full Senate both voted to instruct the Senate Legal Counsel to file an action under section 1365 to enforce the subpoena. See S. RES. 199, 104th Cong. (1995), \emph{reprinted in} 141 CONG. REC. S18,920-21 (daily ed. Dec. 19, 1995).

\textsuperscript{55} 28 U.S.C. § 1365(a) (1994).
section 1365 is more succinct: "[t]his bill . . . does not provide any authority for enforcement of subpoenas [sic] against executive branch officials." Of course, this leaves open the question of whether the federal officials in question are acting in their official capacities. This is necessarily a case-by-case determination. However, it certainly seems clear that a subpoena served upon the White House Counsel directing him to produce records of meetings attended by numerous members of the White House Counsel's Office would fall within the exemption: the White House Counsel is a federal official, and the meeting with his staff is almost certainly one in his official capacity.

An action to enforce a subpoena which fell within this statutory exemption should be dismissed for lack of subject-matter jurisdiction.

Therefore, it seems that an action to enforce a subpoena against the White House Counsel would be dismissed pursuant to the exemption in section 1365.

Second, even if the Senate subpoena did not fall within the exemption, it seems unlikely that the district court would require compliance with a subpoena for materials that the court itself would consider privileged. Rather, the court is more likely to refuse to enforce a subpoena for materials that it determines to be privileged. While Congress may determine the rules by which it governs its own proceedings, the courts remain free to do the same. Under the authority by which each branch governs itself—the same authority by which Congress may refuse to recognize the privilege—the judiciary recognizes the attorney-client and work-product privileges as a right. Accordingly, the courts would almost certainly recognize and entertain a claim of privilege (depending on its validity), even if the documents being subpoenaed were being sought by a Senate committee.

The language of section 1365 does not contain any grant of such authority to the district court. Moreover, the committee report for section 1365 is unclear as to the role contemplated for the courts. On one hand, the report states that "commencing a civil action to enforce a subpoena [sic] or order . . .

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57. The subpoena for the Kennedy notes was directed to Kennedy himself, after he had left the White House. Therefore, he would not fall within the exemption. However, the asserted privilege was the White House's. Kennedy could have given the notes to the White House—the possessor of the asserted privilege—and they could have asserted the exemption on the grounds that the notes related to federal officials' activity in their official capacities. Kennedy would not be guilty of contempt because, under section 1365, a party is only liable while he refuses to produce the subpoenaed documents. See S. Rep. No. 95-170, at 41 (1977), reprinted in 1978 U.S.C.C.A.N. 4257. Presumably, once Kennedy no longer possessed the notes, he would not be liable under the statute, because he could no longer produce them.
59. See also Alvin K. Hellerstein, A Comprehensive Survey of the Attorney-Client Privilege and Work-Product Doctrine, in PRACTICING LAW INST., CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 7 (1994) (noting that, where Congress attempts to use the courts to enforce a subpoena, "it would seem that the courts are likely to recognize the [attorney-client] privilege").
created no new dependence by Congress on the courts and no new right of a
court to review congressional actions."\textsuperscript{60} Such language does not seem to
create any discretion in the court. On the other hand, the report also states that:

The court will first review the validity of the subpoena [sic] or order and then, when
finding it valid, issue an order to the recalcitrant party demanding compliance. If
the party remains recalcitrant, Congress or the court itself may initiate a proceeding
to require the party to appear to show cause why he should not be held in contempt
of the court's order to comply . . . [A] civil proceeding under [§ 1365]\textsuperscript{61} would
be for contempt of the court's order, not for contempt of Congress itself. [Under
both the criminal contempt and civil contempt proceedings], the court will first
determine the validity of the congressional proceeding before it will impose a
sanction on the party.\textsuperscript{62}

Thus, after the respondent to a subpoena refuses to comply, the Senate may
seek a court order requiring compliance. If the respondent still refuses to
comply, he may be found in contempt of the court itself. What is significant
is that refusal to comply with an order issued under section 1365 constitutes
contempt of that court rather than of Congress.\textsuperscript{63}

This distinction is not a hollow one. If the court had determined that the
materials were covered by the attorney-client or work-product privilege, the
court would be called upon to hold a party in contempt as a result of his failure
to produce materials which the court considered privileged. As a positive
question, a court seems very unlikely to take that step. There is a strong
tradition in the federal common law for the vigorous protection of both
privileges. According to the Supreme Court, the attorney-client privilege is
"the oldest of the privileges for confidential communications known to the
common law,"\textsuperscript{64} while the work-product privilege is "well recognized" and
"essential to an orderly working of our system of legal procedure," in the
absence of which "inefficiency, unfairness and sharp practices would inevitably
develop . . . ."\textsuperscript{65} In the face of this tradition, a district court seems unlikely
to ignore wholly this tradition and find a party in contempt for withholding
materials which the court itself would never compel the party to produce.

More importantly, as a normative question, it seems that a court ought not
to take such action. The CRS Report, in explaining how Congress is not bound
by the common-law privileges, cited as one primary reason the separation of
powers doctrine. According to the report, Congress has the right to govern its

\textsuperscript{61} Section 1365 was originally codified as 28 U.S.C. § 1364 (1979). It was recodified in Pub. L.
\textsuperscript{63} That is not to say that the party is not also liable for contempt of Congress itself. The point is
simply that refusal to comply with a § 1365 order does not constitute contempt of Congress.
\textsuperscript{64} Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
\textsuperscript{65} Hickman v. Taylor, 329 U.S. 495, 511, 512 (1947).
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own proceedings, and is not bound by the courts' determination of what ought to be privileged.66 Of course, the courts have this same right. In determining whether to hold a party in contempt of the courts, the judiciary should not have to step outside of the rules by which it has decided to govern its own proceedings. This is particularly true when the rules at issue are as long-standing and vigorously guarded as the attorney-client and work-product privileges.67

Another reason cited in the CRS Report is of particular relevance in these situations, where there is at least a possibility of litigation related to the topic of the meeting. First, the attorney-client and work-product privileges are intended to protect communications both from one's adversaries in litigation and from the fact-finder.68 Where there is a threat of litigation relating to the topic of a meeting, the court clearly should protect the content of the meeting so that the parties' interest in the litigation is not adversely affected. Otherwise, the protection of these privileges in the underlying litigation would become hollow, because the substance of the communications and work-product would presumably be available to the parties' adversaries, even if not admissible in the litigation.

It appears that no court has yet faced this issue. However, there is some support for this reasoning. The closest case is one that arose when a district court placed a protective order on certain discovery materials in a large multi-district antitrust case.69 Two subcommittees70 of the House of Representatives served subpoenas on the plaintiffs' counsel for some of the discovery materials that were subject to the protective order. The plaintiffs' counsel and the counsel for the two subcommittees then moved for leave for the plaintiffs to comply with the subpoena, despite the protective order. The court found that the plaintiffs would not have possession of the subpoenaed materials but for the discovery rules of the federal courts—the same discovery rules that gave the court power to impose a protective order.71 It also found that Congress was "interfering in the processes of a Federal Court in an individual case," a power

67. For instance, in the case of the Kennedy notes, the litigation in preparation for which the meeting was called—potential Resolution Trust Corporation or Small Business Administration litigation, as well as, perhaps, congressional hearings—had not yet been finished (or indeed even begun) at the time the notes were sought. The court reviewing the subpoena should have recognized these privileges for the same reason that it would in the actual litigation (assuming that the courts would find them privileged). The privilege in the litigation would become hollow otherwise, because the content of the Clintons' communications with their attorneys, and the communications among these attorneys would become available to the Clintons' adversaries in the litigation.
68. See CRS Report, supra note 32, at 48.
70. The two subcommittees were the Subcommittee on Oversight and Investigation of the House Interstate and Foreign Commerce Committee, and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House Committee on Small Business. See id. at 211.
71. See id. at 212.
that it does not have.\textsuperscript{72} For these reasons, it denied the motion.

The holding in \textit{In re Beef Industry} clearly bears on the issue of whether Congress would recognize the President’s common-law privileges in two ways, though there are certainly some differences between the question in that case and the present issue. First, the spirit of that court’s holding is that when Congress attempts to use the courts to enforce its subpoenas, the courts will do so only on their terms and pursuant to their own rules of procedure. The district court refused to amend its discovery procedures in order to accommodate the House subpoenas, despite the fact that the House committees were not parties to any litigation. Similarly, a court faced with a Senate subpoena for privileged materials should refuse to abandon the privileges that it recognizes in all other matters. Second, the \textit{In re Beef Industry} court found that the House committees were impermissibly attempting to interfere in an individual case. An attempt to discover attorney-client and work-product materials might also be construed as likely to have a profound effect on the litigation in preparation for which the materials were produced, and thus might be resisted on the same grounds.

The second case that bears on this issue is one in which the D.C. Circuit has at least hinted in dictum that it would adopt the approach urged here. \textit{Brown & Williamson Tobacco Corp. v. Williams}\textsuperscript{73} involved a tobacco company’s attempt to recover documents that a paralegal employed by the company’s law firm had stolen and turned over to two anti-tobacco congressmen.\textsuperscript{74} The court noted with approval one “subtle” argument by the company that the congressmen should not be able to keep the documents because they never would have been able to obtain them through legal methods. The court stated: “The legislature has broad investigatory authority, including the subpoena power, and Congress certainly could have sought the documents from [the plaintiff] directly. But had it done so, the argument runs, appellant would at least have had an opportunity to raise its [attorney-client] privilege claim.”\textsuperscript{75} The court found only one flaw with this argument. “The difficulty with [plaintiff’s] position is the lack of a connection between the alleged stolen

\textsuperscript{72} Id.

\textsuperscript{73} 62 F.3d 408 (D.C. Cir. 1995).

\textsuperscript{74} The tobacco company filed suit against a former employee of the company’s law firm. The employee had made copies of litigation-related documents, which he then claimed to have returned. \textit{See id.} at 411. Soon afterward, it became clear that two anti-tobacco congressmen had received copies of the documents. \textit{See id.} at 412. The company requested a court order requiring the congressmen to return the original documents or, in the alternative, copies of the originals. The court then issued subpoenas for the documents to the congressmen. The congressmen argued that the Speech and Debate Clause barred enforcement of the subpoenas. \textit{See id.} The D.C. Circuit eventually agreed with this defense and upheld the district court’s order quashing the subpoenas. \textit{See id.} at 423. The tobacco company’s argument had been that Congress’ use of documents which were both illegally obtained and arguably privileged is not part of legitimate legislative activity, and thus not covered by the Speech and Debate Clause. \textit{See id.} at 421.

\textsuperscript{75} Id. at 421.
or privileged nature of the documents and the remedy it seeks.\textsuperscript{76} The court certainly seemed to agree with the plaintiff’s argument—similar to the argument made here—that, faced with a congressional subpoena, a court would consider the plaintiff’s claim of attorney-client privilege.

The above discussion assumes that the Senate or one of its committees, in an effort to enforce a section 1365 subpoena, would take the position that the privileges cannot be asserted against the committee even if they did apply to the documents. In fact, it is not at all clear that a committee would take that position. The CRS Report notes that the instances in which a congressional committee has refused to recognize a privilege have been “rare.”\textsuperscript{77} Indeed, one of the Republican members of the Whitewater Committee stated that, while he did not believe the Kennedy notes were privileged, he was not willing to take the position (urged by some other members of the committee) that the committee should not recognize even a valid privilege claim.\textsuperscript{78} Thus, while Senate committees are not required to honor a valid privilege claim, they are clearly reluctant to do otherwise.

2. \textit{The Attorney-client and Work-product Privileges and Government Lawyers}

Once it is determined that a valid privilege claim can be raised successfully against Congress, as it can against a federal grand jury, the remaining question is whether the privilege claim is valid on the merits. The first issue regarding this point is whether government lawyers may claim the attorney-client privilege in the face of a subpoena from an investigatory body. This issue has been one of the most contested issues in the debates over the White House privilege claims, and one of the most misunderstood.\textsuperscript{79} In effect, the issue

\textsuperscript{76} Id. at 422.

\textsuperscript{77} CRS Report, supra note 32, at 45.

\textsuperscript{78} See 141 CONG. REC. S18,946 (daily ed. Dec. 20, 1995) (statement of Sen. Bennett) ("I will stand absolutely . . . to protect the attorney-client privilege in every circumstance, whether it regards the President of the United States, any citizen of the United States, or a convicted felon who is incarcerated by the United States. Wherever you wish to go where there is a legitimate attorney-client privilege, this Senator will stand to protect that privilege . . . . The President has the right to consult his attorneys on matters relating to his personal affairs, with the absolute assurance that no committee of Congress will ever intrude upon that consultation, and that no one will ever do anything that would weaken that right. It is one of the more fundamental rights established in American common law, and it must be protected.").

