Received(Date): 7 FEB 2002 00:15:00
From: Kathleen Clark <KATHLEEN@wulaw.wustl.edu> (Kathleen Clark <KATHLEEN@wulaw.wustl.edu> [UNKNOWN])
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : Friday, Feb. 8 at 3 pm - 888 16th St. NW, 2nd fl. conference rm.- ethics class
P_ZK1B5003_WHO.TXT_1.wpd
P_ZK1B5003_WHO.TXT_2.wpd
P_ZK1B5003_WHO.TXT_3.wpd
P_ZK1B5003_WHO.TXT_4.wpd
P_ZK1B5003_WHO.TXT_5.wpd
P_ZK1B5003_WHO.TXT_6.wpd

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Kathleen Clark <KATHLEEN@wulaw.wustl.edu> (Kathleen Clark <KATHLEEN@wulaw.wustl.edu> [UNKNOWN])
CREATION DATE/TIME: 7-FEB-2002 00:15:00.00
SUBJECT:: Friday, Feb. 8 at 3 pm - 888 16th St. NW, 2nd fl. conference rm. - ethics class
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

Dear Brett,
I greatly appreciate your taking the time to speak with my students yet again this Friday at 3 pm. As you may recall, the class takes place in the 2nd floor conference room at 888 16th St. NW.
This class will examine application of attorney-client privilege to the government. Attached you will find a list of the readings and questions that the students will have reviewed before the class, along with each of the readings (which I'm sure that you know like the back of your hand).
If you have any questions, you can call me at my office (314-935-4081) or on my cell phone ( ).
See you Friday afternoon.
--Kathleen

FOIA(b)6
PRA-P6

==========

Kathleen Clark kathleen@wulaw.wustl.edu
Professor of Law
Washington University phone: (314) 935-4081
Campus Box 1120
St. Louis, MO 63130 fax: (314) 935-6493

==========

- 2-8-a-c-govt-read-assign.wpd - swidler.wpd - upjohn.wpd - NIXON.wpd - LINDSEY.wpd - 28usc535.wpd
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZK1B5003_WHO.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZK1B5003_WHO.TXT_2>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZK1B5003_WHO.TXT_3>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZK1B5003_WHO.TXT_4>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZK1B5003_WHO.TXT_5>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_ZK1B5003_WHO.TXT_6>

The Ethics of Lawyering in Government

Washington, D.C.
Spring, 2002

Prof. Kathleen Clark
(314) 935-4081
kathleen@wulaw.wustl.edu

Assistant: Andrea Powell
(314) 935-6422
powell@wulaw.wustl.edu

Friday, February 8, 2002

During this class session, we will study the attorney-client privilege; discuss how it differs from the lawyer's duty of confidentiality; and examine the contours of the privileges for three different types of clients: individuals, corporations, and governments.

Guest Speaker:

Brett Kavanaugh, Associate White House Counsel, formerly Associate Independent Counsel working for Kenneth Starr, where he wrote the briefs and handled the oral arguments in two of the cases in today's reading -- *Lindsey* and *Swidler & Berlin*.

Reading:

Swidler & Berlin v. United States, 524 U.S. 399 (1998)
Upjohn v. United States, 449 U.S. 383 (1981)
United States v. Nixon, 418 U.S. 683 (1974)
In re: Bruce R. Lindsey (Grand Jury Testimony), 148 F.3d 1100 (D.C. Cir. 1998)
28 U.S.C. § 535(b)

Questions & Problem:

How is the attorney-client privilege different from the lawyer's duty of confidentiality that we discussed earlier in the semester?
Which is broader in scope: the privilege or the duty?
Which is applicable to a lawyer's decision whether to describe a client's case to a friend?
Which is applicable to a lawyer's decision whether to testify about a client?

In *Swidler & Berlin v. United States*, what reasons does the Supreme Court identify for recognizing an attorney-client privilege?

In her Swidler dissent, Justice O'Connor asserts:

> Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication.

Do you agree? Should these two situations – the exoneration of an innocent criminal defendant

and a compelling law enforcement interest – be treated the same?

If individual clients need the attorney-client privilege in order to feel comfortable seeking legal advice, do corporations also need the privilege so that corporate employees will feel comfortable seeking legal advice on behalf of the corporation?

Do governments need the privilege so that government employees will feel comfortable seeking legal advice on behalf of the government?

What are the reasons to distinguish the government from the corporate context?

Precisely what was in dispute in the *Upjohn* case?
What information was the government trying to get that Upjohn was trying to withhold?

Under *Upjohn*, which communications between corporate employees and a corporation's lawyers are protected by the corporation's attorney-client privilege?

Does the *Upjohn* decision control what information the Missouri Attorney General can obtain from a corporation in a Missouri state court proceeding?
If so, why?
If not, why not?

Upjohn includes the following passage:

> "this Court has assumed that the [attorney-client] privilege applies when the client is a corporation, *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915), and the Government does not contest the general proposition."

Should corporations have the benefit of attorney-client privilege?
Be prepared to discuss arguments in favor and against the corporate attorney-client privilege.

In *Lindsey*, who represented the interests of the United States?
Who represented the interests of the executive branch of the United States?

Is the D.C. Circuit's ruling in *Lindsey* (dated July 27, 1998) consistent with the Supreme Court's ruling in *Swidler & Berlin* (dated June 25, 1998)?
If so, explain.
If not, why not?

