

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL,
Respondent.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Office of Independent Counsel has issued a grand jury subpoena commanding the White House to produce notes of certain communications between attorneys in the Office of the President and the First Lady, Hillary Rodham Clinton, in the presence of the First Lady's personal counsel. The court of appeals, which enforced the subpoena by a divided vote, did not dispute that the notes (i) reflected confidential communications (ii) made for the purpose of providing legal advice (iii) to a client (the Office of the President) (iv) in connection with ongoing grand jury proceedings and contentious legislative hearings. The court held, however, that there simply is no governmental attorney-client privilege in the face of a federal grand jury subpoena. It also held that documents created by government lawyers in anticipation of grand jury and legislative proceedings are not prepared "in anticipation of litigation" for purposes of the work product doctrine.

The petition presents two questions:

1. Whether the court of appeals correctly held that the Office of the President does not possess an attorney-client privilege that may be asserted in response to a federal grand jury subpoena and must comply with the subpoena.

2. Whether work performed by attorneys for an entity of the federal government in anticipation of grand jury proceedings involving the entity and employees of the entity, or in preparation for legislative hearings investigating the operations of the entity, is protected under the attorney work product doctrine.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Hillary Rodham Clinton was a party in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Office of the President respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-61a) is not yet reported. The opinion of the district court (App. 62a-83a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 9, 1997. The petition for a writ of certiorari is accordingly due no later than July 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Rule 501 of the Federal Rules of Evidence is set forth at App. 96a.

STATEMENT

This case arises from a subpoena *duces tecum* issued to the White House by the Office of Independent Counsel Kenneth W. Starr (“IC”), calling for production of “[a]ll documents created during *any* meeting attended by *any* attorney from the Office of the Counsel to the President and Hillary Rodham Clinton” (emphasis added) regarding a wide range of subjects. App. 2a. Although the IC and the White House had successfully resolved many other disputes over requests for information, the IC chose, through this subpoena, to contest whether the federal government is entitled to the protections for its lawyers’ activities enjoyed by all other organizations. Because the IC has determined not to recognize the confidentiality of *any* communications between attorneys for the federal government and any government officials, petitioner has sought judicial resolution of the matter.

Reversing the district court's decision, a divided court of appeals ordered the subpoena enforced. The majority recognized that the lower courts have applied a governmental attorney-client privilege in a wide array of settings, thereby "encouraging the full and frank presentation of legal advice" to government clients. App. 16a. Notwithstanding this well-settled body of law, the majority treated the present case as one of "first impression" (*id.* at 29a) because it arose in the context of a federal grand jury investigation. In that setting, the majority stated (*id.* at 17a), "the general duty of public service calls upon federal employees and agencies to favor disclosure over concealment." The court of appeals also held that petitioner could not invoke the work product doctrine because the White House could not itself be indicted, and therefore the subpoenaed materials were not prepared "in anticipation of litigation."

A. Factual Background

1. In January 1994, Attorney General Janet Reno appointed Robert Fiske to investigate "whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with: (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services." 28 C.F.R. § 603.1. Mr. Fiske was replaced by Independent Counsel Kenneth W. Starr in August 1994, after the Independent Counsel statute was reauthorized.

Although the IC's investigation initially focused on events in Arkansas that antedated President Clinton's Administration, it has expanded to encompass a wide range of allegations regarding the conduct of White House officials during this Administration. In connection with these matters, scores of present and former White House employees have been interviewed by the IC or have given grand jury

testimony about their conduct during this Administration. The IC has issued more than 20 document subpoenas to the White House. Moreover, all of these matters also have been thoroughly investigated by congressional committees, which have treated them as affairs having serious import for the Office of the President. See Declaration of Jane C. Sherburne ¶¶ 6, 12 [hereafter “Sherburne Dec.”] (App. 85a).

This swirl of inquiries has produced a host of legal issues for the Office of the President requiring the involvement and advice of White House attorneys. The task of these lawyers in rendering legal advice to the Office of the President has included, among other things, satisfying the Office’s obligation to respond to document requests and subpoenas from Congress and the IC; considering whether to recommend that the President invoke executive or other privileges with regard to any of the information requested; advising on matters related to appearances by White House officials before congressional investigative committees, and negotiating the terms of such appearances; representing the Office of the President in connection with interviews and depositions by the IC of White House personnel, including attendance at depositions of the President and the First Lady, discussions with the IC regarding such interviews and depositions, and advice to the President, First Lady, and White House staff in connection with these interviews and depositions; advising whether the Office of the President should alter its policies in response to information developed by investigations of any of the above matters; seeking to ensure that the conduct of White House officials is presented accurately and portrayed without distortion in congressional hearings; ensuring that public statements regarding the matters under investigation are accurate; consulting with personal counsel for the President and the First Lady and personal counsel for White House staff on factual and legal points of mutual concern; and, in the latter connection, evaluating where the line is properly drawn between the President’s and First Lady’s

official and personal capacities and which functions are properly performed by White House counsel, which by personal counsel, and which by the two together. See Sherburne Dec. ¶¶ 7, 9 (App. 85a-87a); Affidavit of David E. Kendall ¶ 3 (App. 93a).