\textsuperscript{79} Several Republican members of the Senate Whitewater Committee argued that the meeting could not have been privileged because government lawyers (the members of the White House Counsel and Lindsey) were present at the meeting while acting in their official capacities. See, e.g., 141 CONG. REC. S18,990 (daily ed. Dec. 20, 1995) (statement of Sen. Domenici); 141 CONG. REC. S18,972, S18,973 (daily ed. Dec. 20, 1995) (statement of Sen. Thompson); 141 CONG. REC. S18,963 (daily ed. Dec. 20, 1995) (statement of Sen. Hatch); 141 CONG. REC. S18,946 (daily ed. Dec. 20, 1995) (statement of Sen. Bennett); see also 141 CONG. REC. S18,945 (daily ed. Dec. 20, 1995) (statement of Sen. D’Amato) (reading letter from Chairman Leach arguing that presence of government lawyers may lead to conclusion that meeting was not privileged).
includes two main sub-issues: whether government lawyers have a confidential attorney-client relationship with their client, and if so, whether this privilege may be asserted against another branch or agency of the federal government. The Eighth Circuit, in an opinion\textsuperscript{80} that it is argued here was incorrect, held that any communications between employees of an agency and that agency's lawyer are not privileged when they are the subject of a federal grand jury subpoena. This Article argues that it is clear that government lawyers do have a confidential attorney-client relationship with their client, the agency they represent; that, under \textit{Upjohn}, this privilege should extend to communications between an agency's lawyers and the agency's employees; and that the agency should be able to assert this privilege against another branch or agency of the federal government.

\textbf{a. The Privileges Generally}

It is clear that communications between government lawyers and their clients are protected by the attorney-client privilege,\textsuperscript{81} and that the work-

\textsuperscript{80} See \textit{In re Grand Jury Subpoena Duces Tecum}, 112 F.3d 910 (8th Cir. 1997).

\textsuperscript{81} See \textit{Fed. R. Evid.}, 501 (mandating that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law . . . . "). Proposed Federal Rule of Evidence 503 is frequently referred to as Supreme Court Standard 503 and generally regarded by the federal courts as "an accurate definition of the federal common law of attorney-client privilege." \textit{In re Bieter Co.}, 16 F.3d 929, 935 (8th Cir. 1994); see also \textit{Tennenbaum v. Deloitte & Touche}, 77 F.3d 337, 340 (9th Cir. 1996) (asserting that proposed Federal Rules of Evidence are the guide to federal common law) (citing Transamerica Computer Co. v. IBM, 573 F.2d 646, 651 (9th Cir. 1978) (quoting United States v. Mackey, 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975)); United States v. Moscony, 927 F.2d 742, 751 (3d Cir. 1991) (stating that Supreme Court Standard 503 is a restatement of federal common law). Standard 503 includes within its definition of "client"—whose communications with his attorney are privileged—"public officer[s]," as well as "organization[s] . . . either public or private." In \textit{re Subpoena Duces Tecum}, 112 F.3d at 926 (Kopf, J., dissenting) (setting forth Standard 503). In addition, the Freedom of Information Act extends the attorney-client privilege to government lawyers. See 5 U.S.C. § 552(b)(5) (exempting from Freedom of Information Act "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"); S. REP. No. 89-813, at 2 (1965) (including within (b)(5) exception to FOIA "documents which would come within the attorney-client privilege if applied to private parties").

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product of government lawyers is protected by the work-product doctrine. The second and more difficult question is whether the government lawyers may assert these privileges in the unusual situation in which another part of the government—usually Congress or its committees, or an independent counsel—seeks the purportedly privileged materials. Another way of stating this question is: Who is the client (and thus holder of the privileges) of the agency lawyer (in this case, the White House Counsel), the federal government as a whole, or the agency that the attorney represents? Again, the answer is clear: the agency attorney’s client is the agency that he represents. Government lawyers—or at least “agency lawyers” who are employed by an agency other than the Department of Justice—are considered to represent, and thus owe their ethical duties to, the agency that they represent. The District of Columbia Rules of Professional Conduct are most clear on this point: “The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.” Courts have also held that the government attorney’s client is the agency that he represents.

The privilege that exists between an agency lawyer and his client (the agency) protects all communications between that lawyer and the employees of the agency that are necessary to the attorney’s representation of the agency.

See, e.g., 6 U.S. Op. Off. Legal Counsel at 496 (1982) (stating that the “client” in government attorney-client relationship is the agency or division being advised); Geoffrey P. Miller, Government Lawyers’ Ethics in a System of Checks and Balances, 54 U. Chi. L. Rev. 1293, 1298 (1987) (stating that government attorney’s duties run to officer who has power of decision over the issue, usually the officer in charge of department in which attorney works); Jennifer Wang, The White House’s White House Counsel: Ethical and Political Considerations, 114 Harv. L. Rev. 1485, 1494 (2001) (showing that agency attorneys’ duties run to agency head).

82. See, e.g., Department of Econ. Dev., 139 F.R.D. at 300 (stating that government agency is considered a ‘client,’ and agency lawyers are considered attorneys for that client); Deuterium, 19 Cl. Ct. at 699 (stating general counsel of agency acts as attorney for other officials of that agency); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 124 cmt. b (Proposed Final Draft No.1, 1996) (stating that privilege belongs to the agency represented). This same holding is implicit in numerous cases in which courts were required to interpret FOIA exemption (b)(5). See, e.g., Brinton v. Department of State, 656 F.2d 600, 603-04 (D.C. Cir. 1980); Mead Data Cent. Inc. v. United States Dep’t of Air Force, 566 F.2d 242, 252-55 (D.C. Cir. 1977); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980); Falcone v. IRS, 479 F. Supp. 985, 989-90 (E.D. Mich. 1979).
Under the Supreme Court's opinion in *Upjohn*, communications between an institutional client and an attorney representing the institution are covered by the attorney-client privilege. The scope of this privilege extends to all communications between the attorney and employees of that institution that are necessary to that attorney's representation. (Indeed, this must be the case, because an institution can only communicate through its employees.) By applying this same principle to the agency lawyer, one must conclude that the attorney-client privilege held by an agency includes all communications between the agency's employees and its attorneys that are necessary for the attorney's representation. The Office of Legal Counsel has recognized that an *Upjohn* analysis is probably appropriate in judging the scope of the attorney-client privilege where the client is a government agency.

Moreover, a government attorney owes the same ethical duties to his agency that a private attorney owes his client. For instance, the comment to Rule 1.6(i) of the D.C. Rules of Professional Conduct states that "[t]he employing agency has been designated the client under this Rule to provide a commonly understood and easily determinable point for identifying the government client." More significantly, the paragraph identifying the agency lawyer's client, as well as the accompanying comment, are located within the rule that mandates the confidential attorney-client relationship, entitled "Confidentiality of information." Therefore, the relationship between the agency lawyer and the agency includes the duty of confidentiality, and, under *Upjohn*, this privilege should include communications between the lawyers and the agency's employees.

Once that privilege is recognized, the question is whether it may be invoked against another branch of the federal government. Several commentators, including Professor Geoffrey Hazard, have argued that this attorney-client privilege (and, presumably, the work-product privilege) necessarily operates to the exclusion of any duties to any other branch of the federal government. Under this analysis, the separation-of-powers doctrine requires that institutional lawyers serve only the interests of their agency heads, and that a government lawyer serves the "public interest" best by vigorously representing the interests of the agency of which he is an employee. In fact, the agency attorney owes

87. See id.
89. D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6, cmt. 35.
90. D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6.
91. See Miller, supra note 83, at 1295-96, 1298 (stating that agency attorney's duties run to executive branch, and specifically the agency he represents); Wang, supra note 83, at 124-25 (same). Miller found questions of whether an agency attorney's duties run to the executive branch generally, or to the agency by which he is employed to be "subtle and complex." Miller, supra note 83, at 1298. Nevertheless, he concluded, "in principle, their answer is easy: the attorney's duties run to the officer who has the power of decision over an issue. In the vast majority of cases, that officer will be the head
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no allegiance to, and may take positions contrary to, the other branches.\footnote{In a system of checks and balances it is not the responsibility of an agency attorney to represent the interests of Congress or the Court.} The Restatement of the Law Governing Lawyers considers and rejects any other formulation of the government lawyer's duties.\footnote{Moreover, just as the agency lawyer owes no ethical duty to any other branch of the government, the privileges associated with his representation of the agency may also be asserted against the other branches. This position has been argued with regard to agency lawyers generally, as well as to the White House Counsel specifically.} In short, the White House Counsel is the agency attorney for the Office of the President.\footnote{Therefore, the White House Counsel has a confidential}

of the department in which the attorney works." \textit{Id.} In any case, the D.C. Rules of Professional Conduct are much clearer on this point. As discussed above, they state clearly that the client (and holder of the privilege) of the government lawyer is the agency by which he is employed. See \textit{supra} note 89 and accompanying text.

\footnote{See Miller, \textit{supra} note 83, at 1296; Wang, \textit{supra} note 83, at 124-25.}
\footnote{Miller, \textit{supra} note 83, at 1296.}
\footnote{In the comments to section 124, possible alternatives to that section's broad formulation are listed. The comments note that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another." Nevertheless, "[t]his Section... states the generally prevailing rule that governmental agencies and agents enjoy the same privilege as non-governmental counterparts." \textit{RESTATEMENT OF THE LAW GOVERNING LAWYERS} \textsection{124 cmt. b (Proposed Final Draft No. 1, 1996) (emphases added).}}

\footnote{See \textit{generally} Miller, \textit{supra} note 83.}
\footnote{See Wang, \textit{supra} note 83, at 125. The same position was taken by Professor Hazard, a prominent expert on legal ethics at the University of Pennsylvania Law School. In a letter that Senator Sarbanes read into the record during the debate on the Kennedy notes, Professor Hazard stated that:}

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.


Finally, the Office of Legal Counsel has taken a position that is even broader than that argued here. In a memorandum, it concluded that the Attorney General, who is the principal legal adviser for the entire executive branch, enjoyed a confidential relationship with the President. See 6 U.S. Op. Off. Legal Counsel at 481 (1982). Under this reasoning, the White House Counsel—the principal legal advisor for the White House alone—would certainly enjoy a confidential relationship with the President.

\footnote{See Wang, \textit{supra} note 83, at 125 (citing Bruce E. Fein, \textit{Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney}, 30 Fed. B. News & J., Sept.-Oct. 1983, at 406; see also Bruce Ingersoll & Ellen Joan Pollock, \textit{As Whitewater Inquiry Grows Broader, Clinton Seeks New White House Counsel}, WALL ST. J., Mar. 7, 1994, at A3: But several prominent lawyers, including former White House counsels, said Mr. Nussbaum [in his dealings with Treasury Department officials] appears to have misunderstood a fundamental aspect of his job—that his client wasn't Bill Clinton, but the presidency.}

It is an institutional representation," said Arthur Culvahouse, White House counsel during the Reagan years. "You do not represent the president in his individual capacity. You represent the office of the presidency."
attorney-client relationship with the Office of the President. The privilege that accompanies this relationship may be asserted against any party, including other departments or other branches of the federal government. Moreover, like any other agency attorney, the White House Counsel's work-product is privileged.

b. The Eighth Circuit Decision and the Attorney-Client Privilege

The one case in which a court has decided this issue is the Eighth Circuit's decision regarding the Sherburne-Nemetz notes. In that opinion, the Eighth Circuit reached the opposite conclusion, finding that the notes were not covered by either the attorney-client or work-product privilege. Specifically, the majority of that court held that the White House (and presumably any federal agency) could not use the privilege to withhold information from a federal grand jury. The court specifically rejected any application of *Upjohn* in that context, citing four main reasons. First, the court noted that no wrongdoing by White House personnel could expose the White House itself to criminal liability as an entity. Second, it noted that under 28 U.S.C. § 535(b), executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General. Third, it stated that, beyond this statutory duty, "the general duty of public service calls upon government employees and agencies to favor disclosure over concealment." Finally, it concluded that there was little threat of altering the conduct of government lawyers by allowing these communications to be revealed.