If a Senator has consulted a lawyer on her staff for legal advice, and that lawyer is later subpoenaed as part of a criminal investigation, can that lawyer claim an absolute attorney-client privilege?
Does the D.C. Circuit's ruling in *Lindsey* control here?
To what degree was its ruling in *Lindsey* implicitly based on the fact that both the prosecutor and the lawyer-prospective witness are in the executive branch of government?
Should a lawyer in the legislative branch be treated differently?

According to *Lindsey*, President Clinton initially claimed that his conversations with Bruce Lindsey were protected by both executive privilege and attorney-client privilege.

After the district court rejected the President's executive privilege argument, he decided not to pursue that argument on appeal, relying instead only on the attorney-client privilege argument.
Why did the President drop the executive privilege argument?
Did he base that decision on legal or political grounds?
Did he make a mistake in abandoning the executive privilege argument?

The D.C. Circuit discusses whether impeachment is a political or a legal proceeding.
Do you agree with its analysis?

Problem

Assume that federal law imposes civil and criminal penalties on municipalities as well as private companies for non-compliance with these environmental laws, and that criminal liability can attach both to the entity and the individuals responsible for the entity's compliance. Federal law limits criminal culpability to those situations where the responsible individual knew of the illegality and failed to fix it.

Suppose that you are the city attorney for Clayton, Missouri. The mayor has asked you to review Clayton's policies in disposing of solid and toxic wastes to determine whether they comply with federal law.

Do you write a memo or brief the mayor orally?

Does the *Lindsey* decision have any impact on your decision?

If the Justice Department later instigated an investigation of Clayton's compliance with the environmental laws, could it gain access to any memo that you provided to the mayor?

Could it gain access to any notes that you took in preparation for a briefing of the mayor?

Could you be forced to testify before a grand jury about the advice you gave the mayor?

Swidler & Berlin v. United States

524 U.S. 399
(Argued June 8, 1998; Decided June 25, 1998)
(excerpts) (footnotes and citations omitted)

James Hamilton, Washington, DC, for petitioners.
Brett M. Kavanaugh, Washington, DC, for respondent.

REHNQUIST, C.J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege.

This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July, 1993, Foster met with petitioner James Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2-hour meeting, Hamilton took three pages of handwritten notes. One of the first entries in the notes is the word "Privileged." Nine days later, Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to petitioners Hamilton and Swidler & Berlin for, *inter alia*, Hamilton's handwritten notes of his meeting with Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney client privilege and by the work product privilege. The District Court, after examining the notes *in camera*, concluded they were protected from disclosure by both doctrines and denied enforcement of the subpoenas.

The attorney client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn*. The issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. Our interpretation of the privilege's scope is guided by "the principles of the common law ... as interpreted by the courts ... in the light of reason and experience." FED.RULE EVID. 501.

The Independent Counsel argues that the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court, *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Penn. 1976), and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant.

But other than these two decisions, cases addressing the existence of the privilege after death--most involving the testamentary exception--uniformly presume the privilege survives, even if they do not so hold. Several State Supreme Court decisions expressly hold that the attorney-client privilege extends beyond the death of the client, even in the criminal context. *See In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70 (Mass. 1990). In *John Doe Grand Jury Investigation*, for example, the Massachusetts Supreme Court concluded that survival of the privilege was "the clear implication" of its early pronouncements that communications subject to the privilege could not be disclosed at any time. The court further noted that survival of the privilege was "necessarily implied" by cases allowing waiver of the privilege in testamentary disputes.

Such testamentary exception cases consistently presume the privilege survives. They view testamentary disclosure of communications as an exception to the privilege: "[T]he general rule with respect to confidential communications ... is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs." The rationale for such disclosure is that it furthers the client's intent.

Indeed, in *Glover v. Patten*, 165 U.S. 394, 406-408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual's death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client's interests, could be impliedly waived in order to fulfill the client's testamentary intent.

The great body of this caselaw supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. Given the language of Rule 501, at the very least the burden is on the Independent Counsel to show that "reason and experience" require a departure from this rule.

The Independent Counsel contends that the testamentary exception supports the posthumous termination of the privilege because in practice most cases have refused to apply the privilege posthumously. He further argues that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reasons by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.

But the Independent Counsel's interpretation simply does not square with the caselaw's implicit acceptance of the privilege's survival and with the treatment of testamentary disclosure as an "exception" or an implied "waiver." And the premise of

his analogy is incorrect, since cases consistently recognize that the rationale for the testamentary exception is that it furthers the client's intent. There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent.

Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. Undoubtedly, as the Independent Counsel emphasizes, various commentators have criticized this rule, urging that the privilege should be abrogated after the client's death where extreme injustice would result, as long as disclosure would not seriously undermine the privilege by deterring client communication. But even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of the common law.

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self- incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. This is true of disclosure before and after the client's death. Without assurance of the privilege's

posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined to criminal cases, or, as the Court of Appeals suggests, if it is limited to information of substantial importance to a particular criminal case. [3] However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion. In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.

In a similar vein, the Independent Counsel argues that existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal. However, these exceptions do not demonstrate that the impact of a posthumous exception would be insignificant, and there is little empirical evidence on this point.[4] The established exceptions are consistent with the purposes of the privilege, while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege, without reference to common law principles or "reason and experience."