2. At issue in this litigation are lawyers' notes generated during two meetings among Mrs. Clinton, attorneys representing her in her personal capacity, and White House lawyers representing the Office of the President with regard to the concurrent IC and congressional investigations of Whitewater and related matters. The first meeting took place on July 11, 1995, and was attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, Associate Counsel to the President Miriam Nemetz, and David Kendall, a partner in the law firm of Williams & Connolly. Ms. Sherburne was the lawyer in the Office of the President with responsibility for providing advice to the White House in connection with Whitewater-related issues. Ms. Nemetz worked with Ms. Sherburne on these matters. Mr. Kendall represents Mrs. Clinton in her personal capacity in connection with the investigations of Whitewater and related matters. Ms. Nemetz took notes during the meeting (the "Nemetz notes"). Sherburne Dec. ¶¶ 11, 16 (App. 87a, 89a).

The July 11, 1995 meeting and related notes concerned Mrs. Clinton's activities in the period immediately following the death of Deputy Counsel Vincent Foster. Eleven days later, on July 22, 1995, the IC interviewed the First Lady extensively about this matter. In addition, the Senate Special Committee to Investigate Whitewater Development Corporation and Related Matters (the "Senate Whitewater Committee") began public hearings on the Foster matter on July 18, 1995. Ms. Sherburne and Ms. Nemetz were involved in gathering and analyzing the facts relating to this matter so that they could advise the Office of the President regarding the related grand jury and congressional investigations. Sherburne Dec. ¶¶ 14-17 (App. 88a-89a).

The second set of notes at issue was taken by Ms. Sherburne (the “Sherburne notes”) during breaks in, and immediately following, Mrs. Clinton’s appearance on January 26, 1996, before a federal grand jury in the District of Columbia working under the direction of the IC. Present were Mrs. Clinton, Ms. Sherburne, Mr. Kendall and his partner Nicole Seligman, and at times John Quinn, Counsel to the President. The meeting was a traditional “debriefing” of a witness regarding her grand jury testimony; that testimony principally concerned the January 1996 discovery of a copy of Rose Law Firm billing records in the White House Residence. This discovery had dominated the news for several weeks, and the Senate Whitewater Committee had initiated an investigation of the matter. Sherburne Dec. ¶¶ 18-21 (App. 89a-90a).

On June 21, 1996, nearly two years after taking over the Whitewater investigation from Mr. Fiske, Independent Counsel Starr issued to the White House a subpoena *duces tecum* calling for production of “[a]ll documents created during *any* meeting attended by *any* attorney from the Office of the Counsel to the President and Hillary Rodham Clinton” (emphasis added) regarding a wide range of subjects. App. 2a. The White House identified nine sets of notes in response to the subpoena, including the Nemetz notes and the Sherburne notes, but declined to produce them, stating that they were subject to claims of attorney-client and executive privilege and were also protected by the work product doctrine. See Letters from Jane C. Sherburne to John D. Bates (reprinted at IC App. 8-11).¹

¹ References to “IC App.” and “White House App.” denote the respective appendices filed in the court of appeals.

B. Proceedings Below

1. On August 19, 1996, the IC moved to compel production of the Nemetz notes and the Sherburne notes.² Following briefing and oral argument, the United States District Court for the Eastern District of Arkansas (Wright, J.) denied the motion to compel. App. 62a-83a. The court observed (*id.* at 73a-74a) that “it is generally accepted that the attorney-client privilege applies in the governmental context in civil cases,” and it could discern no authority suggesting why the privilege should not likewise apply in the grand jury context (*id.* at 72a-73a). Moreover, the court recognized (*id.* at 74a) that there was a need in this case for both personal and governmental counsel to communicate with Mrs. Clinton: “Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers.”

The district court nevertheless declined to reach the question whether an entity of the federal government may generally assert an attorney-client privilege in response to a grand jury subpoena. Taking a narrower approach, the court held (App. 82a) that “these notes are protected from disclosure by the reasonable belief of the White House and Mrs. Clinton that the communications were privileged * * *.” “Even prior to the meetings at issue here, the White House Counsel’s Office has generally considered confidential communications by its lawyers for the purpose of legal advice to be shielded by the attorney-client privilege.” *Id.* at 73a. Because there was “no dispute that Mrs. Clinton, her personal counsel, and the White House lawyers all considered these meetings to involve confidential attorney-client

² The IC did not pursue the other documents identified by the White House, which were notes and memoranda memorializing the IC’s sworn depositions of the First Lady, which both White House lawyers and the First Lady’s personal counsel attended.

communications” (*id.* at 76a), the court sustained the assertion of privilege.

As a second and independent ground for denying the motion to compel, the district court held (App. 81a) that the subpoenaed notes are also “work product of the type that is clearly protected from disclosure to the grand jury.” The notes were prepared by counsel and plainly “reveal the attorneys’ mental processes in evaluating the communications.” *Ibid.* In addition, the court found (*id.* at 64a) that the notes were created in anticipation of litigation, because “at the time of the meetings at issue in this case, there was a considerable amount of legal activity taking place with respect to Whitewater related matters.” The court accordingly held (*id.* at 81a) that “[t]he Nemetz and Sherburne notes are * * * work product” and, under Eighth Circuit precedent, were “absolutely protected from disclosure in [the] grand jury setting.”

2. The court of appeals reversed by a divided vote. App. 1a-61a. The majority recognized that “the attorney-client privilege is the oldest known to the common law” (*id.* at 6a), and that the courts, commentators, and this Court’s Proposed Federal Rule of Evidence 503 have “ma[de] it clear that ‘[t]he definition of “client” includes governmental bodies’” (*ibid.*). The majority concluded, however, that these authorities do not resolve “the particular situation before us in this case” (*ibid.*) because they did not involve an assertion of attorney-client privilege in the context of a federal grand jury investigation (*id.* at 5a).