The dissent made a number of salient points in response to the majority's conclusion that *Upjohn* did not apply to the case. First, it noted that the *Upjohn* decision was not based upon the fact that a corporation could face criminal liability. Second, it noted that the Court in *Upjohn* found that "even minor corporate employees needed candid legal advice to insure that the corporation complied with the law, and absent the privilege such advice would not likely be forthcoming," and that the same reasoning applied to the White House. In sum, it stated:

The organizational attorney-client privilege, be it asserted by the White House or *Upjohn*, is intended to encourage officials, who may be fearful of losing their jobs, their reputations, their privacy, or their liberty, to tell the organization the raw

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99. *See id.* at 920.
100. *See id.*
101. *Id.*
102. *See id.*
103. *See id.* at 931 (Kopf, J., dissenting).
104. *Id.*
truth so it can comply with the law. The privilege is also premised upon the reasonable belief that no-nonsense legal advice generally depends upon confidentiality, and corporations need such advice if they are to comply with the law. In this regard, there is no reason to presume that the White House is different from Upjohn.105

The dissent took a more direct route than the majority's opinion in concluding that the meeting was privileged. It argued simply that such materials are presumptively privileged on the basis of Standard 503. First, it noted that, under Supreme Court Standard 503, communications between an attorney and his client are privileged, that the term "client" includes "governments" and "organizations," and that the latter term necessarily includes the White House.106 Moreover, the dissent noted that Standard 503 does not contain any exception for criminal investigations.107 Finally, it found that the public interest is served by recognizing a privilege for the White House.108 It relied on the rationale behind Exemption 5 to FOIA, as well as on many of the authorities cited above (including the official opinions of the Office of Legal Counsel) in finding that the attorneys for a public agency, like those representing a private attorney, benefit from a full explanation from their clients, and that the public interest is served as a result.109

The dissent then applied Standard 503 to the facts of the case and found that the White House was a "client" within the meaning of Standard 503; that Mrs. Clinton was a "representative" of the client;110 that the communications were to or from a lawyer; that the communications were confidential; and that the communications were made for the purpose of facilitating the rendition of legal services.111 It found that the communications were confidential, despite the presence of private counsel, because the matter at issue—the activities of Mrs. Clinton and other White House staff—concerned her in both her private and official capacities. Moreover, the meeting was for the rendition of legal services because the White House Counsel had an interest in discovering what the White House's representative (Mrs. Clinton) knew about the activities in order to advise the client (the White House).112 The dissent thus concluded

105. Id. at 931-32.
106. See id. at 926.
107. See id. at 929.
108. See id. at 929-32.
109. See id.
110. Id. at 933. The dissent cited the D.C. Circuit's holding that "Congress itself has recognized that the President's spouse acts as the functional equivalent of an assistant to the President," Association of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 904 (D.C. Cir. 1993), and the Office of Legal Counsel's opinion that attorney-client privilege covers "the broad scope of White House advisers in the Office of the President." 6 U.S. Op. Off. Legal Counsel at 496 (1982).
111. See In re Grand Jury Subpoena, 112 F.3d at 933-35.
112. See id. at 934.
that the communications were presumptively privileged.\footnote{113} 

In addition to the points contained in the dissent, there are additional responses to be made to the majority opinion. First, there is authority which supports applying the \textit{Upjohn} analysis to communications between government employees and government attorneys.\footnote{114} Second, the fact that the White House is not subject to criminal liability is irrelevant. The privilege is intended to foster frank discussions between an actor and his (or its) attorney. Although a government agency (including the White House) is not subject to criminal liability, the officials acting in that agency may be liable in a number of ways. They may be subject both to criminal liability and to impeachment for actions in their official capacities. In an effort to avoid taking actions which are illegal and may give rise to criminal liability, agency officials are likely to consult the agency's attorneys. These communications are not subject to FOIA disclosure—they are covered by FOIA Exemption 5—because better policy results when a decision-maker is able to speak frankly to the agency's attorney, and the attorney to the decision-maker.\footnote{115} For the same reasons, the privilege should be upheld against a grand jury subpoena.\footnote{116}

\footnote{113. The dissent made one further note. It went on to find that, having been found presumptively privileged, the documents ordinarily would be subject to the \textit{Nixon} balancing test, under which the party seeking the materials must make a showing of specific need, relevance, and admissibility, and that the public interest in disclosure outweighs the interest in confidentiality. \textit{See id. at 935-40} (citing United States v. Nixon, 418 U.S. 683 (1974)). In this case it found that, even upon such a showing, the documents should not be turned over, because the \textit{Nixon} balancing test does not apply to personal attorney-client privileges, and turning over the notes would threaten Mrs. Clinton's personal attorney-client privilege. \textit{See id. at 939-40.}

The \textit{Nixon} decision, however, arose in the context of a claim of executive privilege. It is not at all clear that the balancing test used there applies to other claims of privilege. Indeed, the dissent itself expresses some doubt as to whether the \textit{Nixon} balancing test applies to claims of attorney-client privilege. \textit{See id. at 938.} Moreover, neither Standard 503 nor Federal Rule of Evidence 501 makes any provision for breaching the attorney-client privilege where the public interest dictates such a breach. \textit{See Fed. R. Evid. 501; Fed. R. Evid. 503 (proposed), reprinted in 56 F.R.D. 183, 260-66 (1972).} Finally, the dissent noted that it would apply the \textit{Nixon} balancing test only where the materials are the subject of "criminal investigations involving special prosecutors"; it specifically stated that it would not allow a showing of public need for the materials to overcome the privilege in cases of civil litigation or congressional hearings. \textit{In re Grand Jury}, 112 F.3d at 936 n.21.

114. \textit{See Department of Public Works v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303, 310 (1964) (arguing that in determining the extent of attorney-client privilege, "the problem is the same where the client is a body politic as where the client is a corporation"); 6 U.S. Op. Off. Legal Counsel at 481, 495-97 (1982) (noting that \textit{Upjohn} analysis of corporate "client" in attorney-client relationship is helpful in examining attorney-client relationship in government context). According to the \textit{Restatement of the Law Governing Lawyers}, the attorney-client privilege covers communications "made between privileged persons . . . in confidence . . . for the purpose of obtaining or providing legal assistance for the client." \textit{RESTATEMENT OF THE LAW GOVERNING LAWYERS} § 118 (Proposed Final Draft No. 1, 1996). The term "privileged persons" includes "agents" who "facilitate communications between" the client and his lawyer. \textit{Id.} § 120. The section on the privilege in the governmental context refers to these sections in defining the scope of the privilege for a governmental client. \textit{See id.} § 124.


116. There are numerous decisions noting that, even under FOIA, the public interest is served by allowing executive officials, including attorneys, to discuss policy options without fear of disclosure.
The responses to the majority’s other points may be stated more briefly. First, as the dissent noted, the Department of Justice has concluded that the statutory duty of executive branch officials, under 28 U.S.C. § 535(b), to report criminal activity does not override the attorney-client privilege.\textsuperscript{117} Second, the court concluded that the public interest lies in disclosure rather than concealment. The response to this argument is discussed at length above. In essence, it is the notion that, under the separation-of-powers doctrine, the public interest is served by having the officials of any branch of the government—including its attorneys—vigorously represent the interests of that branch. Finally, the court found that there is little chance of a chilling effect on the actions of executive branch officials by allowing the disclosure of these communications in the rare instance of a grand jury subpoena. This is a judgment call by the court and has some support in the Supreme Court’s decisions.\textsuperscript{118} However, one important point to be made here is that this conclusion applies only in the instance of a grand jury subpoena; it has no bearing on the question of whether breaching the privilege in the case of a Senate subpoena is likely to have a chilling effect. As is discussed below,\textsuperscript{119} congressional investigations tend to be much more common and their document requests broader than grand jury investigations, so breaching the privilege in the case of a congressional investigation is much more likely to have a chilling effect on the actions of executive branch officials.

In sum, both the caselaw and the language of Standard 503 clearly support the finding that communications in meetings between lawyers in the Office of the White House Counsel and members of the White House staff are protected by the attorney-client privilege. This privilege shields these communications from disclosure, even when that disclosure is sought by a federal grand jury or by a committee of Congress.

c. \textit{The Eighth Circuit Decision and the Work Product Doctrine}

Similar reasoning applies with regard to the work product of government lawyers. As discussed above, the Supreme Court has recognized that the work product privilege applies to the work product of government attorneys.\textsuperscript{120}


\textsuperscript{118} See \textit{United States v. Nixon}, 418 U.S. 683, 712 (1974) (finding that grand jury investigations of the executive branch are so rare that a chilling effect was unlikely).

\textsuperscript{119} See discussion infra Subsection II.B.2.

\textsuperscript{120} See \textit{FTC v. Grolier Inc.}, 462 U.S. 19, 20 (1983) (holding that work product is included in FOIA (b)(5) exception); \textit{NLRB v. Sears, Roebuck & Co.}, 421 U.S. 132, 154-55 (1975) (same); see
Nevertheless, the Eighth Circuit decision held that the work-product privilege did not apply to the notes in that case. It found that the notes did not satisfy the requirement that materials be “prepared in anticipation of litigation or for trial.”121 It flatly rejected the White House claim that the meetings were held in preparation for the Independent Counsel’s investigation, stating that the Independent Counsel “is not investigating the White House, nor could it do so.”122 While White House officials might be under investigation, the court found that the White House could not claim work-product privilege on the grounds that “some other person, such as Mrs. Clinton, was anticipating litigation.”123 The court also rejected the argument that the meetings were held in preparation for congressional hearings, both because such hearings are not “litigation” and because the only possible harm that could come from such hearings is political harm.124

There are a number of flaws inherent in this reasoning. First, materials prepared in relation to congressional hearings may fall within the “adversarial proceedings” requirement. The court found that the only authority on the question of whether congressional hearings fall within the “adversarial proceedings” requirement was the Restatement of the Law Governing Lawyers.125 A comment on the work-product section of the Restatement explains that the doctrine applies to materials prepared in “reasonable anticipation” of “future litigation.”126 Another comment to the same section explains that “litigation” includes “adversarial proceedings before an administrative agency, an arbitration panel or a claims commission,” as well as “a proceeding such as . . . an investigative legislative hearing.”127

Second, an Independent Counsel’s investigation might give rise to litigation in which the White House has an interest. While the White House as an entity would not be a party to any litigation arising from the Independent Counsel’s investigation, it would certainly have an interest in that investigation and any

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121. In re Grand Jury Subpoena, 112 F.3d 910, 924 (8th Cir. 1997) (quoting FED. R. CIV. P. 26(b)(3)).
122. Id. at 924.
123. Id.
124. See id. at 924-25.
125. See In re Grand Jury Subpoena, 112 F.3d at 924.
127. Id. at cmt. h (emphasis added). The comment states that “[i]n general, a proceeding is adversarial when evidence or other legal argument is presented by parties contending against each other with respect to legally significant factual issues.” Id. This definition would also appear to include congressional hearings investigating possible wrongdoing in the executive branch.
litigation that resulted. In the case of the Sherburne-Nemetz notes, one focus of the investigation, and the subject of the meetings, was the conduct of the White House staff members in their official capacities. In particular, the investigation might have questioned whether White House personnel had obstructed justice by failing to comply with past subpoenas for materials such as the Rose Law Firm billing records. Therefore, the White House as an institution was subject to scrutiny of its activities both in its discovery of the documents and in any past failure to produce them.

The court conceded that the White House might suffer political harm as a result of congressional hearings (or, presumably, of the Independent Counsel's investigation) but held that this threatened harm was not sufficient to render the Sherburne-Nemetz notes work-product. However, the court overlooked the possibility that either investigation could theoretically result in a recommendation of impeachment proceedings. Impeachment would certainly seem to rank above the level of mere "political harm." Following the court's reasoning, this might constitute harm only to the individuals employed in the White House rather than to the institution of the White House, and thus is not the business of the White House Counsel. This conclusion, if the court had reached it, would have been patently absurd. The notion that the institution of the Presidency has nothing at stake in a putative impeachment proceeding—that it is only the business of the individuals who happen to occupy that position presently—is wholly unrealistic. An impeachment proceeding would certainly result in great damage to the institution. Therefore, it would be the ethical duty of the attorney for that institution to vigorously represent the institution in any impeachment proceedings, as well as in any other proceedings which might conceivably present a threat of impeachment.

Thus, the court's conclusion as to the work-product issue seems flawed as well.\textsuperscript{128} Congressional hearings may be "litigation" for the purpose of the doctrine. In any case, the institution of the White House had a great deal at stake in investigations by both the Independent Counsel and Congress. These interests of the White House rose above mere political harm to the individuals working in the White House. Since the investigations could conceivably have led to impeachment proceedings, the attorneys for the White House would have been neglecting their ethical duties to their client if they had not prepared for both investigations. Therefore, the notes of the meetings were certainly within the definition of work product.

3. \textit{The Presence of Private Attorneys and the Common Interest Doctrine}

Another issue that often arises in disputes over these meetings is whether

\textsuperscript{128} Accord In re Grand Jury Subpoena, 112 F.3d at 931 n.19 (Kopf, J., dissenting).
the presence of private attorneys destroys any privilege that might otherwise protect the communications among government attorneys or between government attorneys and officials of the agency that they represent. Ordinarily, the privilege that attaches to confidential attorney-client communications or work product is lost if the contents are shared with a third party. However, under the common-interest doctrine—which may apply both to communications subject to the attorney-client privilege and to communications protected by the work-product doctrine—the privilege is not waived when attorneys who represent different clients with common interests share confidential communications. The question thus arises whether government attorneys may ever share a common interest with private attorneys and whether they share an interest in any given case. These questions have arisen in the disputes over both the Kennedy notes and the Sherburne-Nemetz notes.

The common-interest doctrine certainly might apply to a meeting between the White House Counsel and the President's private counsel. Although the two sets of attorneys represent different clients—the White House Counsel represents the Office of the President, while the private counsel represents the Clintons personally—each could have had an interest in preparing for possible litigation or other proceedings. As Professor Hazard has concluded, these proceedings might well include proceedings to which another branch or agency of the federal government is a party.

The Kennedy notes provide a good example of this point. At the time of

129. See, e.g., In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244, 248-49 (4th Cir. 1990) (stating that common interest privilege is "an exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege").

130. See id. at 249 (The common interest privilege "applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine."); see also Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572, 578-79 (S.D.N.Y. 1960) (applying common interest doctrine to materials covered by the work-product doctrine).

131. See In re Grand Jury Subpoenas, 902 F.2d at 249.

132. In the letter that Senator Sarbanes read into the record, Professor Hazard, after finding that the President's consultations with the White House Counsel were privileged, stated:

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 a 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 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 . . . .