---

[3] Petitioner, while opposing wholesale abrogation of the privilege in criminal cases, concedes that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

[4] Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication. Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989); Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 352 (1989); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962). These articles note that clients are often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244-246, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 YALE L. J., *supra*, at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra*, at 382, 386. Similarly, relatively few court decisions discuss the impact of the privilege's application after death. This may reflect the general assumption that the privilege survives--if attorneys were required as a matter of practice to testify or provide notes in criminal proceedings, cases discussing that practice would surely exist.

Finally, the Independent Counsel, relying on cases such as *United States v. Nixon*, 418 U.S. 683, 710 (1974), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of caselaw.

It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation--thoughtful speculation, but speculation nonetheless--as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

Rule 501's direction to look to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" does not mandate that a rule, once established, should endure for all time. But here the Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the prevailing caselaw. Interpreted in the light of reason and experience, that body of law requires that the attorney client privilege prevent disclosure of the notes at issue in this case.

The judgment of the Court of Appeals is Reversed.

Justice O'CONNOR, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Although the attorney-client privilege ordinarily will survive the death of the client, I do not agree with the Court that it inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.

. . .

The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where "necessary to achieve its purpose," and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise."

I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. But, after death, the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. Thus, some commentators suggest that terminating the privilege upon the client's death "could not to any substantial degree lessen the encouragement for free disclosure which is [its] purpose." This diminished

risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. The privilege does not "protect[ ] disclosure of the underlying facts by those who communicated with the attorney," and were the client living, prosecutors could grant immunity and compel the relevant testimony. After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete "loss of crucial information" will often result.

As the Court of Appeals observed, the costs of recognizing an absolute posthumous privilege can be inordinately high. Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense. In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. Indeed, even petitioner acknowledges that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. "[O]ur historic commitment to the rule of law ... is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon, supra*, at 709 (internal quotation marks omitted). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.

A number of exceptions to the privilege already qualify its protections, and an attorney "who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit." . . .

Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication. In my view, the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client. . . .

With respect, I dissent.

Upjohn v. United States

449 U.S. 383 (1981)
(excerpts) (citations and footnotes omitted)

Justice Rehnquist delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context . . . . With respect to the privilege question the parties and various amici have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure . . . .

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons

. . . demanding production of:

* * *

> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The company declined to produce the documents specified . . . on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons . . . . [The] court . . . concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which . . . agreed that the privilege did not apply "[to] the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the "control group" could be made. . . .

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to

possess an identity analogous to the corporation as a whole." The first case to articulate the so-called "control group test" adopted by the court below, . . . reflected a similar conceptual approach:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply."

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. *See* ABA Code of Professional Responsibility, Ethical Consideration 4-1:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also Hickman v. Taylor, 329 U.S. 495, 511 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below -- "officers and agents . . . responsible for directing [the company's] actions in response to legal advice" -- who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc):

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he interviews employees not having "the very highest authority", their communications to him will not be privileged. If, on the other hand, he interviews only those employees with "the very highest authority", he may find it extremely difficult, if not impossible, to determine what happened.'"

The control group test adopted by the court below thus frustrates the very purpose of the

privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. . . .

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," particularly since compliance with the law in this area is hardly an instinctive matter . . . .[2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. . . .

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. . . . Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. . . . Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .

. . . Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply

---

[2] The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

United States v. Nixon

418 U.S. 683
(excerpts) (citations omitted) (footnotes omitted)
July 8, 1974, Argued
July 24, 1974, Decided

Leon Jaworski and Philip A. Lacovara argued the cause and filed briefs for the United States in both cases.

James D. St. Clair argued the cause for the President . . . . With him on the briefs were Charles Alan Wright, Leonard Garment, . . .

Norman Dorsen and Melvin L. Wulf filed a brief for the American Civil Liberties Union as amicus curiae urging affirmance of the District Court judgment.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the cases.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States, in the case of *United States v. Mitchell*, to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia. . . . The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, [and] of lack of jurisdiction . . . . The President appealed to the Court of Appeals. We granted both the United States' petition for certiorari before judgment . . . because of the public importance of the issues presented and the need for their prompt resolution.

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[3] with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, see n. 8, *infra*, a subpoena *duces tecum* was issued . . . to the President by the United States District Court . . . . This subpoena required the production . . . of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. The Special Prosecutor was able to fix the time, place, and persons present at

---

[3] The seven defendants were [former Attorney General] John N. Mitchell, [former White House Chief of Staff] H. R. Haldeman, [former White House domestic affairs advisor] John D. Ehrlichman, [former White House special counsel] Charles W. Colson, [former Assistant Attorney General] Robert C. Mardian, [former Nixon campaign lawyer] Kenneth W. Parkinson, and [former White House aide] Gordon Strachan. . . . Colson entered a guilty plea on another charge and is no longer a defendant.

these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena. . . . This motion was accompanied by a formal claim of privilege. . . .

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. It further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed," to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. . . .

* * *

II
JUSTICIABILITY

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker v. Carr*, 369 U.S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

The mere assertion of a claim of an "intra-branch dispute," without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. . . .