The majority therefore approached the issue as if it were called upon “to establish[] a new privilege, which courts ordinarily undertake with great reluctance.” App. 6a. Beginning with that premise, the majority concluded that a claim of attorney-client privilege simply could not be countenanced in this setting. It acknowledged that *Upjohn Co. v. United States*, 449 U.S. 383 (1981), “contains strong

language about the importance of the attorney-client privilege in encouraging the full and frank presentation of legal advice.” App. 16a. It decided, however, that there were more important lessons to be learned from *United States v. Nixon*, 418 U.S. 683 (1974). Although “the President did not assert an attorney-client privilege in *Nixon*, and so the case is not directly controlling,” the majority nevertheless surmised (App. 15a) that “*Nixon* is indicative of the general principle that the need for confidentiality within the executive branch may be subordinated to the needs of the federal government’s own criminal justice processes.” “[M]ore importantly,” the majority added, permitting the assertion of a governmental attorney-client privilege in this context would contravene what the majority termed “the general duty of public service,” which “calls upon federal employees and agencies to favor disclosure over concealment.” *Id.* at 17a.³

In addition, the majority held (App. 25a-27a) that the subpoenaed materials do not constitute protected work product because they were not prepared in anticipation of litigation. It observed (*id.* at 26a) that the IC has been investigating only White House *officials*, not the Office of the President, and that the government could not assert a work product claim merely because “some other person was anticipating litigation.” *Ibid.* And although the majority recognized (*ibid.*) that the White House itself was anticipating adversarial congressional hearings at the time the subpoenaed notes were prepared, it held that such hearings did not constitute litigation for purposes of the work product doctrine.

³ Having determined that there is no governmental attorney-client privilege as against a federal grand jury, the majority held (App. 21a) that there accordingly could not be a “common interest” protection for communications made in the presence of both government attorneys and private counsel.

Judge Kopf dissented (App. 29a-61a), flatly rejecting (*id.* at 31a) the majority’s refusal to accept “the well-recognized principle that the government, including the White House, is legitimately entitled to the attorney-client privilege (and the work-product doctrine).” In Judge Kopf’s view (*id.* at 48a), “the White House had a legitimate institutional need for the advice of its lawyers so that, acting through people, including the First Lady, as it must, the White House could carefully and candidly respond to the Independent Counsel.” And it “misses the point” of *Upjohn*, Judge Kopf added, simply to tell White House officials to talk to private counsel instead of government attorneys. *Id.* at 42a.

Concluding that petitioner enjoys an attorney-client privilege in this setting, the dissent next stated that under *United States v. Nixon* a court should apply a “balancing” test that weighs the interests of confidentiality secured by the privilege against the IC’s need for the subpoenaed materials. App. 50a. In this case, however, Judge Kopf found it unnecessary to do so in light of the First Lady’s *personal* privilege. *Id.* at 56a-57a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has issued an extraordinary and unprecedented decision that will substantially impair the ability of the Office of the President (and other federal agencies) to secure sound legal advice, particularly in the face of Independent Counsel investigations. Based on its premise that federal agencies must “favor disclosure over concealment” (App. 17a), the majority concluded that federal government entities may not assert a privilege to prevent the disclosure of confidential attorney-client communications (at least in the context of a federal grand jury subpoena) or assert work-product protection for legal work performed in preparation for legislative hearings or in connection with grand jury investigations of agency officials.

If the court of appeals were right, it would be markedly more difficult for government officials to obtain the candid and informed legal assistance necessary to the performance of their functions. Moreover, the logic of the panel's decision suggests that the Eighth Circuit would not honor the governmental attorney-client privilege in *any* context. Because the court's decision has such grave consequences for the government **S** and because it is so plainly wrong **S** further review is warranted.

I. THE DECISION BELOW MISAPPREHENDS THE BASIC PRINCIPLES OF ATTORNEY-CLIENT PRIVILEGE AND MISCONCEIVES THE ROLE OF GOVERNMENT LAWYERS

This Court held in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), that private entities such as a corporation enjoy an absolute privilege against the disclosure of confidential communications between their attorneys and persons whose relationship to the entity affords them information vital to the provision of legal advice to the entity. The privilege must be expansively construed and absolutely protected, the Court ruled, "in order that [the entity] could obtain legal advice." *Id.* at 394. Were the law otherwise, the privilege would become uncertain **S** and "[a]n uncertain privilege * * * is little better than no privilege at all." *Id.* at 393.

In asserting the attorney-client privilege in response to the IC's subpoena, the Office of the President sought only that protection accorded to non-governmental entities under *Upjohn*. Lawyers for the Office of the President communicated with the First Lady in confidence for the purpose of providing legal advice to their client. As the district judge expressly found, there was a surpassing need for *both* governmental *and* personal counsel to communicate with Mrs. Clinton: "Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers. App. 74a. White House

attorneys **S** no less than attorneys for private entities **S** have a duty to their client to “ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant.” *Upjohn*, 449 U.S. at 390-391. And for that reason, White House attorneys **S** no less than attorneys for private entities **S** must be free to communicate, in confidence, with officials, employees, and other individuals within that entity who may possess information that bears on the formulation of sound legal advice. That is exactly what White House attorneys were doing on July 11, 1995 and January 26, 1996, when they met, in confidence, with Mrs. Clinton and her personal attorneys.

Significantly, the Eighth Circuit did not dispute that the notes at issue here would be covered by the attorney-client privilege if taken by an attorney for a private organization, rather than by an attorney for the government. Instead, it held that “an entity of the federal government” may not “use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury.” App. 5a. This holding is indefensible from the standpoint of either precedent or public policy.