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.

that meeting, the only contemplated adversarial proceedings were litigation
relating to Whitewater—litigation to which the Resolution Trust Corp. would
be party—and congressional hearings on the same topics. In either case, the
adversaries of the Clintons' counsel would have been attorneys for the federal
government (either the RTC or Congress). A finding that the common-interest
doctrine applied to the meeting between the White House Counsel and the
President's private counsel would have meant that attorneys representing the
federal government would be on either side of the litigation. Some Republicans
argued that such an arrangement was impossible, because government lawyers
could never have a common interest with a potential adversary of another
branch of the federal government.¹³³

This argument is flawed in its assumptions, in that it oversimplifies the
agency attorney's role. This broad generalization that all government lawyers
serve the same client, the federal government, overlooks the fact that different
lawyers in the government serve different functions. Agency attorneys do not
represent "the federal government." As discussed above, agency attorneys,
including the White House Counsel, are considered to represent, and to owe
their ethical duties to, the particular agency that they represent.¹³⁴ They do
not owe their loyalty to any other branch, or to some nebulous "public
interest." Under the system of separation of powers, the agency attorney serves
the public interest by serving the interest of the branch and agency that he
represents.

In addition to litigation, congressional hearings are another possible source
of a common interest between the Office of the President and the President in
his personal capacity. Congressional hearings might investigate or expose
wrongoing on the part of the President or White House staff. This possibility
creates an interest on the part of both entities to prepare for these hearings and
plan strategy as to how to present a defense of both. More importantly, these
hearings could theoretically lead to impeachment proceedings, in which both
entities would clearly have a great interest. To suggest that the White House
as an institution has no interest in how it is portrayed in these hearings, simply
because it cannot be held criminally liable (as the Eighth Circuit apparently
would) is to characterize the interests of the White House too narrowly. In
order to determine whether the White House employees committed wrongdoing

¹³³ See 141 CONG. REC. S18,973 (daily ed. Dec. 20, 1995) (statement of Sen. Thompson); 141

¹³⁴ This point is demonstrated by the fact that it is not altogether unusual for litigation between
different branches of the federal government to proceed in the federal government. See, e.g., Bowsher
American Tel. & Tel., 551 F.2d 384 (D.C. Cir. 1976); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C.
a Senate subpoena against the White House under section 1365 would be such an action: the Senate or
its committee would be the plaintiff, and the White House would be the defendant.
and to advise the President on future actions, the White House Counsel must be able to have confidential communications with employees of its client. These interests clearly intersect with the President's personal interest in avoiding impeachment or criminal or civil liability.135

One additional point should be made with regard to the unique nature of the President's duties. The issue of whether the interests of a government official's official and private capacities intersect could theoretically arise in any case involving a government official in which she consulted both government lawyers and private lawyers. However, the issue is particularly important in cases involving the President. This is because the President is in a very unique position: there is very little distinction between his official and private capacities. As the White House argued in its brief on the Kennedy Notes, the President is sui generis for this reason. His duties are so overwhelming, and the demands on his time and attention so numerous, that the distinction between his official and personal capacities can be blurred. This point is illustrated by such ordinary details as the involvement of government officials and resources in such personal affairs as the President's living arrangements, security, food, and travel. Indeed, the amount of government involvement in such an obviously personal affair as the President's family vacation provides a good example of how uniquely "official" the President's "personal" capacity is.

Nevertheless, the above discussion regarding the common-interest doctrine relates only to the question of whether the Office of the President and the President in his personal capacity may ever have a common interest. This same discussion applies to all legal proceedings—those against another branch or agency of the government, and those against a private entity or individual. Whether these two clients have a common interest in any given proceeding,

135. For instance, in the case of the Kennedy notes, while the President's private counsel may have been contemplating litigation with the RTC, the White House Counsel was not a party to that litigation, and should not be viewed as a party merely because it, like the RTC, is a department of the federal government. The White House Counsel's duties ran toward the Office of the President, and, while it would have been improper for the White House Counsel to interfere in the RTC litigation, it would have been equally unethical for them to fail to represent the interests of the Office of the President in reacting to the reports of the RTC investigation.

In addition, at the time of the relevant meeting there was also the possibility of congressional hearings involving the Clintons. On November 4, the day before the meeting, the House Small Business Committee officially requested a report from the Small Business Administration on David Hale's activities and his allegations that his company had loaned money to Susan McDougal and to the Whitewater Corporation. See Rempel & Franz, supra note 5; Schmidt, supra note 5; Seper, supra note 5. It appeared at the time that, after receiving the report, the House Committee might begin an investigation into Hale's allegations. The President's two sets of lawyers would clearly have a common interest in preparing for any congressional hearings—to satisfy the committees that neither the Clintons nor any other White House staff had done anything improper. Therefore, in light of these two threats of future litigation, the meeting was covered by the common-interest doctrine.

In the case of the Sherburne-Nemetz notes, the reasoning would be similar. Both congressional hearings and an independent counsel investigation could theoretically give rise to impeachment proceedings. These proceedings would implicate the interests of both the White House and the Clintons personally.
White House Counsel

however, necessarily depends on the nature of the proceedings, and, more importantly, the nature of the government officials' interests.

4. Waiver of the Attorney-Client Privilege: The Presence of Non-Attorneys

An issue that might arise with regard to this sort of meeting (and one which did arise in the disputes over the Kennedy notes and the Sherburne-Nemetz notes) is the presence at the meetings of White House officials who are not attorneys, or not working in the White House as attorneys. Some have argued that the presence of a third party who is neither an attorney nor a client results in a waiver of any attorney-client privilege that might otherwise cover the meeting.

There are two points to be made on this issue. First, it is true that, ordinarily, any privilege covering communications between an attorney and a client which are made in the presence of a third party is deemed to have been waived. As discussed above, the common-interest rule is one exception to this rule. In addition to communications among attorneys, the common-interest rule also protects communications between one client and an attorney for another client when the clients have a common interest. Second, under Upjohn v. United States, the communications between an employee of an organization and an attorney for that organization are protected by the attorney-client privilege if the communications were necessary for the counsel to provide legal advice to the corporation. This same analysis applies to

136. Bruce Lindsey was present at the meeting at which the Kennedy notes were taken, and, of course, Mrs. Clinton was present at the meetings where the Sherburne-Nemetz notes were taken. Both are attorneys, but neither was working as a member of the White House Counsel's Office at that time. Lindsey's title at the time was Assistant to the President and Director of Presidential Personnel.

137. For instance, several Republican members of the Senate Whitewater Committee members argued that because Lindsey was present and acting neither as a lawyer nor as a client, any expectation of confidentiality in the meeting was lost, and the privilege was waived. See, e.g., 141 CONG. REC. S18,990 (daily ed. Dec. 20, 1995) (statement of Sen. Domenici); 141 CONG. REC. S18,983 (daily ed. Dec. 20, 1995) (statement of Sen. Specter); 141 CONG. REC. S18,973 (daily ed. Dec. 20, 1995) (statement of Sen. Thompson); 141 CONG. REC. S18,963 (daily ed. Dec. 20, 1995) (statement of Sen. Hatch); 141 CONG. REC. S18,946 (daily ed. Dec. 20, 1995) (statement of Sen. Bennett).


139. See supra Subsection II.A.3.

140. See, e.g., United States v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997); United States v. Moscony, 927 F.2d 742, 751 (3d Cir. 1991); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). Supreme Court Standard 503 also covers communications between a client and "a lawyer representing another in a matter of common interest." Moscony, 927 F.2d at 751.


142. See id. at 393. Of course, the Eighth Circuit refused to apply Upjohn in the case of the Sherburne-Nemetz notes. See supra Subsection II.A.2. for a discussion of this decision.
communications between a government agency and its attorneys.\textsuperscript{143}

Therefore, communications between a White House official and members of the White House Counsel which are made for the purpose of obtaining legal advice are privileged under \textit{Upjohn}. Moreover, where the White House Counsel and President's private counsel meet on a matter of common interest (that is, where the Office of the President and the President in his personal capacity have a common interest), the proceedings at this meeting are also privileged. Under federal common law, these privileges intersect: where the White House official's communications would be privileged if shared only with White House Counsel, they are also privileged when they are shared with the President's private counsel. Therefore, the presence of a White House official at the meeting does not waive any privilege that applied to the meeting, as long as the communications were necessary to the attorneys' ability to render legal advice to their clients.\textsuperscript{144}

The common-interest doctrine applies to work product, as well as to attorney-client communications;\textsuperscript{144} thus, a non-attorney's presence has no

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\textsuperscript{143} See Department of Public Works v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303, 310 (Dist. Ct. App. 1964) (arguing that in determining the extent of attorney-client privilege where the client is a state, "the problem is the same where the client is a body politic as where the client is a corporation"); 6 U.S. Op. Off. Legal Counsel at 481, 495-97 (1982) (noting that \textit{Upjohn} analysis of corporate "client" in attorney-client relationship is helpful in examining attorney-client relationship in government context).

According to the \textit{Restatement of the Law Governing Lawyers}, the attorney-client privilege covers communications "made between privileged persons . . . in confidence . . . for the purpose of obtaining or providing legal assistance for the client." \textit{RESTATEMENT OF THE LAW GOVERNING LAWYERS} § 118 (Proposed Final Draft No. 1, 1996). The term "privileged persons" includes "agents" who "facilitate communications between" the client and his lawyer. \textit{Id.} at § 120. The section on the privilege in the governmental context refers to these two sections in defining the scope of the privilege for a governmental client. \textit{See id.} at § 124.

\textsuperscript{144} In the dispute over the Kennedy notes, the White House made a different argument with regard to Lindsey's role at the meeting. It took the position that Lindsey was doing legal work for the White House, even though he was not a member of the White House Counsel. See \textit{White House Brief, supra note 3, at 9 & n.1; see also Williams & Connolly Brief, supra note 7, at 24-25 (Lindsey was "providing legal advice and analysis to the Office of the President, . . ."). This analysis is more complicated, because it essentially rests on a factual determination of the role that Lindsey played at the meeting. He had admitted to performing a number of non-legal functions, such as handling press inquiries. While it is possible that Lindsey's role at the meeting was to some extent legal, it was probably not exclusively legal. Courts agree that there is no privilege covering non-legal advice, even when it is given by a lawyer to his client. \textit{See, e.g., Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8 (D.D.C. 1991) (holding that business advice is not privileged); McCaugherty v. Siffermann, 132 F.R.D. 234, 238 (N.D. Cal. 1990) (same). Moreover, when an attorney's communication is a combination of legal and non-legal advice, the communication is not privileged unless "the communication is designed to meet problems which can fairly be characterized as predominantly legal." \textit{Leonen v. Johns-Manville, 135 F.R.D. 94, 99 (D.N.J. 1990) (quoting Cuno, Inc. v. Paul Corp., 121 F.R.D. 198, 204 (E.D.N.Y. 1988) (citing 2 J. \textsc{Wein}stein \\textsc{&} M. \textsc{Ber}ger, \textsc{\textit{Weinstei}n's Evidence,} § 503(a)(1)(01), at 503-22 (1990))). The burden is on the party claiming the privilege to demonstrate that the communication "would not have been made but for the client's need for legal advice or services." \textit{Leonen, 135 F.R.D. at 99 (quoting First Chicago v. United Exch. Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989)). Therefore, the White House would have had to satisfy this burden. Of course, this argument would apply only where the White House official present at the meeting is an attorney.

\textsuperscript{145} \textit{See, e.g., In re Grand Jury Subpoena 89-3 \\& 89-4, 902 F.2d 244, 249 (4th Cir. 1990); Transmirra Prods. Corp. v. Monsanto Chemical Co., 26 F.R.D. 572, 578-79 (S.D.N.Y. 1960).}
effect on the work-product privilege. Therefore, the presence of a White House official does not constitute a waiver of that privilege either.

5. The Crime-Fraud Exception

Another issue that merits discussion is the crime-fraud exception to the privileges. It bears mentioning only because it received a great deal of attention in the fight over the Kennedy notes, and thus seems likely to be raised—at least in public statements—in future disputes. It is impossible to make a general statement as to whether the crime-fraud exception applies because it necessarily depends upon the facts of a given case. The important point to be made here is that the allegation of an improper transfer alone, without the support of independent evidence of criminal activity, is not enough to satisfy the requirements for the crime-fraud exception.

The Supreme Court has recognized a crime-fraud exception to the attorney-client privilege where the communication will be used to further future wrongdoing, that is, “where the desired advice refers not to prior wrongdoing, but to future wrongdoing." The exception also applies to work product. However, courts agree that there are two steps necessary before one may prevail in applying the exception. First, the burden is on the movant—the party seeking to apply the exception—to produce independent evidence of the likelihood that the exception applies. According to the Supreme Court, the movant must satisfy an objective standard of the likelihood of wrongdoing: “the judge should require a showing of a factual basis adequate to support a good-faith belief by a reasonable person” that the exception applies.

146. Several Republican Committee members argued that, because an improper transfer may have been made at the meeting, the privilege was lost under the crime-fraud exception. See 141 CONG. REC. S18,975 (daily ed. Dec. 20, 1995) (statement of Sen. Thompson); 141 CONG. REC. S18,963 (daily ed. Dec. 20, 1995) (statement of Sen. Hatch); 141 CONG. REC. S18,945 (daily ed. Dec. 20, 1995) (statement of Sen. D'Amato).

147. United States v. Zolin, 491 U.S. 554, 562-63 (1989) (quoting 8 WIGMORE § 2298, at 573). “It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.” Id. at 563 (citations omitted).