Our starting point is the nature of the proceeding for which the evidence is sought -- here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U. S. C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U. S. C. §§ 509, 510, 515, 533. Acting

pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.[8] The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.[9]

* * *

Here . . . it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so.[10] So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special

---

[8] The regulation issued by the Attorney General pursuant to his statutory authority, vests in the Special Prosecutor plenary authority to control the course of investigations and litigation related to "all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. In particular, the Special Prosecutor was given full authority, *inter alia*, "to contest the assertion of 'Executive Privilege' . . . and [handle] all aspects of any cases within his jurisdiction." *Id.*, at 30739. The regulation then goes on to provide:

> "In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

[9] That this was the understanding of Acting Attorney General Robert Bork, the author of the regulation establishing the independence of the Special Prosecutor, is shown by his testimony before the Senate Judiciary Committee:

> "Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if disagreement should develop."

Hearings on the Special Prosecutor before the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pt. 2, p. 450 (1973). Acting Attorney General Bork gave similar assurances to the House Subcommittee on Criminal Justice. Hearings on H. J. Res. 784 and H. R. 10937 before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess., 266 (1973). At his confirmation hearings, Attorney General William Saxbe testified that he shared Acting Attorney General Bork's views concerning the Special Prosecutor's authority to test any claim of executive privilege in the courts. Hearings on the Nomination of William B. Saxbe to be Attorney General before the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 9 (1973).

[10] At his confirmation hearings, Attorney General William Saxbe testified that he agreed with the regulation adopted by Acting Attorney General Bork and would not remove the Special Prosecutor except for "gross impropriety." *Id.*, at 5-6, 8-10. There is no contention here that the Special Prosecutor is guilty of any such impropriety.

Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress.

. . . Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

* * *

IV
THE CLAIM OF PRIVILEGE
A

[W]e turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum*.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that "[it] is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

* * *

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell v. McCormack*, supra, at 549. And in *Baker v. Carr*, 369 U.S.,

at 211, the Court stated:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed. 1938). We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury v. Madison*, *supra*, at 177.

B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the 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.[15] Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;[16] the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that

---

[15] There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. C. WARREN, THE MAKING OF THE CONSTITUTION 134-139 (1937).

[16] The Special Prosecutor argues that there is no provision in the Constitution for a Presidential privilege as to the President's communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch v. Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it." *Marshall v. Gordon*, 243 U.S. 521, 537 (1917).

the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., at 635 (Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. 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. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), the Court of Appeals held that such Presidential communications are "presumptively privileged," and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "[in] no case of this kind would a court be required to proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas., at 192.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

> "that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. . . . In *United States v. Reynolds*, 345 U.S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

No case of the Court, however, has extended this high degree of deference to a

President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.[19] The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, 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.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

. . . If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed

---

[19] 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, nor with the President's interest in preserving state secrets. 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.

material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was "essential to the justice of the [pending criminal] case." *United States v. Burr*, 25 F. Cas., at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption, and ordered an *in camera* examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications delivered under the compulsion of the subpoena *duces tecum*.

E

. . . Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall, sitting as a trial judge in the *Burr* case, *supra*, was extraordinarily careful to point out that

> "[in] no case of this kind would a court be required to proceed against the president as against an ordinary individual." 25 F. Cas., at 192.

. . . [A] President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in *United States v. Burr, supra*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

In re: Bruce R. Lindsey (Grand Jury Testimony)

148 F.3d 1100 (D.C. Cir.)
(excerpts) (footnotes and citations omitted)
June 29, 1998, Argued
July 27, 1998, Decided

W. Neil Eggleston argued the cause for appellant the Office of the President, with . . . Charles F.C. Ruff, Counsel to the President, . . . on the briefs.
David E. Kendall argued the cause for appellant William J. Clinton, with . . . Nicole K. Seligman, . . . Robert S. Bennett, Carl S. Rauh, . . . on the briefs.
Douglas N. Letter, Attorney, U.S. Department of Justice, argued the cause for *amicus curiae* the Attorney General, with whom Janet Reno, Attorney General, . . . and Stephanie R. Marcus, Attorney, . . . on the brief.
Kenneth W. Starr, Independent Counsel and Brett M. Kavanaugh, Associate Independent Counsel, argued the causes for appellee the United States, ...

Before: RANDOLPH, ROGERS and TATEL, Circuit Judges.

PER CURIAM:

In these expedited appeals, the principal question is whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense. The Supreme Court and this court have held that even the constitutionally based executive privilege for presidential communications fundamental to the operation of the government can be overcome upon a proper showing of need for the evidence in criminal trials and in grand jury proceedings. *See United States v. Nixon*, 418 U.S. 683 (1974). In the context of federal criminal investigations and trials, there is no basis for treating legal advice differently from any other advice the Office of the President receives in performing its constitutional functions. The public interest in honest government and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowledged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. The extent to which the communications of White House Counsel are privileged against disclosure to a federal grand jury depends, therefore, on whether the communications contain information of possible criminal offenses. Additional protection may flow from executive privilege [[sealed material]].