A. The Decision Below Substantially Impairs The Ability Of Federal Governmental Entities To Consult With Their Attorneys

1. Government agencies, no less than private clients, must have the benefit of sound legal advice in order to conduct their day-to-day affairs. “In the modern regulatory state, where agency decision-making is dominated by statutes and court rulings, lawyers play an extraordinarily powerful role.” Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in *GOVERNMENT LAWYERS* 143, 157 (1995). Because “[e]ven public legal rights are contingent at their boundaries and subject to argumentation and dispute as to their precise extent” (Restatement of the Law (Third) Governing Lawyers, Proposed Final Draft No.

1 (Mar. 29, 1996) § 124 (hereafter “Restatement”)), government agencies must have access to legal advice simply to know what the law is and what they must do to comply. Agencies likewise need the benefit of counsel “to resist claims and contentions that the agency considers legally or factually unwarranted.” Restatement § 124. And, of course, government employees must be free to consult confidentially with government lawyers concerning the whole array of complex laws and regulations that govern public service *S e.g.*, conflicts of interest, ethics, or Hatch Act restrictions.

In discharging these obligations to their clients, government attorneys, like their private counterparts, must be able to speak in confidence with agency employees and officials. To paraphrase *Upjohn* (449 U.S. at 391), government employees “can, by actions within the scope of their employment, embroil the [agency] in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by [government] counsel if he is adequately to advise the client with respect to such actual or potential difficulties.”

Absent a reliable expectation of confidentiality, however, government attorneys “will not be fully informed by the client” and will thus be impaired in assisting their client agency “to obtain the full advantage of our legal system.” *Upjohn*, 449 U.S. at 389, 391. Similarly, government attorneys, if they are to be truly candid with their clients, must be assured as well that their advice will be treated as confidential. Not surprisingly, therefore, “the generally prevailing rule” is that “governmental agencies and agents enjoy the same privilege as non-governmental counterparts.” Restatement § 124.

That was certainly the assumption of Congress when it enacted Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). And it has been the firm position

taken by every Administration over the last 20 years, Democratic and Republican alike. As the Office of Legal Counsel summarized the point in a 1982 opinion: “Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector.” *Memorandum for the Attorney General re: Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. O.L.C. 481, 495 (1982).⁴

2. The court of appeals recognized (App. 19a) that, by crafting a special exemption for federal grand jury proceedings, its decision would undermine the assurance of confidentiality in communications between government agencies and their lawyers. Nevertheless, the majority optimistically predicted that the decision would “not make the duties of attorneys who work in-house for the federal government *significantly* more difficult.” *Ibid.* (emphasis added). This optimism is entirely unfounded.

⁴ See also *Memorandum for the Deputy Assistant Attorney General re: The Attorney-Client Relationship in Department of Justice Representation of Individual Employees and Release of Information Obtained During That Representation Under the Freedom of Information Act* (Aug. 30, 1978) (reprinted at White House App. 80a-96a); *Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976) (reprinted at White House App. 60a-79a). Indeed, in the 1976 OLC Opinion, Assistant Attorney General (now Justice) Scalia expressly rejected (*id.* at 70a-71a) the proposition that the government attorney’s duty to maintain the confidences of a client should be subject to a “balancing approach” that takes account of the competing “public interest in investigating and disciplining or prosecuting wrongdoers.”

The majority first observed (App. 19a) that the White House “assumes that the attorney-client privilege is more predictable *ex ante* than it actually is.” But the court’s examples **S** disputes with counsel, the declaration of bankruptcy, and the raising of an advice-of-counsel defense **S** are all instances in which the privilege is vitiated by events *under the client’s control*. A government agency can, of course, also choose to waive its privilege, but it is quite a different matter to say that the privilege is automatically wiped out when an Independent Counsel chooses to issue a grand jury subpoena.

The majority surmised, however, that “confidentiality will suffer only in those situations that a grand jury might later see fit to investigate.” App. 19a. To begin with, that assumption overlooks the many cases (like this one) in which a grand jury *has already been convened*. In that event, the grand jury can be expected to “see fit” to investigate **S** and subpoena **S** any and every governmental attorney-client communication that bears even slightly on the underlying inquiry. Each day’s new attorney-client communications about the investigation itself, or about the subject matter of the investigation, would be fair game.

Moreover, even in matters where grand jury interest has not yet emerged, it remains impossible for a client to know in advance when that might occur. Any conversation, no matter how innocuous, might later be the subject of grand jury inquiry. A grand jury, after all, “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Experience shows that this is especially true of grand juries convened by Independent Counsels. As a recent alumna of IC Starr’s office has noted, “the Special Division has provided ICs with very broadly worded jurisdictional mandates, and the courts have been willing to accept a very permissive reading of what ‘related’ matters ICs may legitimately pursue within those

mandates.” O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 485-486 (1996). “Make no mistake about it,” one former Independent Counsel has observed, “when you set an independent counsel in motion * * * no train is going to stop that independent counsel until he or she has thoroughly, and I underscore thoroughly, investigated the allegations which have been presented to them by the court.” Statement of Joseph E. DiGenova, *Hearing before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives*, 104th Cong., 2d Sess. 65, 67 (1996).