148. See, e.g., In re Richard Roe, Inc., 68 F.3d 38, 40 n.2 (2d Cir. 1995); In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994); Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994), modified, 30 F.3d 1347 (11th Cir. 1994); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 142 (Proposed Final Draft No. 1, 1996).


150. Zolin, 491 U.S. at 572 (citing Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)).
Second, if the movant satisfies this burden, the court must conduct an in camera inspection of the materials to determine whether the materials fall within the exception. In any case, it is clear that the mere possibility or allegation that the communications were used to further wrongdoing is insufficient; there must be independent evidence of this, before even an in camera inspection of the materials is appropriate.

151. See id. at 574, 575.
152. See id. at 571-72.
153. The Senate debate over the Kennedy notes offers a good example of the misapplication of this principle. None of the floor statements of the Committee members contained any reference to independent evidence that supported the Committee's suspicion about the meeting. Indeed, the two senators who discussed the issue at any length were both very speculative in their allegations of supposed wrongdoing. One senator argued that the White House Counsel "may have gained through their official capacities." 141 CONG. REC. S18,963 (daily ed. Dec. 20, 1995) (statement of Sen. Hatch) (emphasis added). Therefore, he argued, "to find out whether anything illegal occurred [at the meeting], the President must disclose the notes." Id. (emphasis added). Another senator argued that the notes were not privileged because "discussions may have been held about certain information that may have been improperly passed to private lawyers . . . ." 141 CONG. REC. S18,973 (daily ed. Dec. 20, 1995) (statement of Sen. Thompson) (emphasis added). These arguments are clearly insufficient under the Supreme Court's standard for the crime-fraud exception, which requires some independent evidence of wrongdoing. See Zolln, 491 U.S. at 574, 575.

Even if the Committee could somehow have presented enough independent evidence to satisfy the court that the crime-fraud exception might apply, it is not at all clear that the Committee would have received the notes. Once the movant, here the Committee, satisfies the initial burden, the materials are turned over to the court for an in camera inspection to determine whether they fall under the exception. However, it is not clear from examining the notes themselves that the meeting was held to assist some wrongdoing, simply because the notes themselves are impossibly cryptic. Republican members of the Committee and news reports on the notes focused on two excerpts from the notes. The first, at the top of the first page of the notes, reads:

1. Gather the Facts—Chronologies, etc.
2. Try to find out what's going in Investigation
3. Respond to Requests that are made
4. Strategy for Dealing with the Media
   — One Person.


The second passage that drew notice was a few cryptic lines which read:

Vacuum Rose Law Files WWDC Docs-subpoena

*Documents—>never know go out
Quietly

Kennedy Notes, supra, at 7; see also Fritz, supra (reporting "vacuum" reference in notes); Labaton, supra (same), Quinn-Judge, supra (same); Susan Schmidt & Charles R. Babcock, Whitewater Notes Sketchy on Meeting, WASH. POST, Dec. 23, 1995, at A3 (same); Seper, supra (same).

A number of the Republican Committee members claimed that these passages confirmed their suspicions that the meeting was held for illegitimate purposes, while the White House argued that these portions proved nothing. The Republicans claimed that the phrase "try to find out what's going in the investigation" in the first passage showed that the government lawyers were using their positions to convey confidential government information to the Clintons' private counsel. See Fritz, supra (noting that Senator D'Amato believed that passage could indicate that members of the White House Counsel could use position to obtain confidential information); Labaton, supra ("Republicans say this [passage] shows how Government (sic) lawyers were being used inappropriately to assist the Clintons' private
6. The "Substantial Need" Exception to the Work-Product Doctrine

A final issue that might arise in an attempt to invade the work-product privilege is whether the notes of a meeting fell within the exception to the work-product doctrine. While the attorney-client privilege is absolute, the work-product doctrine is not. Under Hickman v. Taylor and Federal Rule of Civil Procedure 23(b)(3), the work-product doctrine includes an exception for situations where the opposing party demonstrates, first, that it has "substantial need" for the materials, and second, that the party is unable to obtain the substantial equivalent of the materials without "undue hardship."
This exception does not extend, however, to the mental impressions and opinions of an attorney, known as "opinion work-product." In any case, such a showing would be very difficult with regard to the notes of a meeting between two sets of lawyers, both because the notes are likely to fall within the category of "opinion work-product" and because the substantial equivalent of the notes—the sworn testimony of those present—is likely to be available.

The Supreme Court, as well as every lower court to consider the issue, has found that "opinion work-product" is treated differently from other forms of work-product and is not subject to the "substantial need" exception. In Upjohn, the Court held that "such work product [reflecting attorneys' mental processes and oral statements] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." These materials enjoy an absolute or near-absolute privilege.

The notes of a meeting between two sets of lawyers would almost certainly be considered opinion work-product, subject to a heightened level of protection. The notes of a strategy meeting among attorneys are clearly opinion work-product because they tend to reflect the thoughts and opinions of the attorneys. Courts unanimously agree that an attorney's notes from interviewing a witness or client (if the White House official were present) are also considered opinion work-product because of their tendency to reveal the attorney's thoughts. Therefore, the notes would be treated as opinion work-product subject to a higher standard of protection, and protected by an absolute

consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.


158. The Upjohn Court explicitly refused to resolve a difference among lower courts as to whether such materials are absolutely protected (and thus never discoverable upon any showing of need), or whether they could occasionally be obtained by satisfying some indefinite higher standard. See id. at 401. Since the Upjohn decision, this split has continued. Although an apparent majority of courts recognize an absolute privilege with regard to opinion work-product, see, e.g., National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 983-84 (4th Cir. 1992) (holding that opinion work-product is absolutely privileged); In re Martin Marietta Corp., 856 F.2d 619, 626 (4th Cir. 1988) (same); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974); In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973); Diamond State Ins. Co. v. Rebel Oil Co., 157 F.R.D. 691 (D. Nev. 1994); Ward v. Maritz, 156 F.R.D. 592, 594 (D.N.J. 1994), some courts instead have held that opinion work-product enjoys "a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

The difference, however, between these two lines of cases is negligible. Although the latter group of cases finds a non-absolute privilege, these courts almost without exception refuse to breach the privilege. See, e.g., Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1422-23 (11th Cir. 1994) (refusing to breach privilege); Sponck v. Pell, 759 F.2d 312, 316 (3d Cir. 1985) (same); In re Murphy, 560 F.2d at 336 (same); International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 187 (M.D. Fla. 1973) (same).
White House Counsel

or near-absolute privilege, regardless of whether a White House non-attorney were present.\textsuperscript{159}

B. \textit{The Executive Privilege}

The executive privilege is another ground on which the White House might attempt to resist a subpoena.\textsuperscript{160} Although the Clinton administration has often chosen to oppose subpoenas on other grounds—undoubtedly in an effort to avoid any similarity or comparisons to the Nixon White House and its assertion of the executive privilege in the Watergate investigation\textsuperscript{161}—the executive privilege does offer a viable grounds for resistance in certain situations. Therefore, it merits discussion in this context.

1. \textit{Executive Privilege Generally}

The general framework for considering claims of executive privilege was established by the Supreme Court in \textit{United States v. Nixon}.\textsuperscript{162} The \textit{Nixon} Court recognized an executive privilege that is broad but not invincible. It found that any communications between the President and his advisors are presumptively privileged.\textsuperscript{163} The Court recognized this broad presumptive privilege because it found that the public interest is served by having the President receive advice that is more likely to be forthright because of its privileged nature.\textsuperscript{164} Stated differently, the Court found that the President's advisors would hesitate to speak bluntly or to make potentially embarrassing or unpopular statements if all of their communications were subject to easy

\textsuperscript{159} The same result—nondisclosure—would almost certainly occur even if the notes of a meeting were deemed only "fact work-product" and thus subject to the substantial need exception. One seeking the notes probably could not demonstrate a substantial need for the notes because in most instances, that authority (most likely a grand jury or congressional committee) could obtain the "substantial equivalent" of the notes—the sworn testimony of the participants both as to the facts underlying the meeting and the substance of the meetings. Therefore, there is little compelling reason to require the production of the otherwise privileged notes.

\textsuperscript{160} Some courts now draw a distinction between two types of executive privilege: the "presidential communications executive privilege" and the "deliberative process executive privilege." See, e.g., \textit{In re Sealed Case}, 116 F.3d 550 (D.C. Cir. 1997). The only one of these two which might apply to the type of materials discussed here is the former. For the sake of simplicity, this article will refer to the presidential communications privilege as the executive privilege.

\textsuperscript{161} The President's spokespeople continually argued that the President only wanted the same right to attorney-client confidentiality that every citizen enjoys. For example, in a statement issued to the press, Mark Fabiani of the White House Counsel's Office said: "Every American has the right to seek private advice from a doctor, lawyer, or minister. Senators, Speakers, and Presidents enjoy this same right . . . ." The statement expressed a desire to reach a compromise that "would provide the information the Committee requests without violating the important principle that every American has a right to seek private advice from a lawyer." Statement of Mark Fabiani, Special Associate Counsel to the President (Dec. 12, 1995).

\textsuperscript{162} 418 U.S. 683 (1974).

\textsuperscript{163} See id. at 705-06.

\textsuperscript{164} See id. at 705.
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disclosure. However, within this broad privilege, the Court recognized a hierarchy among privileged materials. Materials dealing with especially sensitive topics, such as national security, receive a higher degree of protection than other communications. This is because of the obvious additional need (beyond simply encouraging forthright advice) for confidentiality in dealing with such topics.

The general presumptive privilege may be overcome. A court considering a claim of executive privilege must weigh the general privilege afforded to all materials against the other branch's need for the materials. This analysis focuses on two factors. First, the court must examine the extent to which the subpoenaed materials are fundamental to the other branch's function, and conversely, the extent to which depriving the other branch of the materials would "impair the basic function" of that branch. Second, the court must consider the extent to which the release of the materials in this type of situation would affect the future actions of Presidential advisors—whether, by releasing the materials in a given situation, such advisors would temper their advice in the future out of fear of having the content of their communications publicized.

Cases from the lower courts have also added some detail to this framework. First, the type of conduct that a subpoenaed document might reveal is not a

165. "[T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." Id. "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. These are the considerations justifying a presumptive privilege for Presidential communications." Id. at 708. The Court also cited the secrecy of the Constitutional Convention in 1787 as proof that "[t]here is nothing novel about governmental confidentiality." Id. at 705 n.15.

166. See id. at 706. The Court distinguished between a "broad, undifferentiated claim of public interest in the confidentiality of such conversations" and the "need to protect military, diplomatic, or sensitive national security secrets." Id. It also noted that in dealing with military or diplomatic secrets, "courts have traditionally shown the utmost deference to Presidential responsibilities." Id. at 710. "No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality." Id. at 711; see also Peter M. Shane, Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress, 71 MINN. L. REV. 461, 472 (1987) ("The other critical point from Nixon is the Court's implication that different claims of privilege may be accorded different weights according to the basis of the claims.").

167. See Nixon, 418 U.S. at 707 ("[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

168. Id. at 712. The Court noted that allowing the executive privilege to deprive the court of relevant evidence would "gravely impair the basic function of the courts." Id.

169. For instance, the Court noted, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." Id. This second consideration seems necessarily a function of the likelihood of a given type of situation arising again. If the situation in which a communication is sought is rare, the release of the communication will have little effect on future advice because of the rarity of that situation. In contrast, if the advice is sought in a very ordinary situation, the eventual release of that advice will have more of a chilling effect in the future because of the future threat of disclosure.
consideration in determining whether the executive privilege covering that document can be defeated. Rather, the asserted need depends solely "on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." Second, the presumptive privilege extends beyond communications with the President. It is now clear that the executive privilege attaches not only to communications with the President, but also to communications among his senior advisors, even when they are not made directly to the President. The executive privilege applies to "communications made by presidential advisors in the course of preparing advice for the President," as well as to "communications which these advisors solicit[] and receive[] from others as well as those they authored themselves." It also extends to "communications authored or received in response to a solicitation by members of a presidential advisor's staff." Finally, it appears that the presence or advice of nongovernmental officials in a meeting does not constitute a definite waiver of the executive privilege. The D.C. Circuit has stated in dicta that a President's Article II right to receive confidential advice includes advice from private citizens. Citing the historical precedent for Presidents' reliance on informal advisers and the President's interest in receiving confidential advice, the court concluded that "[a] statute interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns."
The application of this framework varies depending on the reason for which the materials are being sought. The *Nixon* Court held that the general presumptive privilege that attaches to presidential materials will always be defeated by a district court subpoena *duces tecum* that is required for the prosecution of a federal criminal case, as long as there is a “demonstrated, specific need” for the materials in the trial. The standard is essentially identical where a grand jury subpoenas materials to which the presumptive privilege applies. The required showing consists of two components: the party must show that each discrete group of subpoenaed materials likely contains important evidence—that is, that “the evidence sought must be directly relevant to issues that are expected to be central to the trial”—and that the evidence is not available with due diligence elsewhere. According to the *Nixon* Court, a subpoena that satisfies the requirement of demonstrated specific need must prevail over the presumptive privilege for two reasons. First, allowing the privilege to deprive a criminal trial of relevant and admissible evidence would “impair the basic function of the courts.” Second, disclosing the communications would have a minimal impact on Presidential advisors in the future, because the occasions in which executive materials are sought for a criminal prosecution are infrequent. The Court held, therefore, that the general assertion of privilege could not prevail over the subpoena.