On January 16, 1998, at the request of the Attorney General, the Division for the Purpose of Appointing Independent Counsels issued an order expanding the prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr. Previously, the main focus of Independent Counsel Starr's inquiry had been on financial transactions involving President Clinton when he was Governor of Arkansas, known popularly as the Whitewater inquiry. The order now authorized Starr to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law" in connection with the civil lawsuit against the President of the United States filed by Paula Jones. "Thereafter, a grand jury here began receiving evidence about Monica Lewinsky and President Clinton, and others . . . . "

On January 30, 1998, the grand jury issued a subpoena to Bruce R. Lindsey, an attorney admitted to practice in Arkansas. Lindsey currently holds two positions: Deputy White House Counsel and Assistant to the President. On February 18, February 19, and March 12, 1998, Lindsey appeared before the grand jury and declined to answer certain questions on the ground that the questions represented information protected from disclosure by a government attorney-client privilege applicable to Lindsey's communications with the President as Deputy White House Counsel, as well as by executive privilege, and [[sealed material]]. Lindsey also claimed work product protections related to the attorney-client privilege [[sealed material]].

On March 6, 1998, the Independent Counsel moved to compel Lindsey's testimony. The district court granted that motion on May 4, 1998. The court concluded that the President's executive privilege claim failed in light of the Independent Counsel's showing of need and unavailability. It rejected Lindsey's government attorney-client privilege claim on similar grounds, ruling that the President possesses an attorney-client privilege when consulting in his official capacity with White House Counsel, but that the privilege is qualified in the grand jury context and may be overcome upon a sufficient showing of need for the subpoenaed communications and unavailability from other sources. [[sealed material]].

[[sealed material]] the Office of the President [[sealed material]] appealed the order granting the motion to compel Lindsey's testimony, challenging the district court's construction of both the government attorney-client privilege and [[sealed material]]. . . . Neither the Office of the President nor the President in his personal capacity has appealed the district court's ruling on executive privilege. In Part II we address the availability of the government attorney-client privilege; [[sealed material]].

The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. It "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*.

The Office of the President contends that Lindsey's communications with the

President and others in the White House should fall within this privilege both because the President, like any private person, needs to communicate fully and frankly with his legal advisors, and because the current grand jury investigation may lead to impeachment proceedings, which would require a defense of the President's official position as head of the executive branch of government, presumably with the assistance of White House Counsel. The Independent Counsel contends that an absolute government attorney-client privilege would be inconsistent with the proper role of the government lawyer and that the President should rely only on his private lawyers for fully confidential counsel.

Federal courts are given the authority to recognize privilege claims by Rule 501 of the FEDERAL RULES OF EVIDENCE, which provides that

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Although Rule 501 manifests a congressional desire to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, the Supreme Court has been "disinclined to exercise this authority expansively." "These exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*. Consequently, federal courts do not recognize evidentiary privileges unless doing so "promotes sufficiently important interests to outweigh the need for probative evidence."

The Supreme Court has not articulated a precise test to apply to the recognition of a privilege, but it has "placed considerable weight upon federal and state precedent," and on the existence of "a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" That public good should be shown "with a high degree of clarity and certainty."

Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts. Much of the law on this subject has developed in litigation about exemption five of the Freedom of Information Act ("FOIA"). See 5 U.S.C. § 552(b)(5). Under that exemption, "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are excused from mandatory disclosure to the public. We have recognized that "Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege." "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." In Lindsey's case, his client -- to the extent he provided legal services -- would be the Office of the President.

. . . In discussing the government attorney-client privilege applicable to exemption

five, we have mentioned the usual advantages:

> . . . In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. We see no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

Thus, when "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors," exemption five applies.

Furthermore, the proposed (but never enacted) Federal Rules of Evidence concerning privileges, to which courts have turned as evidence of common law practices, recognized a place for a government attorney-client privilege. Proposed Rule 503 defined "client" for the purposes of the attorney-client privilege to include "a person, public officer, or corporation, association, or other organization or entity, either public or private." The commentary to the proposed rule explained that "the definition of 'client' includes governmental bodies." The Restatement also extends attorney-client privilege to government entities. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT].

The practice of attorneys in the executive branch reflects the common understanding that a government attorney-client privilege functions in at least some contexts. . . .

Recognizing that a government attorney-client privilege exists is one thing. Finding that the Office of the President is entitled to assert it here is quite another.

It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected. As oft-cited definitions of the privilege make clear, only communications that seek "legal advice" from "a professional legal adviser in his capacity as such" are protected. Or, in a formulation we have adopted, the privilege applies only if the person to whom the communication was made is "a member of the bar of a court" who "in connection with the communication is acting as a lawyer" and the communication was made "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding."

On the record before us, it seems likely that at least some of the conversations for which Lindsey asserted government attorney-client privilege did not come within the formulation just quoted. [[sealed material]]. Both of these subjects arose from the expanded jurisdiction of the Independent Counsel, which did not become public until January 20, 1998. Before then, any legal advice Lindsey rendered in connection with *Jones v. Clinton*, a lawsuit involving President Clinton in his personal capacity, likely could not have been covered by government attorney-client privilege. [[sealed material]].

According to the Restatement, "consultation with one admitted to the bar but not in that other person's role as lawyer is not protected." RESTATEMENT § 122 cmt. c. "[W]here one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator . . . the consultation is not professional nor the statement privileged." Thus Lindsey's advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege.

As for conversations after January 20th, the Office of the President must "present the underlying facts demonstrating the existence of the privilege" in order to carry its burden. A blanket assertion of the privilege will not suffice. Rather, "the proponent must conclusively prove each element of the privilege." In response to the Independent Counsel's questions, Lindsey invariably asserted executive privilege and attorney-client privilege. On this record, it is impossible to determine whether Lindsey believed that both privileges applied or whether he meant to invoke them on an "either/or" basis. As we have said, the district court's rejection of the executive privilege claim has not been appealed. With this privilege out of the picture, the Office of the President had to show that Lindsey's conversations "concerned the seeking of legal advice" and were between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was "acting in his professional capacity" as an attorney.