It is therefore cold comfort to tell federal agencies and employees that their confidential communications with counsel will be compromised “only” in those situations “that a grand jury might later see fit to investigate” (App. 19a). Under the court of appeals’ ruling, attorney-client communications are just another investigative tool, and there is nothing other than the IC’s own tactical judgment to prevent him from seeking access to the entire universe of attorney work product. Indeed, although privilege issues tend to be debated in the more antiseptic context of document production, it is important to recognize that, if the court below is correct, *every* IC would be free to turn *every* White House (or other government) lawyer into a witness. Nor, of course, is the problem confined to this investigation. Every other Independent Counsel, now and in the future, is virtually certain to make similar demands. Since 1978 there have been 17 Independent Counsel investigations, at least four of which remain open today. See Congressional Research Service, *Independent Counsel Provisions: An Overview of the Operation of the Law* (Apr. 2, 1997).

Finally, the court below suggested (App. 19a) that “[a]n official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.” But far from illuminating the answer, this

denigration of the role of government lawyers and the responsibilities of government clients merely restates the problem. The issue here is not whether the small number of government employees who fear they may have violated the law should retain private counsel. The court of appeals' ruling will discourage *all* government employees from speaking with government counsel when there is any chance that their statements, however innocuous, could pique the curiosity of a grand jury that is, or may be, investigating their activities. By encouraging government employees to speak only with private counsel, the majority both imposes an extraordinary burden on the employees and effectively deprives the government of critical information.

3. The court of appeals' decision would be damaging enough if all it did was to vitiate governmental attorney-client privilege in the context of federal grand jury proceedings. In fact, however, the ruling casts serious doubt on whether the Eighth Circuit would recognize a governmental attorney-client privilege in *any* setting, because nearly all of the reasons marshaled by the majority carry equivalent force outside the grand jury context.

That is certainly true of the majority's central rationale: that there is a "general duty of public service" that requires agencies and their attorneys "to favor disclosure over concealment." If that is so, why would it uniquely cover federal grand jury proceedings? Surely criminal defendants have equally strong claims to such materials. They, after all, have a constitutional right to compulsory process (the IC does not); thus, the agencies' "general duty * * * to favor disclosure" should require them to disclose otherwise privileged materials to indicted individuals as well. And what reasoned basis, given the premises of the decision below, exists for stopping there? Private plaintiffs in litigation with the federal government often seek to vindicate "the public interest" (App. 18a). The Eighth Circuit's newly-minted duty

of disclosure seemingly would require turning over otherwise privileged materials to them as well.

The majority's reading of *United States v. Nixon* S that otherwise privileged conversations must "be subordinated to the needs of the federal government's own criminal justice processes" (App. 15a) S has a comparable sweep. So too for the majority's reliance (*id.* at 17a) on the fact that governmental agencies cannot be indicted. In the first place, the existence of the privilege has never been thought to depend on whether the privilege holder is susceptible to indictment; otherwise an immunized person would lose his attorney-client privilege, which is surely not the law. Moreover, the majority's rationale proves too much. A federal agency also cannot be indicted in a case in which a criminal defendant seeks access to government attorney-client materials, or in a state grand jury investigation or trial, nor can it be made liable in a private *qui tam* action.

These implications may have caused the court of appeals little concern because, as it acknowledged at the outset (App. 5a), it was not prepared to concede that there is a governmental attorney-client privilege in *any* setting. But by deciding the case as it has, the majority has invited litigants and other courts to extend its supposedly limited ruling to a wide array of other contexts.

The uncertainties posed by the court of appeals' decision, both for the White House and for other governmental agencies, warrant further review and cannot await the next case. Agencies and their employees need to know, and know now, whether their communications with government counsel are likely to be compromised by grand jury inquiry.

B. The Court Of Appeals' Decision Is Wrong

If the decision below were correct, federal agencies would be obliged to accept this substantial impairment of their ability to consult with, and receive frank advice from,

counsel. In at least two respects, however, the decision **S** which the majority chose to apply retroactively to the communications with the First Lady **S** is deeply and indefensibly wrong: it carves out an unprecedented exception from the scope of the attorney-client privilege (which has never before been held to apply only in *certain* contexts but not others); and it rests on a misguided conception of what governmental agencies and their lawyers do for a living. A heavy burden falls to the proponent of such “a radical reworking of our law” (*Osborne v. Ohio*, 495 U.S. 103, 119 (1990)), which neither the IC nor the majority below has carried.

1. The decision misapprehends basic principles of attorney-client privilege

The court of appeals’ decision is rather “like a restricted railroad ticket, ‘good for this day and train only.’” *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting). According to the majority, even if the Office of the President could assert a privilege had these notes been sought in civil discovery, or perhaps even for use in state criminal proceedings **S** nevertheless, in this purportedly special context, the privilege simply evaporates. There is absolutely no basis for carving out from the long-settled and time-honored principles of attorney-client privilege a special exception for federal grand jury subpoenas.

a. Although the court of appeals professed agnosticism on the point (App. 5a), there can be no question that the lower courts have recognized and applied the governmental attorney-client privilege in a wide array of contexts. As the majority conceded (*id.* at 10a), the courts have uniformly embraced the privilege in civil cases.⁵ The

⁵ See, e.g., *Wright v. OSHA*, 822 F.2d 642, 648 (7th Cir. 1987) (attorney-client privilege protects communications between OSHA and Solicitor of Labor); *Covington & Burling v. Food & Nutrition*

Restatement reflects this consensus view. Section 124, which was approved by the American Law Institute in May 1996 (see 64 U.S.L.W. 2739), is entitled “Privilege for Governmental Client” and states “the generally prevailing rule that governmental agencies and agents enjoy the **same** privilege as non-governmental counterparts.” Comment b, at 409 (emphasis added). Similarly, the Advisory Committee's note to Proposed Fed. R. Evid. 503, dealing with the attorney-client privilege, provides that its “definition of ‘client’ includes governmental bodies.” Advisory Comm. Note to Standard 503, Subdivision (a)(1).