Courts take a more skeptical approach to congressional attempts to obtain privileged materials. The *Nixon* court explicitly stated that its conclusion that the privilege could be defeated on a showing of demonstrated, specific need applied only to cases in which the materials are necessary for a criminal trial:

> We are not here concerned with the balance between the President’s generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information . . . . We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

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179. *Id.* at 713.
180. *See In re Sealed Case,* 116 F.3d 550, 577 (D.C. Cir. 1997). The test for a grand jury subpoena differs in only one way. Materials sought by a grand jury need not be admissible at a criminal trial, while materials sought pursuant to a Rule 17(c) subpoena must be admissible. *See id.*
181. *Id.* at 575.
183. *See id.* at 712; *see also supra* note 147 (discussing the ways in which a court would determine the probable effect on advisors in the future).
184. *See id.* at 713 (“The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”).
185. *Id.* at 712 n.19.
White House Counsel

The only decision that does deal with a congressional attempt to invade the privilege is Senate Select Committee. In that case, a Special Prosecutor and a Senate committee were investigating Watergate. The Senate committee issued a subpoena directing President Nixon to turn over recordings of certain meetings, and the President refused to comply, invoking the executive privilege over the recordings. The D.C. Circuit found that the Senate committee had failed to show that the materials were necessary to the fulfillment of its constitutional responsibility.

The committee argued that its investigation was an appropriate function under its legislative authority (because legislation might result from the investigation) and under Congress' power to oversee the executive branch. The court rejected the latter justification because the House Judiciary Committee was also investigating these matters, and the Senate investigation was thus redundant, and that, therefore, there was little need for the tapes. It also hinted at some skepticism of the asserted general oversight function. More importantly, the court found that the tapes were not essential to the legislative process, because a precise reconstruction of past events is not necessary to the legislative process: legislative judgments depend more on predicted consequences than on past events. Therefore, the court held, the committee had not shown that the tapes "were critical to the performance of its legislative functions," and the claim of privilege prevailed.

The courts apply this substantive law in a somewhat unusual procedural framework. They are to use a "staged decisional structure" for examining requests for materials for which the executive asserts the general, "presumptive" executive privilege. In this structure, an authority requesting materials for which the privilege has been invoked must make a strong showing

187. In fact, the Committee issued two subpoenas: the other directed the President to produce all records that related to the "activities, participation, responsibilities or involvement of twenty-five named persons in any alleged criminal acts related to the Presidential election of 1972." Id. (internal quotation marks omitted). The district court issued an order quashing this second subpoena. It found that the subpoena was "too vague and conclusory to permit a meaningful response" and "wholly inappropriate given the stringent requirements applicable where a claim of executive privilege has been raised." Id. at 728 (internal quotation marks omitted). This order quashing the second subpoena was not appealed to the D.C. Circuit, and the circuit court did not review it. See id.
188. See id. at 727.
189. See id. at 731-32.
190. See id. at 732. The court noted that the House Judiciary Committee had begun an inquiry into impeaching the President, and that therefore the House investigation had "an express constitutional source." See id.
191. "In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution." Id. at 728.

192. See id.
193. Id.
194. Id. at 730.
of need—"a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations"—before the presumption that the general confidentiality of presidential materials serves the public interest will fail. If a court finds that an adequate showing of need has been demonstrated, it is to conduct an in camera examination of the materials. The President may raise more specific reasons why the privilege should be upheld (beyond the standard presumption of privilege) as part of this in camera examination. If the court is convinced that the other party has satisfied its burden, it may compel the President to turn the materials over to the court. However, the materials are not necessarily made available to the party seeking them. Based on its in camera inspection of the materials, the district court is to excise any non-relevant materials, and make the rest of the materials available to the party seeking it.

The Supreme Court in Nixon stressed the importance of this duty of the district court, and the care with which the court must act in not disclosing especially sensitive materials. Finally, any materials that the court does not find to be relevant to the purpose for which they are sought are restored to their privileged status and "returned to their lawful custodian."

2. The Executive Privilege and Attempts To Discover the Content of Meetings Between Private Counsel and the White House Counsel

Any notes of meetings between the White House Counsel and the President's private counsel (including perhaps other White House officials) are almost certainly covered by the presumptive privilege. The D.C. Circuit has held that communications among the President's senior advisors, as well as communications they made in the course of preparing advice for the President, communications they solicited or received from others, and communications made in response to a solicitation by a member of the President's staff, are all covered by the presumptive privilege. Under the first part of this definition, communications among members of the White House Counsel and other

195. Id.
197. See Nixon, 418 U.S. at 706, 714-15; In re Sealed Case, 116 F.3d at 565; Senate Select Comm., 498 F.2d at 730.
198. See Nixon, 418 U.S. at 706, 713-14; Senate Select Comm., 498 F.2d at 730-31.
199. See Nixon, 418 U.S. at 714-15 (directing the district court to protect against the release of any parts of the subpoenaed documents that were not relevant to the purposes of the trial, for which they were sought, or that were not admissible at that trial); In re Sealed Case, 116 F.3d at 565.
200. See Nixon, 418 U.S. at 714-15 (stressing need to accord President full confidentiality wherever possible).
201. Id. at 716.
202. See In re Sealed Case, 116 F.3d at 572.
White House Counsel

White House staff are clearly covered by the presumptive privilege. Indeed, the D.C. Circuit has specifically held that communications among members of the White House Counsel and other senior staff are covered.\footnote{See id. at 578-79.} Moreover, any communications between the President’s private counsel and the White House Counsel are also covered by the privilege. They would be covered by the latter part of the explanation of the privilege’s scope, which extends the privilege to communications that White House officials solicit or receive from others. This conclusion squares with the D.C. Circuit’s statement in dicta that the fact that the source of a communication is not a White House official is not a bar to a finding that the communication is privileged. Therefore, the proceedings at a meeting between these two groups of attorneys would fall within the scope of the presumptive privilege.

Of course, this privilege may be defeated. It may succumb to a sufficient showing of need by a judicial proceeding (a grand jury or criminal trial) or, at least theoretically, by the Congress. However, the courts have drawn a distinction between the two: it is more deferential to claims for privileged materials that are made by judicial proceedings than to claims by Congress. Of course, the question of privilege has come up in both situations: the Kennedy Notes were sought by a Senate committee, and the Sherburne-Nemetz Notes were the subject of a grand jury subpoena. Therefore, it is necessary to analyze the two putative types of requests separately.

a. Judicial Proceedings and the Notes of These Meetings

The easier of the two questions is whether a judicial proceeding will prevail over a claim of executive privilege. A grand jury or criminal trial subpoena will always prevail over the privilege, as long as the authority seeking the materials can satisfy the required showing of a demonstrated, specific need. This requirement includes two components: the materials must be likely to contain important evidence, and must not be available with due diligence elsewhere. These requirements are not hollow or pro forma.\footnote{See In re Sealed Case, 116 F.3d at 581 (finding an insufficient showing of need because the Independent Counsel failed to show that the information sought was unavailable from other sources).} For instance, a court might examine whether grand jury testimony from one of the attorneys at the meeting was an adequate substitute. However, if a prosecutor satisfies this requirement, the privilege is overcome. The materials are submitted for an in camera review, and the White House is given a chance to raise any more particularized objections to producing the materials. After reviewing the materials, the court must hand over any materials relevant to the purpose for which they are sought, and return all others to the White House.
b. Congressional Requests and the Notes of These Meetings

The more difficult question arises when Congress requests materials that are covered by the privilege. A court considering such a request must weigh the benefits to present and future advisors of keeping the conversations privileged against the extent to which the materials are needed by another branch to fulfill its function. It is difficult to speak generally on this matter, because the determination is necessarily somewhat factual. Nevertheless, one can consider generally a situation in which a president’s lawyers meet, and Congress attempts to discover notes of that meeting. What is most striking about such a scenario is that each side can make only a fairly weak argument on its own behalf. The privilege, however, should survive the challenge, though primarily as a result of the weakness of Congress’s argument of need for the notes, and the courts’ skepticism toward such requests, rather than the strength of the argument for protecting the privilege.

Congress would face an uphill battle in showing a sufficient need for the notes. The showing necessary to invade the privilege is a function solely of “the nature and appropriateness of the function in the performance of which the material [is] sought, and the degree to which the material [is] necessary to its fulfillment.” In most situations, Congress would have to base its claim for the materials on its exercise of a constitutional oversight function: its purported duty to oversee the executive branch. While there is little question that such a function exists, it is almost certainly secondary to Congress’ primary function of legislation. In this context, it seems unlikely that Congress could satisfy the requirement placed on it by Senate Select Committee—that of showing that the subpoenaed materials are “demonstrably critical to the responsible fulfillment” of Congress’ function. The contrast between this scenario and that in cases such as Nixon is striking. In this type of situation, Congress would be seeking the notes in furtherance of a purpose that is of a secondary function, whereas the district court’s claim for the materials in Nixon arose out of the most essential and constitutionally significant function of the judiciary—determining the guilt or innocence of individuals charged with a crime.

206. In addition, some have argued that Congress at times has approached the limits of its constitutional oversight function. For instance, one commentator has argued that the Senate Whitewater Committee may have exceeded its powers by focusing on events that took place before the Clinton Administration. See John Podesta, Misusing Congress’ Investigatory Power: ‘Targeting’ Individuals Is an Abuse, LEGAL TIMES, Feb. 12, 1996, at 24.
207. Senate Select Committee, 498 F.2d at 731.
Another factor is that an Independent Counsel, once appointed, may be investigating the very same matters as the Congress. If the Independent Counsel has access to the materials (as he or she very well might under the preceding section), Congress’ attempts to obtain the documents may be redundant. In *Senate Select Committee*, the D.C. Circuit relied on the fact that the investigation in furtherance of which a Senate subpoena had been issued was redundant, or “cumulative,” in refusing to defeat the executive privilege. If the subpoenaed materials have been produced to an Independent Counsel, the court might refuse to invade the privilege on the grounds that the role of unearthing any wrongdoing in the executive branch is more central to the role of the Independent Counsel than to that of the Congress, so that the disclosure to Congress would be unnecessary.

The White House could make a more compelling argument in support of the privilege in most situations. The second consideration under *Nixon* is the extent to which allowing the privilege to be defeated in a certain situation would affect presidential advisors in the future. Requiring disclosure in the face of a congressional subpoena would probably have a substantial impact on future advisors because congressional investigations of the affairs of the executive branch are quite common. Since the Reagan Administration, congressional investigations of the executive branch have become both broader in scope and more common. These investigations often include enormous document requests which are, at least on occasion, intended to harass the executive branch rather than to assist the Congress in fulfilling a legitimate constitutional duty.

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208. See id. at 732.
209. See *Nixon*, 418 U.S. at 712 (“[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of criminal prosecutions.”).
210. See, e.g., Shane, *supra* note 166, at 463 (“[T]he occasions for invocation of the executive privilege may well become more numerous over time because of developments in both the executive and legislative branches.”). Professor Shane cites the increase in staff in both branches as one reason for this greater occurrence. See id. The increased politicization of congressional investigations in the wake of the “October Surprise” and “Iraqgate” investigations may also have contributed to the greater frequency of such investigations.
211. Indeed, the document requests sometimes are just a method by which congressional committees attempt to divert executive branch officials from other duties. A memorandum which is believed to be from Virginia Thomas, House Majority Leader Aramay’s liaison to committee chairmen, to House chairmen entitled “Oversight Meeting: Topic—Carrying Out the Republican Agenda: Hearings and Markups” was circulated after the House hearings on the Waco standoff. (The Waco hearings were deemed a failure by the House leadership). The document provides some insight into the purposes behind some congressional hearings. As articulated here, these purposes could hardly be described as legitimate legislative activity. Most telling is an item under the heading “Lessons Learned, Observations, and Suggestions.” Its advice is intriguing:
Do not be put off by the Administration. They are often our foe. Demand documents, draft tough letters, and recall [Rep. John] Dingell and others who forced Republican Administrations to spend a lot of time on their requests. *Philosophy—the more time employees of the Administration have to respond to legitimate Congressional requests, the less time they have to carry out their agenda.* Many bureaucrats in the Administration believe the Republicans will
common instance, in which a congressional committee is investigating alleged wrongdoing in the executive branch, it seems unlikely that any presidential advisor could ever speak candidly without a very credible fear that his remarks will be disclosed.212 Ironically, this is partly the result of the ever-increasing bounds of the oversight function that Congress claims. If the Committee argues that its oversight authority is broad, then the court should find a compelling reason to sustain the claim of executive privilege, because if the privilege does not apply in such situations, there are very few communications within the White House that would not be subject to disclosure, and the candor that the Supreme Court sought to protect in Nixon would suffer. Again, the contrast with Nixon should be noted. The Nixon court was faced with the extremely unusual situation of a criminal prosecution of top White House officials. A court reviewing a congressional subpoena for notes of a meeting between a President's private and official attorneys would consider the rather commonplace situation of congressional oversight of the executive function. If any oversight committee can breach the privilege, and at least one oversight committee is looking into matters at almost all times, the executive privilege could become a rather hollow privilege.213

Overall, it seems unlikely that a court would or should conclude that the public interest in breaching the attorney-client privilege on the basis of a congressional request outweighs the chilling effect that such disclosure would have on future communications. The fact that congressional investigations and document requests are on occasion motivated by purposes that are less than central to Congress's role and would likely deter future advisors from speaking frankly, reinforces this conclusion.

be out in two years and are stalling at any cost. Oversight Meeting: Topic—Carrying out the Republican Agenda: Hearings & Markups at 2 (on file with author) (emphasis added).