With regard to most of the communications that were the subject of questions before the grand jury, it does not appear to us that any such showing was made in the grand jury by Lindsey or in the district court by the Office of the President in the proceedings leading to the order to compel his testimony. . . .

We therefore turn to the question whether an attorney-client privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others. Although the cases decided under FOIA recognize a government attorney-client privilege that is rather absolute in civil litigation, those cases do not necessarily control the application of the privilege here. The grand jury, a constitutional body established in the Bill of Rights, "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people," while the Independent Counsel is by statute an officer of the executive branch representing the United States. For matters within his jurisdiction, the Independent Counsel acts in the role of the Attorney General as the country's chief law enforcement officer. Thus, although the traditional privilege between attorneys and clients shields private relationships from inquiry in either civil litigation or criminal prosecution, competing values arise when the Office of the President resists demands for information from a federal grand jury and the nation's chief law enforcement officer. As the drafters of the Restatement recognized, "More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." For these reasons, others have agreed that such "considerations" counsel against "expansion of the privilege to all governmental entities" in all cases.

The question whether a government attorney-client privilege applies in the federal grand jury context is one of first impression in this circuit, and the parties dispute the import of the lack of binding authority. The Office of the President contends that, upon recognizing a government attorney-client privilege, the court should find an exception in the grand jury context only if practice and policy require. To the contrary, the Independent Counsel contends, in essence, that the justification for any extension of a government attorney-client privilege to this context needs to be clear. These differences in approach are not simply semantical: they represent different versions of what is the status quo. To argue about an "exception" presupposes that the privilege otherwise applies in the federal grand jury context; to argue about an "extension" presupposes the opposite. In *Swidler & Berlin*, the Supreme Court considered whether, as the Independent Counsel contended, it should create an exception to the personal attorney-client privilege allowing disclosure of confidences after the client's death. After finding that the Independent Counsel was asking the Court "not simply to 'construe' the privilege, but to narrow it, contrary to the weight of the existing body of caselaw," the Court concluded that the Independent Counsel had not made a sufficient showing to warrant the creation of such an exception to the settled rule.

In the instant case, by contrast, there is no such existing body of caselaw upon which to rely and no clear principle that the government attorney-client privilege has as broad a scope as its personal counterpart. Because the "attorney-client privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle,'" and because the government attorney-client privilege is not recognized in the same way as the personal attorney-client privilege addressed in *Swidler & Berlin*, we believe this case poses the question whether, in the first instance, the privilege extends as far as the Office of the President would like. In other words, pursuant to our authority and duty under Rule 501 of the Federal Rules of Evidence to interpret privileges "in light of reason and experience," we view our exercise as one in defining the particular contours of the government attorney-client privilege.

When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Investigation and prosecution of federal crimes is one of the most important and essential functions within that constitutional responsibility. Each of our Presidents has, in the words of the Constitution, sworn that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." *Id.* art. II, § 1, cl. 8. And for more than two hundred years each officer of the Executive

Branch has been bound by oath or affirmation to do the same. *See id.* art. VI, cl. 3; *see also* 28 U.S.C. § 544 (1994). This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.[3]

The oath's significance is underscored by other evocations of the ethical duties of government lawyers.[4] The Professional Ethics Committee of the Federal Bar Association has described the public trust of the federally employed lawyer as follows:

> [T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. . . . [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.

Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1, 32 FED. B.J. 71, 72 (1973). The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As Judge Weinstein put it, "if there is wrongdoing in government, it must be exposed. . . . [The government lawyer's] duty to the people, the law, and his own conscience requires disclosure . . . . " Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18

---

[3] We recognize, as our dissenting colleague emphasizes, that every lawyer must take an oath to enter the bar of any court. But even after entering the bar, a government attorney must take another oath to enter into government service; that in itself shows the separate meaning of the government attorney's oath. Moreover, the oath is significant to our analysis only to the extent that it underlies the fundamental differences in the roles of government and private attorneys -- of particular note, the fact that private attorneys cannot take official actions.

[4] Indeed, the responsibilities of government lawyers to the public have long governed the actions they can take on behalf of their "client":

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78 (1935). In keeping with these interests, prosecutors must disclose to the defendant exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), and must try to "seek justice, not merely to convict," MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980). Similarly, the government lawyer in a civil action must "seek justice" and avoid unfair settlements or results. *Id.* EC 7-14.

MAINE L. REV. 155, 160 (1966).

This view of the proper allegiance of the government lawyer is complemented by the public's interest in uncovering illegality among its elected and appointed officials. While the President's constitutionally established role as superintendent of law enforcement provides one protection against wrongdoing by federal government officials, another protection of the public interest is through having transparent and accountable government.[5] As James Madison observed,

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

This court has accordingly recognized that "openness in government has always been thought crucial to ensuring that the people remain in control of their government." Privileges work against these interests because their recognition "creates the risk that a broad array of materials in many areas of the executive branch will become 'sequestered' from public view." Furthermore, "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.).