Congress, too, has recognized the appropriateness of a governmental attorney-client privilege. Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), excepts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” By its terms, Exemption 5 entitles the government to withhold under FOIA any documents that it would be privileged to withhold in litigation. And Congress made quite clear that the attorney-client privilege was one of the privileges available to the government. As this Court explained in *NLRB v. Sears*,

Service, 744 F. Supp. 314, 323 (D.D.C. 1990) (privilege protects communications between attorneys and officials of the FNS); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550, 552 (D. Mass. 1984) (“[t]he attorney-client privilege does apply ‘in the governmental context’”); *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (the attorney-client privilege “unquestionably is applicable to the relationship between Government attorneys and administrative personnel”), *aff'd*, 734 F.2d 18 (7th Cir. 1984); *SEC v. World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981) (privilege protects communications between SEC staff investigator and SEC attorneys); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (“[c]ourts generally have accepted that attorney-client privilege applies in the governmental context”).

Roebuck & Co., 421 U.S. at 154, “[t]he Senate Report states that Exemption 5 ‘would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.’” Accord, e.g., *Mead Data Central, Inc. v. United States Dep’t of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (Exemption 5 “covers professional advice on legal questions which bears on [agency] decisions”). Congress, in short, authorized agencies to withhold materials on attorney-client privilege grounds precisely because such a privilege would be available to the agency in litigation.

b. The court of appeals also was wrong in asserting that it was writing on a clean slate. In conflict with the decision below, the Sixth Circuit has concluded that the governmental attorney-client privilege is available *in the context of grand jury proceedings*. In *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989), the City of Detroit sought to quash a federal grand jury subpoena seeking minutes of City Council meetings on the ground that the minutes were protected by the attorney-client privilege. The Sixth Circuit vacated the district court’s order enforcing the subpoena and remanded the case for a determination whether the meetings were confidential under state law. The court plainly took *as a given* that a governmental attorney-client privilege can be asserted in a federal grand jury proceeding, otherwise its consideration of the factual question whether the predicates of the privilege had been satisfied would have been senseless. See also *In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury*, 241 N.J. Super. 18, 574 A.2d 449 (1989) (holding that an attorney employed by a county board of freeholders could not be made to reveal client communications to a grand jury investigating the county).⁶

⁶ The dearth of precedent on this point is no doubt due to the fact that (a) any such intrabranched disputes would ordinarily (outside

c. The court of appeals reasoned, however, that even if an attorney-client privilege would otherwise apply to these notes, the privilege simply disappears in the face of a federal grand jury subpoena. It must be said, at the outset, that the court's conception of attorney-client privilege is wholly unknown to the law. Until the decision below, no court had *ever* held that the attorney-client privilege applies in some contexts but not others. Rather, attorney-client privilege applies across the board; unless some exception to the privilege is present (and the majority identified none), the privilege applies *whatever* the context.

Thus, for example, no court had ever before held that the same attorney-client communication is privileged in some litigation settings but not others, for some corporate transactions but not others, in some criminal investigations but not others. If the attorney-client privilege were subject to such context-specific loopholes, it would be a highly uncertain protection: no client could possibly know whether his confidential communications to counsel will be fully protected. As this Court has cautioned, “[a]n uncertain privilege * * * is little better than no privilege at all.” *Upjohn*, 449 U.S. at 393. Accord, *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996).

The court of appeals' exception for federal grand jury proceedings thus entails a reformulation of the very idea of attorney-client privilege. None of the majority's reasons, however, justifies such a change in the law. True, “a grand jury has broad investigatory powers” (App. 13a), but courts

the IC-type situation) be resolved by consultation between agency heads or, if necessary, by the chief executive, but not by the courts; and (b) no previous Independent Counsel has had the audacity or imagination to launch such a direct attack upon the seemingly well-established rights of government clients to unfettered assistance of counsel.

have regularly sustained attorney-client privilege claims in response to grand jury inquiries. See, e.g., *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32 (2d Cir. 1986); *In re Grand Jury Subpoena*, 788 F.2d 1511 (11th Cir. 1986), modifying 765 F.2d 1014 (11th Cir. 1985). Nor does this Court's ruling in *Nixon* lend the slightest support to the decision below. Even the majority recognized (App. 15a) that *Nixon* "is not directly controlling" because the President never asserted attorney-client privilege in that case.

If anything, *Nixon* forecloses, not supports, the majority's decision. Although the *Nixon* Court agreed that "'the public * * * has a right to every man's evidence,'" it emphasized that there is an exception for "common-law * * * privileges," including for "an attorney or a priest[, who] may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709.

As for the court of appeals' refusal to apply the principles of *Upjohn*, here too its decision is flawed at every turn. That the White House cannot be indicted is beside the point, as it ignores the very premise of *Upjohn* S that clients need legal advice not only to fend off litigation but also so that they can know what their rights and duties are and thereby "promote broader public interests in the observance of law and administration of justice." 449 U.S. at 389. And the majority's notion that corporate attorneys have a more compelling interest than government attorneys "in ferreting out any misconduct by employees" (App. 17a) rests on a strange concept of governmental responsibilities.⁷

⁷ The majority's reliance (App. 17a) on 28 U.S.C. § 535(b) for the proposition that government attorneys, unlike private attorneys, "are under a statutory duty to report criminal wrongdoing by other employees" is contrary to both the legislative history of the provision (see H.R. Rep. No. 2622, 83rd Cong., 2d Sess. (1954)) and the consistent interpretation of the Department of Justice. See *Memorandum for the Acting Assistant Attorney General re: Duty of*

2. The decision misconceives the role and responsibilities of federal government employees and attorneys

The majority's central rationale (App. 17a) is that "the general duty of public service calls upon federal employees and agencies to favor disclosure over concealment." In the majority's view, "[t]he public responsibilities" of government entities are "reason enough to find *Upjohn* unpersuasive." *Id.* at 17a, 18a. That sentiment **S** which in the majority's estimation was "more important[]" (*id.* at 17a) to its resolution of the case than any other **S** reflects an oversimplified conception of how the federal government works, and a basic misapprehension about the roles and duties of federal government attorneys.