The memorandum also includes other advice. One item is entitled "Remember the Democrats did not play fair in past Congresses." Id. at 1. Chairmen are advised to schedule their witnesses in the morning "to meet press deadlines," and to schedule Democratic witnesses in the afternoon. Id. at 1. Chairmen are also advised to run mock hearings and mark-ups in preparing for actual hearings. See id. at 2. Finally, they are also told to "beware of the media cycle. What else is happening in the world and how are we going to compete against it?" Id.

212. For a discussion of the effects of this dispute and its resolution on future disputes, see infra Part III.

213. There is another consideration in the case of the Kennedy notes. Even if a court were to hold that the Committee had sufficiently shown the need to defeat the privilege, the result would have been an in camera investigation by the court. Under Nixon, the materials would have had to be relevant to the stated purpose for their discovery. See United States v. Nixon, 418 U.S. 683, 714-15 (1974). In order to be relevant, the materials would have had to include evidence of wrongdoing in the executive branch, because the Committee's justification for the investigation was its duty to oversee the executive branch. Therefore, the court could release only those portions of the notes which were evidence of wrongdoing in the executive branch. As discussed above, the only suspicious part of the twelve pages of notes was the reference to "vacuum Rose Law files." If a court had been persuaded that this was evidence of executive branch misconduct—in context, even this was not clear—it might have released this portion of the notes. However, even then, the rest of the notes would have resumed their privileged status and been returned to the White House. See Nixon, 418 U.S. at 715.
III. PRACTICAL LESSONS FROM THESE EPISODES

Of course, when the White House decides whether to resist a subpoena on privilege grounds, it considers more than whether the privilege claim is legally viable. Political considerations are almost certainly more important in most instances. The President cannot, and would not, simply rest on the force of his legal arguments in making a privilege claim. On the other hand, the President may also hesitate to make a privilege claim that is probably doomed to ultimate failure because of its lack of legal merit, because this fate might serve only to create an impression that the White House is “stonewalling.” It seems that the President will need to have good cases in both the legal and political sphere before he decides to take a stand on a privilege claim. The politics of a privilege claim are obviously a difficult matter to predict and probably would depend on the specific facts of the privilege claim. Nevertheless, certain general observations can be made about these political realities.

A. Effect on Future Disputes Over Materials Claimed to Be Privileged

First, the way in which the disputes over both the Kennedy notes and the Sherburne-Nemetz notes were resolved is likely to have an effect on the outcome of similar disputes in the future. The resolution of the latter through the Eighth Circuit decision will obviously have some effect simply because of its precedential weight. Future cases in the Eighth Circuit will ostensibly follow that decision, and courts in other circuits hearing similar cases will have to recognize that decision and decide whether to follow its reasoning. However, most of the proceedings in the Eighth Circuit case took place under seal because it was a grand jury matter. The opinion was released only after the press published certain details and the White House petitioned the court to unseal the opinion. In any case, the decision is unlikely to have an effect on the politics of any future grand jury disputes over such notes, precisely because grand jury proceedings are under seal. Thus, public opinion is a source of little concern in such proceedings. Indeed, it is quite possible that one reason the White House decided to contest that subpoena was the fact that the proceedings, and thus its resistance, would be under seal.

However, the situation is different where the dispute is public, as in the case of privilege disputes between Congress and the executive branch. In these situations, the combatants’ actions are dictated by political as well as legal considerations. Indeed, in such a dispute, the White House may opt to cooperate with a subpoena, no matter how valid the executive privilege, if
resisting would likely result in political damage. In short, the battle is fought on two levels: the legal and the political. The party seeking to force production will be successful if the political climate makes the White House's position politically untenable, regardless of its legal merits.

With these considerations in mind, it seems likely that the way in which each of these disputes was resolved will affect the political landscape on which the next battle takes place. These effects will ultimately make the White House's positions even more difficult to sustain. First, the Eighth Circuit decision will certainly have an effect on future debates. It will make an effective tool for a congressional committee to argue that it is a matter of settled law that no privilege attaches to the such meetings. Of course, this argument would have three main flaws: the case is far from settled law, in that the holding is the first of its kind and binds only the courts in the Eighth Circuit; it pertains to grand jury subpoenas only; and, as argued above, the correctness of the holding is questionable. Nevertheless, such nuance may well be lost in the public debate.

Second, the way in which the dispute over the Kennedy Notes was resolved sets a precedent to which committees may refer in future disputes. Whenever the President claims that a document is covered by the attorney-client privilege, Congress can respond with a two-prong argument. First, Congress can say it only needs the particular document for some reason beyond the ordinary reasons. Second, Congress can devise some argument as to why this material falls outside the normal privilege, even if the argument is only remotely plausible from a legal standpoint. This combination of an asserted extraordinary necessity and arguable lack of privilege, even if only remotely plausible, will thus allow future congressional investigations to argue that the White House should, at the very least, "do what the Clinton White House did" and release the documents upon receipt of a promise that investigators will not claim a general waiver of the privilege. This tactic would put the White House in a more defensive position. Indeed, the fact that the Clinton White House acquiesced in this very situation, even without the force of the precedent that it has now created, is strong evidence of this conclusion.

Finally, the White House faces added pressure because the media will almost always take the side of full disclosure. In most cases, media pressure bears on the White House from all sides, including publications that are typically sympathetic to "liberal" issues, because of the institutional bias in the

214. Of course, the converse is also true. Congress is unlikely to take up a politically unpopular fight for materials.

215. With the Kennedy notes, for instance, the Committee claimed that it needed to determine whether confidential government information was passed to private counsel.

216. For instance, the Whitewater Committee argued that government lawyers do not enjoy an attorney-client privilege, and that any privilege was lost because a White House official who was not an attorney attended the meeting.
media in favor of full access to documents. This very point was conceded by a Republican Committee member who was listing the traditionally "liberal" or Democratic-leaning publications that had sided with the Committee in that dispute.\textsuperscript{217} Senator Bennett agreed, albeit reluctantly, with a comment by Senator Dodd that "unlike legal scholars who look at constitutional issues, the press always takes the position that documents should be turned over."\textsuperscript{218}

The institutional bias of the press is apparent in the approach it took in the editorial coverage of the Kennedy notes dispute. Almost without exception, the editorials on the dispute fell into one of two approaches or a combination of the two. The first approach consisted of editorials that argued for disclosure on non-legal grounds rather than addressing the legal issues involved in the dispute. These editorials argued that the President should release the notes in the interest of "openness," or to "avoid the appearance of a cover-up." For instance, on December 14, 1995, the Washington Post urged the President to release the notes without any mention whatsoever of the relative merits of either side's legal position. Instead, the Post argued that the President's "privilege claims ... undercut Mr. Clinton's much-professed interest in getting the facts out [and] look cagey, not candid, and are suggestive of people with something to hide .... The overriding interest is to get at the truth."\textsuperscript{219}

The Washington Times cited the public's "right to know" what transpired at the meeting,\textsuperscript{220} and derided the privilege claims as another example of White House "stonewalling."\textsuperscript{221} The New York Times suggested that the privilege claim was just another of "the evasive tactics that have marked the Clintons' handling of questions about Whitewater ...."\textsuperscript{222} The Chicago Tribune, in an editorial appropriately entitled Asserting Privilege, Looking Guilty, determined that "Clinton [was] a political loser [in the Kennedy notes fight] because he looked like he had something to hide," and archly surmised that it was "strange" that "a president with nothing to hide would have decided to be legally cute about something that is of no real consequence."\textsuperscript{223}

These editorials often failed altogether to mention or challenge the legal merits of either side's position. For example, Stephen Gillers, one of the

\textsuperscript{217} Senator Bennett noted that editorials critical of the White House had "come not just from the media that one would automatically assume would be favorable to the Republican point of view, but it has come from sources that have been traditionally ... somewhat skeptical of Republican positions." 141 CONG. REC. S18,949 (daily ed. Dec. 20, 1995) (statement of Sen. Bennett). He then listed editorials that appeared in the New York Times and the Washington Post. See id. at S18,949-50 (statement of Sen. Bennett).

\textsuperscript{218} 141 CONG. REC. S18,950 (daily ed. Dec. 20, 1995) (statement of Sen. Dodd). Senator Bennett replied that he was "sure that [Senator Dodd] is correct in terms of the institutional bias of the press." Id. (statement of Sen. Bennett).


country’s leading legal ethicists, wrote an opinion article in the New York Times in which he sided with the White House.224 Geoffrey Hazard, another leading ethicist, wrote the Senate Committee a letter, which was read on the Senate floor, in which he supported the White House’s claim.225 Joseph diGenova, a leading Washington attorney, wrote in the Wall Street Journal that the President could not claim attorney-client privilege in opposing a congressional subpoena.226 Regardless of the merits of each of these viewpoints, it is significant that editorialists around the country often took no notice of any of these three opinions on the issue.227 Even without descending into legal arguments, they could have discussed the legal issues presented, including the policy implications of the Committee’s arguments, such as the proposition that government lawyers (including the White House Counsel) have no attorney-client confidentiality or that there is no right to the attorney-client privilege before Congress. This tendency of editorialists to cover only non-legal issues such as a preference for “openness” without focusing on the substantive legal arguments makes it inevitably very difficult for a President to take a position that communications are privileged no matter how strong the legal reasoning for that position.

Other editorials did attempt to base their positions on the legal issues involved. In doing so, however, they spoke only generally of the law, often stated the law incorrectly, and, almost without exception, used incomplete analyses of the White House position. These editorials frequently misstated the law regarding the question of whether the attorney-client privilege applies to government lawyers. For example, the Washington Times wrote that “most experts agree that attorney-client privilege simply does not apply to attorneys representing the president in his official capacity, rather than his private matters.”228 This statement is simply incorrect. Like other agency attorneys, the White House Counsel has a confidential relationship with employees of its client. The Washington Times ignored the common-interest doctrine, which the White House had claimed, when it declared that it was “a pretty long stretch to claim that lawyers employed by the government can be covered by a personal privilege of Mr. Clinton’s” and that “most experts agree that merely by sending government employees into that meeting with their private attorneys, the Clintons waived privilege.”229 The crime-fraud exception to the privilege also provided fertile ground for editorialists, who overlooked the two-part Zolin test, and the required prima facie showing of fraud based on

226. See diGenova, supra note 32.
227. A NEXIS search of editorials found no mention in any of these articles.
independent evidence, by arguing that the privilege did not cover the meeting because the Committee had to find out whether the meeting was used to obstruct justice. The New York Times and the Washington Times were both guilty of that error.\textsuperscript{230}

Finally, not a single editorial on the dispute considered the Clintons' claim of work-product privilege. The Wall Street Journal, for example, overlooked this claim when it concluded that "the [attorney-client] privilege only protects communication between an attorney and a client, and Mr. Clinton wasn't present at the November 1993 meeting"\textsuperscript{231} and later that "Mr. Clinton wasn't party to the meeting itself, normally a condition for such privilege claims."\textsuperscript{232} Other editorials that were slightly more thoughtful in their consideration of the attorney-client privilege also failed to consider the work-product claim. The editorials also tended to overlook the possible claim of executive privilege.

More recent developments require that the breadth of this thesis—that the media is generally hostile to privilege claims—be modified somewhat. In its editorials covering the Sherburne-Nemetz notes, the Chicago Tribune sided with the White House in its privilege claim.\textsuperscript{233} Remarkably, this is the opposite position from the one it took with regard to the Kennedy notes. This may be evidence of two possibilities. First, it suggests that the preference for openness may depend on the perceived quality of the underlying investigation. At the time of the Kennedy notes fight, the Tribune supported the Whitewater Committee's investigation and was hostile to the privilege claim.\textsuperscript{234} By the time of the Eighth Circuit decision and the Supreme Court's denial of certiorari, both of which the Tribune criticized, the Tribune had already soured on the Independent Counsel's investigation as a waste of time and money.\textsuperscript{235} This suggests that the Tribune's position on the validity of each privilege claim was a function of the perceived quality of each investigation. Second, the fact that an editorial board could reach two opposite legal conclusions on the basis of what were (for legal purposes) identical facts is evidence of sloppy legal reasoning. Both meetings involved private lawyers, White House lawyers, and White House staff. Yet the Tribune found the notes from one meeting privileged and those from another meeting not privileged. Thus, these editorialists' conclusions seem to be the result of practical considerations, faulty

\textsuperscript{233} See High Court Errs on Privilege Rights, CHI. TRIB., June 24, 1997, at 18; A Privilege Not for Abridging, CHI. TRIB., May 13, 1997, at 16.
\textsuperscript{234} See Asserting Privilege, Looking Guilty, supra note 223; The Drip, Drip, Drip of Whitewater, CHI. TRIB., Dec. 9, 1995, at 24.
\textsuperscript{235} See Is That What Friends Are For?, CHI. TRIB., Apr. 3, 1997, at 20 (suggesting that Starr's "investigation is becoming a textbook example of why we opposed renewal of the special-counsel statute in 1994").
legal reasoning, or both.