Examination of the practice of government attorneys further supports the conclusion that a government attorney, even one holding the title Deputy White House Counsel, may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations. The Office of the President has traditionally adhered to the precepts of 28 U.S.C. § 535(b), which provides that

> any information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General.

We need not decide whether section 535(b) alone requires White House Counsel to testify before a grand jury.[6] The statute does not clearly apply to the Office of the

---

[5] Congress has clearly indicated, as a matter of policy, that federal employees should not withhold information relating to possible criminal misconduct by federal employees on any basis. We discuss at more length Congress's recognition of these concerns below in our discussion of 28 U.S.C. § 535(b).

[6] 28 U.S.C. § 535(a) authorizes the Attorney General to "investigate any violation of title 18 [the federal criminal code] involving Government officers and employees." The Independent Counsel fills the shoes of the Attorney General in this regard because Congress has given the Independent Counsel "with respect to all matters in [his] prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of . . . the Attorney General."

President. The Office is neither a "department," as that term is defined by the statute, *see* 5 U.S.C. § 101 (1994); 28 U.S.C. § 451 (1994); nor an "agency." However, at the very least "[section] 535(b) evinces a strong congressional policy that executive branch employees must report information" relating to violations of Title 18, the federal criminal code. As the House Committee Report accompanying section 535 explains, "the purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes.

Furthermore, government officials holding top legal positions have concluded, in light of section 535(b), that White House lawyers cannot keep evidence of crimes committed by government officials to themselves. In a speech delivered after the Kissinger FOIA case was handed down, Lloyd Cutler, who served as White House Counsel in the Carter and Clinton Administrations, discussed the "rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." Accordingly, "when you hear of a charge and you talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" Similarly, during the Nixon administration, Solicitor General Robert H. Bork told an administration official who invited him to join the President's legal defense team: "A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I'll have to turn it over. I won't be able to sit on it like a private defense attorney."

The Clinton Administration itself endorsed this view as recently as a year ago. In the proceedings leading to the Supreme Court's denial of certiorari with regard to the Eighth Circuit's decision in In re Grand Jury Subpoena Duces Tecum, the Office of the President assured the Supreme Court that it "embraces the principles embodied in Section 535(b)" and acknowledged that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of the crime." The Office of the President further represented that "on various occasions" it had "referred information to the Attorney General reflecting the possible commission of a criminal offense -- including information otherwise protected by attorney-client privilege." At oral argument, counsel for the Office of the President reiterated this position. In addition, the White House report on possible misdeeds relating to the White House Travel Office stated that "if there is a reasonable suspicion of a crime . . . about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General."

We are not aware of any previous deviation from this understanding of the role of government counsel. We know that Nixon White House Counsel Fred Buzhardt testified

before the Watergate grand jury without invoking attorney-client privilege, although not much may be made of this.[7] On the other hand, the Office of the President points out that C. Boyden Gray, White House Counsel during the Bush Administration, and his deputy, John Schmitz, refused to be interviewed by the Independent Counsel investigating the Iran-Contra affair and only produced documents subject to an agreement that "any privilege against disclosure . . . including the attorney-client privilege" was not waived. However, the Independent Counsel in that investigation had not subpoenaed Gray or Schmitz to testify before a grand jury, and there is no indication that the information sought from them constituted evidence of any criminal offense. Independent Counsel Walsh apparently sought to question these individuals merely to complete his final report. In any event, even outside the grand jury context, the general practice of government counsel has been to cooperate with the investigations of independent counsels. For example, Peter Wallison, White House Counsel under President Reagan, produced his diary for the Iran-Contra investigation and cooperated in other ways. Other government attorneys both produced documents and agreed to be interviewed for that investigation.

The Office of the President asserts two principal contributions to the public good that would come from a government attorney's withholding evidence from a grand jury on the basis of an attorney-client privilege. First, it maintains that the values of candor and frank communications that the privilege embodies in every context would apply to Lindsey's communications with the President and others in the White House. Government officials, the Office of the President claims, need accurate advice from government attorneys as much as private individuals do, but they will be inclined to discuss their legal problems honestly with their attorneys only if they know that their communications will be confidential.

We may assume that if the government attorney-client privilege does not apply in certain contexts this may chill some communications between government officials and government lawyers. Even so, government officials will still enjoy the benefit of fully confidential communications with their attorneys unless the communications reveal information relating to possible criminal wrongdoing. And although the privacy of these communications may not be absolute before the grand jury, the Supreme Court has not been troubled by the potential chill on executive communications due to the qualified nature of executive privilege.[8] *Compare Nixon* (discounting the chilling effects of the qualification of the presidential communications privilege on the candor of conversations), *with Swidler & Berlin* (stating, in the personal attorney-client privilege context, that an uncertain privilege is often no better than no privilege at all). Because both the Deputy White House Counsel and the Independent Counsel occupy positions within the federal government, their situation is somewhat comparable to that of

---

[7] President Nixon waived executive privilege and attorney-client privilege before the grand jury. See SPECIAL PROSECUTION FORCE, WATERGATE REPORT 88 (1975) [hereinafter WATERGATE REPORT].

[8] We do not address privilege exceptions relating to military secrets or other exempted communications.

corporate officers who seek to keep their communications with company attorneys confidential from each other and from the shareholders. Under the widely followed doctrine announced in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), corporate officers are not always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation. Any chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable.