In the first place, the relevant issue is not "concealment," as the majority supposed. It is instead the appropriate balancing of the public's interest in the business of government and the need for confidentiality. And while the federal government has a general statutory obligation under FOIA, 5 U.S.C. § 552, to make its records available to the public, it is an utter non-sequitur to infer (as the majority does) that the government has some overarching "duty * * * to favor disclosure," regardless of the competing costs and benefits. Such an unnuanced conception of the functions of government ignores, among other things, the many exceptions to disclosure under FOIA (*id.* § 552(b)), which include material that would be protected by the attorney-client privilege or the work product doctrine in private litigation

Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee (Mar. 29, 1985), at 4 (reprinted at White House App. 49a-59a). See also Opinion of Nov. 30, 1976, at 5-7 (White House App. 64a-66a); Opinion of Aug. 30, 1978, at 9-10 (White House App. 88a-89a); Opinion of Apr. 3, 1979, at 4 (White House App. 100a).

(see *supra* at 19-20). As the Court noted in *Nixon*, confidentiality in appropriate cases has been central to the proper functioning of the Republic ever since the Constitutional Convention **S** a gathering that was itself conducted in secret and the records of which were sealed for 30 years. 418 U.S. at 705 n.15.

The court of appeals' parallel belief that government attorneys cannot "shield" the information they learn from their agency clients is just as wrongheaded. Government lawyers are not "'independent auditor[s]," as the majority mistakenly suggested (App. 17a); they are, instead, *attorneys*, first and foremost, as to whom (wholly unlike auditors) there is a venerable tradition of protected communications. And government attorneys are bound by much the same ethical and disciplinary rules as lawyers in the private sector, including the duty to maintain the confidentiality of client communications and client secrets. See ABA Informal Opinion 1413 (1978); D.C. Bar Ethics Opinion 148 (1985). In the District of Columbia, where a substantial number of government attorneys practice and where the attorney notes at issue in this case were created, the Rules of Professional Conduct provide that for purposes of the general obligation of client confidentiality, "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation or order." D.C. Rules of Professional Conduct, Rule 1.6(i).⁸ Those rules preclude *all* lawyers **S** government and private alike **S** from disclosing a client's secrets except "[w]hen permitted by the[] Rules or required by law or court order,"

⁸ Although virtually all of the relevant events in this case took place in the District of Columbia, and the attorneys who took the subpoenaed notes were governed by D.C. Bar rules, the Independent Counsel elected to issue the subpoena out of his Arkansas grand jury, rather than out of his D.C. grand jury (where the First Lady had testified).

and provide an additional exception for government lawyers only for circumstances in which disclosure is “authorized by law.” *Id.* Rule 1.6(d)(2).⁹

The court of appeals ignored these basic principles, opining instead that government agencies and employees have a duty to favor disclosure. That fundamental misconception about the relationship between the government and its lawyers lies at the very heart of the majority’s evisceration of the attorney-client privilege in this case.¹⁰

⁹ The Comment to Rule 1.6 explains that the additional exception for government attorneys applies only in those situations in which the government authorizes or requires disclosure “by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity.”

¹⁰ The majority’s peculiar conception of the responsibilities of government agencies and lawyers also impaired its analysis of the common interest issue. The majority agreed that both petitioner and the First Lady were “concerned with understanding fully the facts involved in the OIC’s investigation,” and that each had an interest in “dividing responsibility between the personal attorneys and White House counsel.” App. 22a. But the majority discounted these concerns, and others (see *ibid.*), as “amount[ing] to no more than an assertion that ‘we all want to obey the law’” — and in its view, the common-interest doctrine does not “stretch[] that far.” But assisting clients, including governmental agencies, in understanding and “obey[ing] the law” is precisely what *Upjohn* is about. The majority simply never explained why the common interest doctrine — which even the majority recognized (*id.* at 21a) to be a “loose standard” — could not embrace such a core concern of the attorney-client privilege.

3. Even if petitioner’s attorney-client privilege were not absolute in an IC investigation, it would still warrant far greater weight than the court of appeals gave it

Even if it were appropriate in an IC investigation to apply a balancing test in assessing claims of governmental attorney-client privilege, surely the privilege would not simply evaporate each time the IC made the unilateral decision to issue a grand jury subpoena. To the contrary, the balancing test articulated in *Nixon* to deal with the qualified executive privilege (and certainly any balancing test that might supplant the traditional absolute privilege for attorney-client communications) would require the IC to make a strong showing of need in order to overcome the protections of the privilege. Here, too, the court of appeals went astray by diluting to the vanishing point even the qualified privilege articulated in *Nixon*.