The effect of these two tendencies—a willingness to judge the privilege claims on non-legal grounds and a propensity for sloppiness in analyzing the legal validity of the claims—is that it is even more difficult for the White House to prevail on a valid claim of privilege in the future. It becomes much more difficult to sustain a privilege claim when even the most properly pleaded claim is criticized as merely evasive and, in any case, legally invalid. There is little the White House can do when the press continues to misstate the law, but it is a factor which must be considered.

B. The Likely Effects of These Resolutions on How the White House Deals With Legal Issues in the Future

It is thus clear that the White House will face an uphill battle in making a privilege claim that it can justify publicly. Again, the way in which the Kennedy notes dispute was resolved is likely to have immediate effects on the way future legal issues are handled, both by the White House Counsel and by the President's private lawyers. These effects are ironic in two ways. First, some of these effects are likely to be the exact opposite of those intended by the critics of the privilege claims: their victories may actually encourage the White House attorneys to act in ways that these critics have argued are inappropriate. Second, these resolutions may also give the President's lawyers an incentive to behave in ways that the privileges are intended to discourage.

First, the very conduct that seemed to offend many members of the Whitewater Committee likely will be encouraged by these resolutions. Many of the Republican committee members seemed most bothered about the fact that government and private lawyers were working jointly on the President's personal legal affairs and, more specifically, that government lawyers were doing any of the President's private legal work at all. Ironically, the resolution of this dispute, and the likelihood that future disputes will be resolved in the same way, may result in the White House Counsel doing more of the President's personal legal work. This is not the approach that is supported in this Article, but it is, nevertheless, a realistic possibility.

This possible outcome is because the President's role is, as the White House argued, 
\textit{sui generis}. There are very few issues that deal distinctly with only the private or public side of the President. When issues arise that fall into this fairly expansive gray area, the President is more likely to be inclined to consult the White House Counsel than private counsel. The primary reasons for this are probably that the White House Counsel is literally down the hall from the President and that the White House Counsel is more adept at handling political concerns than private counsel (and political, rather than legal, concerns are probably foremost in the President's mind).

After a legal issue first arrives "on the radar screen" and is referred to the
White House Counsel, it may appear that it is more appropriately an issue for private counsel. Ordinarily, the President would refer it to private counsel and would want those who are aware of the facts needed by private counsel in order to represent the President—most likely including the White House Counsel and any other White House officials who have already worked on and are familiar with the matter—to relate them to private counsel. These are the very type of communications intended to be covered by the attorney-client privilege.

However, if the meeting and communications between White House Counsel and private counsel are not privileged—or privileged as a matter of law, but in a way that is vulnerable to political attack—the President may prefer to limit the attorneys working on the matter to those within the White House Counsel’s office. This would simplify for public purposes a claim of privilege in that it would deprive the White House’s critics of two arguments against a privilege claim. First, by limiting those who work on the matter to government officials, any argument that the executive privilege does not cover the meeting because of the presence of non-government officials is avoided. Second, by limiting any meetings to members of the White House Counsel’s Office, an argument that the common-interest doctrine does not apply also becomes inapposite because the attorneys present represent only one client. Of course (as argued above), each of these arguments is incorrect as a matter of law in any case. Nevertheless, as the editorials from the Kennedy notes dispute indicate, poor legal arguments can be just as effective as correct arguments, and perhaps more so. That is, these arguments are successful if they provide ammunition to the Congress and the media to persist in their attempts to obtain the materials, even if the arguments would not prevail in court. Therefore, the White House is more likely to prevail politically by depriving its opponents of these arguments, in spite of their legal flaws. Keeping responsibility for the matter within the White House also offers other benefits, such as centralizing such functions as handling discovery requests and, perhaps most importantly, handling press relations. Thus, the White House Counsel may in the end do more of the President’s legal work and be more reluctant to transfer responsibility to private counsel as a result of this episode.

A second effect of the critics’ recent victories is that the threat of disclosure gives rise to the very sort of practices that doctrines such as the work-product doctrine are intended to prevent. If meetings between the White House Counsel’s Office and the President’s private counsel are absolutely necessary, and the attorneys cannot be reasonably certain that such notes will remain privileged, the likely result is predictable. The attorneys face a dilemma between taking notes and having to produce them, or not taking notes. They will almost certainly opt for the latter. This dilemma is precisely of the type that the work-product rule is intended to prevent. In first establishing the
doctrine, the Supreme Court stated that, without the work-product doctrine, "much of what is now put down in writing would remain unwritten."\(^\text{236}\) The Court found this result unacceptable because "[i]nefficiency, unfairness and sharp practices would inevitably develop . . . [a]nd the interests of the clients and the cause of justice would be poorly served."\(^\text{237}\) Nevertheless, this would be the result for government attorneys if they did not have the benefit of the work-product doctrine in such meetings.\(^\text{238}\)

C. An Alternative Approach

As discussed above, the battle over materials that the White House claims are privileged can be decided by political factors rather than legal factors. This seems to have been the case in the Kennedy notes. Thus, the White House must consider political factors when establishing procedures for communications between the White House Counsel and private counsel. It must anticipate the bases on which the press and political opponents might attempt to make a privilege claim politically untenable. These bases are often facts relating to the meeting that are legally insignificant to the privilege claim but make this claim difficult to sustain politically. The President's political opponents and the media will seize on details that appear fatal to the privilege claims even if these details are not legally fatal to such claims. Therefore, the White House must try to limit these apparently fatal details so that the media and the opponents have fewer issues upon which to base their complaints.

Anticipating the details on which the White House's opponents will seize is difficult. The best sources are probably past experience and common sense. The key point is that appearance is everything. Therefore, to the extent possible, White House officials other than the President or members of the White House Counsel should not be included in communications or meetings between the President's official and private attorneys. If information is required from a White House official, that official should meet only with members of the White House Counsel, who in turn can relay information to private counsel. This will eliminate the possibility that critics will argue that the privilege was waived because a non-attorney was present, as they did with Bruce Lindsey in the Kennedy notes fight. Second, all communications between the two sets of attorneys or notes of such meetings should clearly be marked as protected by the attorney-client and work-product privilege. Third, when the

\[^{236}\text{Hickman v. Taylor, 329 U.S. 495, 511 (1947).}\]
\[^{237}\text{Id.}\]
\[^{238}\text{It appears that such an effect is appearing already. An article in Time reported that, in preparing for the Senate hearings on possible violations of campaign finance law, certain members of the White House staff, including White House lawyers, were meeting daily. "The President's defense team operates with a bunker mentality, scrawling messages in erasable marker to avoid the net of subpoenas." Michael Weisskopf, Troubles for Thompson's Show, TIME, June 16, 1997, at 41-42.}\]
White House Counsel

White House Counsel serves as a conduit between private counsel and the President, the private counsel should send the President a letter confirming the message that was communicated via the White House Counsel. This will be a clear signal that the specific communications were part of the communications between an attorney (private counsel) and client (the President). It might also be helpful to designate one member of the White House Counsel as responsible for facilitating communications in such situations. Another option where the White House Counsel is playing a more substantive role might be to simply take very clear notes (as opposed to the cryptic Kennedy notes) that will withstand an *in camera* inspection under the crime-fraud exception, should the other side be able to show some independent reason to believe that the meeting was used to further some wrongdoing. The benefits of the decision to take very explicit notes must be weighed against the fact that the clarity of the notes may become a burden if the notes are eventually turned over.

In a non-Whitewater matter, the Clinton White House has already adopted a model of handling such matters that has been quite successful, both in maintaining confidentiality and in limiting the political damage to the President that accompanied the underlying litigation. It is the model that the White House has used in the Paula Jones sexual harassment litigation, and is strikingly different from that used in the Whitewater litigation. Under this approach, the White House made a conscious decision to minimize the involvement of the White House Counsel in the litigation. It began as an attempt to keep the allegations that form the basis of the lawsuit itself as low-profile as possible by keeping the matter “out of the White House.” To the extent practicable, both the legal work and the responsibility for issuing public comment on the litigation have been left to private counsel.

This strategy has been successful in two ways. First, for a long time, it succeeded in achieving its purpose of minimizing the publicity that the litigation received. Through most of President Clinton’s first term, the White House staff was very pleased with the lack of publicity surrounding the case. This period of low publicity did end when the case went to the U.S. Supreme Court. Nevertheless, the President’s staff was pleased for the most part that the matter received little attention until that time and credited the strategy of leaving as much as possible to the President’s private counsel. It is not entirely clear why this strategy was so effective. It may be simply that work done or comments made at a private law firm in Washington are deemed less newsworthy by the media than work or comments by White House lawyers or staff. Whatever the reason, the strategy did seem to work.

The strategy has also benefitted the President by eliminating, or at least minimizing, the threat that the contents of meetings between the White House Counsel and the private counsel in that litigation, Robert Bennett, would be subpoenaed and possibly revealed. The White House Counsel and private
counsel have had little collaboration in that case and almost all of the substantive work has been done by private counsel. Yet despite these efforts to keep the litigation “out of the White House,” Bennett has had to rely on the White House Counsel to communicate with the President. This has at times required frequent contact with members of the White House Counsel. This is a result of the pressures on the President’s time and the White House Counsel’s proximity to the President.

As a result of this collaboration, some of the same claims made by the Whitewater Committee about the Kennedy notes could also be made with regard to notes for the Paula Jones litigation. (For instance, a Senate Committee could claim that it is worried that government attorneys are interfering in “private” litigation and that it needs to determine the extent of the White House Counsel’s involvement.) However, because both the substantive legal work and the public comment on the case has come almost exclusively from Bennett’s office, there seems to be less perception that this is a matter that involves government staff and thus less opportunity for another body to seek to discover the content of these communications.

Finally, this arrangement underscores one other point: that some degree of collaboration between the White House Counsel and private counsel is inevitable, despite the White House’s best efforts to limit this collaboration. This is a necessary result of the simple fact that the President is significantly less accessible to his private counsel than an ordinary client would be. The White House can control the extent of additional collaboration between the two sets of lawyers, however. The experience in the Paula Jones litigation indicates that limiting this collaboration serves the President well by limiting the publicity that the underlying collaboration receives and reducing the risk that the communications will be disclosed. This risk still persists, however, and the White House should take additional steps—those discussed above designed to enhance the appearance of a privilege—to further limit this risk.

IV. CONCLUSION

Some degree of collaboration between the White House Counsel and the President’s private counsel will always be necessary when the President is facing the possibility of litigation for which he will rely on the private counsel. As a legal matter, the communications between the two sets of attorneys are typically covered by both the attorney-client and work-product privileges. These privileges may be asserted against a federal grand jury. They may also be asserted against a Senate subpoena when the Senate files a civil action to enforce a subpoena, despite the fact that Congress ordinarily recognizes common-law privileges, including the attorney-client and work-product privileges, only at its discretion. Moreover, neither the fact that another branch of the federal government might be an opponent in the litigation for which the
attorneys were preparing, nor the fact that White House officials who are not attorneys were included in the meetings, is sufficient to defeat these privileges. Additionally, neither the crime-fraud exception nor the substantial need exception offer much chance to defeat them.

The executive privilege may also protect these communications. They are certainly covered by the presumptive privilege that applies to communications among senior advisors to the President. The only question is whether this privilege may be defeated by an adequate showing of need. Where the notes are subpoenaed by a federal grand jury or for a criminal trial, the privilege will typically be overcome if the materials are necessary and cannot be obtained elsewhere. Where the notes are subpoenaed by a congressional committee, the result is likely to be different. Congress faces an uphill battle in defeating the presumptive privilege.

In addition to legal concerns, the White House must also take into account political considerations when it is structuring the relationship between the White House Counsel and private counsel. This decision is important because privilege claims may often be difficult to sustain politically for a number of reasons. The White House must attempt to anticipate the ways in which its critics will attempt to sway public opinion against the privilege claim and to act accordingly. Communications must be structured so that they appear privileged to a casual observer, regardless of the legal merits of the privilege claim. Only when this appearance is maintained will the White House be able to prevail on the privilege claim. The recent example of the ongoing Paula Jones litigation offers a good example of this approach. Thus, the White House should take two steps. First, it should keep private legal work confined to private counsel where possible. Second, it should anticipate the arguments for disclosing the content of even the limited contacts between private counsel and the White House Counsel, and take steps to limit the details of the contacts that might serve as the bases for these arguments.

This sort of communication promotes the effective representation of the President. This same policy goal—insuring effective representation—is the very reason the common law recognizes the attorney-client and work-product privileges. Similar reasoning lies behind the executive privilege. There is nothing inherently wrong about such communications. Indeed, as part of the attorney-client relationship envisioned by the common law, these communications are appropriate and necessary for the effective representation of the President in his official and personal capacities. Nevertheless, the White House must take steps to ensure that the privileges are both legal valid and politically sustainable. In addition to serving the benefits of its own client, a White House would benefit future administrations, as well as the administration of justice in such matters, by establishing a precedent of asserting and defending privilege claims when they are valid.