Moreover, nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel. The President has retained several private lawyers, and he is entitled to engage in the completely confidential communications with those lawyers befitting an attorney and a client in a private relationship. [[sealed material)] The Office of the President contends that White House Counsel's role in preparing for any future impeachment proceedings alters the policy analysis. . . . [T]o the extent that impeachment proceedings may be on the horizon, the Office of the President contends that White House Counsel must be given maximum protection against grand jury inquiries regarding their efforts to protect the Office of the President, and the President in his personal capacity, against impeachment. Additionally, the Office of the President notes that the Independent Counsel serves as a conduit to Congress for information concerning grounds for impeachment obtained by the grand jury, and, consequently, an exception to the attorney-client privilege before the grand jury will effectively abrogate any absolute privilege those communications might otherwise enjoy in future congressional investigations and impeachment hearings.

Although the Independent Counsel and the Office of the President agree that White House Counsel can represent the President in the impeachment process, the precise contours of Counsel's role are far from settled.[10] In any event, no matter what the role should be, impeachment is fundamentally a political exercise. Impeachment proceedings in the House of Representatives cannot be analogized to traditional legal processes and even the procedures used by the Senate in "trying" an impeachment

---

[10] While a prior Comptroller General has thought that White House Counsel could properly be paid out of federal funds for representing the President in matters leading up to an impeachment, history yields little guidance on the role that White House Counsel would properly play in impeachment proceedings. The only President impeached by the House and tried by the Senate, Andrew Johnson, retained private counsel, and his Attorney General resigned from office in order to assist in his defense. In contrast, after the House Judiciary Committee began an impeachment inquiry into the Watergate scandal, President Richard Nixon appointed James D. St. Clair as a special counsel to the President for Watergate-related matters. Although Nixon resigned before the House of Representatives voted on any articles of impeachment, St. Clair handled much of the President's defense until the President's resignation. At the very least, nothing prevents a President faced with impeachment from retaining private counsel, and in turn this makes less clear what might be the division of labor between White House Counsel and private counsel.

may not be like those in a judicial trial. How the policy and practice supporting the common law attorney-client privilege would apply in such a political context thus is uncertain. In preparing for the eventuality of impeachment proceedings, a White House Counsel in effect serves the President as a political advisor, albeit one with legal expertise: to wit, Lindsey occupies a dual position as an Assistant to the President and a Deputy White House Counsel. Thus, information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege. While the need for secrecy might arguably be greater under these circumstances, the district court's ruling on executive privilege is not before us. In addition, in responding to the grand jury investigation and gathering information in preparation for future developments in accordance with his official duties, White House Counsel may need to interact with the President's private attorneys, and to that extent other privileges may be implicated. [[sealed material)]

Nor is our conclusion altered by the Office of the President's concern over the possibility that Independent Counsel will convey otherwise privileged grand jury testimony of White House Counsel to Congress.[11] First, no one can say with certainty the extent to which a privilege would generally protect a White House Counsel from testifying at a congressional hearing. The issue is not presently before the court.[12] *See Nixon*. Second, the particular procedures and evidentiary rules to be employed by the House and Senate in any future impeachment proceedings remain entirely speculative. Finally, whether Congress can abrogate otherwise recognized privileges in the course of impeachment proceedings may well constitute a nonjusticiable political question.

The Supreme Court's recognition in *United States v. Nixon* of a qualified privilege for executive communications severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege. A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings. Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the

---

[11] Contrary to the Office of the President's suggestion, this is not a novel concern stemming from the Ethics in Government Act. During initial discussions with the Watergate Special Prosecutor, "[James] St. Clair was primarily concerned that evidence produced for the grand jury not subsequently be provided by [the Special Prosecutor] to the House Judiciary Committee for use in its impeachment inquiry." The Special Prosecutor eventually asked the grand jury to transmit an "evidentiary report" to the House Committee considering President Nixon's impeachment.

[12] The Office of the President cites no authority for the proposition that communications between White House Counsel and the President would be absolutely privileged in congressional proceedings, but rather merely suggests that they "should" be.

White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

The district court held that a government attorney-client privilege existed and was applicable to grand jury proceedings, but could be overcome, as could an applicable executive privilege, upon a showing of need and unavailability elsewhere by the Independent Counsel. While we conclude that an attorney-client privilege may not be asserted by Lindsey to avoid responding to the grand jury if he possesses information relating to possible criminal violations, he continues to be covered by the executive privilege to the same extent as the President's other advisers. Our analysis, in addition to having the advantages mentioned above, avoids the application of balancing tests to the attorney-client privilege -- a practice recently criticized by the Supreme Court. *See Swidler & Berlin*.

In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel. When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.

. . . Accordingly, for the reasons stated in this opinion, we affirm . . .

28 U.S.C. § 535
Investigation of crimes involving Government officers and employees

(a) The Attorney General and the Federal Bureau of Investigation may investigate any violation of title 18 involving Government officers and employees--

(1) notwithstanding any other provision of law; and

(2) without limiting the authority to investigate any matter which is conferred on them or on a department or agency of the Government.

(b) Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless--

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

(c) This section does not limit--

(1) the authority of the military departments to investigate persons or offenses over which the armed forces have jurisdiction under the Uniform Code of Military Justice (chapter 47 of title 10); or

(2) the primary authority of the Postmaster General to investigate postal offenses.