This Court ruled in *Nixon* that only a “demonstrated, *specific* need” for evidence, sufficient to persuade the trial court that the subpoenaed material is “‘*essential* to the justice of the [pending criminal] case,’” would suffice to overcome the presumptive executive privilege for White House communications. 418 U.S. at 713 (emphasis added; brackets in the original). In *Nixon* itself, the Special Prosecutor sought the materials in connection with a *pending criminal trial* **S** a case in which indictments had issued of the very persons whose voices appeared on the subpoenaed tapes **S** and established both the “relevance” and the “admissibility” of the subpoenaed materials. *Id.* at 700-701. What is more, the Special Prosecutor demonstrated that “[t]he subpoenaed materials [were] not available from any other source * * *.” *Id.* at 702. Thus, the Court ultimately concluded that the Special Prosecutor had made a showing sufficient to overcome the qualified executive privilege.

The court below read *Nixon* very differently. In its view (App. 13a n.9), the burden fell to petitioner (not the Independent Counsel) and required petitioner to show ““that there is no reasonable possibility that the category of materials the [IC] seeks will produce information relevant to the general subject of the grand jury’s investigation.”” That burden, of course, is nothing more than what Fed. R. Crim. P. 17 would impose *in the absence of any privilege*. See *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). In short, under the court of appeals’ decision, the “balancing test” articulated in *Nixon* **S** if applicable in this context **S** would invariably be struck in the IC’s favor, regardless of any showing of need. That cannot possibly be the law.

II. THE DECISION BELOW RESTS ON A MISTAKEN CONCEPTION OF THE WORK PRODUCT DOCTRINE

The court of appeals declined to apply the work product doctrine because, in its view, the subpoenaed notes were not ““prepared in anticipation of litigation.”” App. 25a. The court’s cramped conception of “litigation,” however, turns a blind eye to both legal and political realities.

A. The majority recognized (App. 26a) that the subpoenaed notes were created in preparation for congressional hearings involving the White House. It also acknowledged (*ibid.*) the Restatement’s position that “litigation ‘includes * * * an investigative legislative hearing.’” The present case illustrates why that is so. The notes were taken in connection with an effort to prepare the Office of the President for hearings before the Senate Whitewater Committee. That Committee’s proceedings, which focused almost entirely on the White House, were no less adversarial than traditional litigation. The Chief Counsel, for example, was a former U.S. Attorney, and minority counsel a former Watergate prosecutor. Witnesses were grilled and rehabilitated, exhibits were introduced as at trial,

and at one point the Chief Counsel even gave a “summation” of his evidence to date.¹¹ And at the end of the process, findings of “fact” were issued by both the majority and minority, just as they might be by a judge or jury.

The policies that underlie the work product privilege are as fully implicated in a contentious and politically charged congressional hearing controlled by the opposition political party as they are in ordinary litigation. To the extent the subpoenaed notes were created in anticipation of these legislative hearings, the work product doctrine should apply. The alternative would permit the unseemly spectacle of calling government lawyers who helped prepare their agencies’ representatives for congressional hearings and questioning them about the strategy they proposed to their clients.¹²

The majority declined to consider congressional hearings to be “litigation” because “the only harm that could come to the Agency as a result of such an investigation is political harm.” App. 27a. It is not clear what the court of appeals meant by “political harm,” but to the extent that the term encompasses a diminution in the ability of the Office of the President to deal with Congress or to garner public support for its positions or to focus its energies on the daily business of the executive branch, these elements of the “political” process lie at the very heart of our system of government. In any event, before this case no court (to our knowledge) had

¹¹ See Maraniss, *The Hearings End Much as They Began*, Wash. Post, June 19, 1996, at A1; Melton, *For Whitewater Committee Counsel, a Painstaking Approach*, Wash. Post, Apr. 8, 1996, at A19.

¹² Under the court of appeals’ decision, work product of counsel for *private* parties prepared in anticipation of legislative hearings would likewise be subject to disclosure.

ever held that a party must face a particular type of litigation *harm* before it may claim the work product protection.

B. The subpoenaed notes were also created in anticipation of ongoing grand jury proceedings that resulted in numerous document subpoenas to the White House and questioning of many White House employees and officials. The court of appeals held that this, too, was not “litigation” for purposes of the work product doctrine. In the court’s view, the IC is investigating only White House *officials*, not the White House itself, and it could find no authority permitting a work product claim merely because “some other person,” such as the First Lady, “was anticipating litigation.” App. 26a.

Here, again, the court misunderstood the work product protection. Although the “White House” itself cannot be a party to a criminal or civil proceeding, its constituent parts certainly can. When the official conduct of key members of the White House is being investigated by a grand jury, the institutional interests of the Office of the President are obviously at stake. Moreover, the White House itself has been the recipient of numerous IC subpoenas, *including the one at issue in this proceeding*. In order for White House lawyers to represent their client's interests adequately, they must be able to record their thoughts and mental impressions freely, without fear that those documents will automatically be discoverable and that candid assessments might be used to call the operations of their client into question.

The majority’s narrow conception of work product would greatly compromise the ability of government lawyers to represent their clients’ broad institutional interests during criminal or civil investigations. Unless representation of those interests is to be accorded a lesser status than the myriad of other representations in which lawyers engage **S** and the court of appeals did not suggest why that should be so **S** the privilege is fully applicable in this setting.

* * * * *

There should be no mistake about the breadth and practical consequences of the Eighth Circuit's decision in this case. If the majority is correct, then the next step will be for the grand jury to require the White House Counsel or other government attorneys to testify about conversations with the President or other government officials concerning the legal advice they have given and the information they gathered in their internal investigations. If that is to be the law, it should be announced by this Court, not by a 2-1 majority of the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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* Pursuant to authorization of the Attorney General, undersigned counsel, serving as special government employees, have been assigned to represent the petitioner.