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**GRAND JURY PROCEEDINGS
UNDER SEAL**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: GRAND JURY PROCEEDINGS.)
_____)

) Misc. Nos. 98-095, 98-096, and
) 98-097 (UNDER SEAL)

**MEMORANDUM OF THE WHITE HOUSE IN OPPOSITION TO OIC'S MOTIONS
TO COMPEL BRUCE R. LINDSEY AND SIDNEY BLUMENTHAL TO TESTIFY
CONCERNING CONVERSATIONS PROTECTED BY THE ATTORNEY-CLIENT,
PRESIDENTIAL COMMUNICATIONS, AND WORK PRODUCT PRIVILEGES**

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The Office of the President ("White House") submits this memorandum in opposition to the Motions to Compel the testimony of Bruce R. Lindsey and Sidney Blumenthal, filed by the Office of the Independent Counsel ("OIC") on March 6, 1998 ("OIC Motions").¹

INTRODUCTION

The President of the United States, if he is to perform his constitutionally assigned duties, must be able to obtain the most candid, forthright, and well-informed advice from his advisors. Only last year, the United States Court of Appeals for the District of Columbia Circuit reaffirmed that principle, emphasizing the importance of preserving confidentiality of presidential communications "to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge." *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997).

Yet, the Independent Counsel now asks the Court to strip away this constitutional protection on the ground that, by merely completing a subpoena form and sending it to one of the

¹ On March 6, 1998, the OIC also moved to compel testimony from Nancy Herrreich. By letter of March 4, 1998, however, the White House informed OIC of its willingness to allow non-lawyers such as Ms. Herrreich to testify to factual matters. We do not believe that, if recalled to testify before the grand jury, Ms. Herrreich would assert the privilege as to any of the factual matters about which the OIC seeks to compel her testimony.

President's lawyers or his senior advisors, he becomes entitled, without any showing of need, to invade the legal and other confidential advice on which the President must rely. The OIC asks the Court, as well, to strip away from government lawyers and their clients the attorney-client privilege—a claim that ignores the historical roots of the privilege, the Rules of Professional Conduct that apply in the District of Columbia, and the law of this jurisdiction.

As to the presidential communications privilege, the OIC ignores the teachings of the Court of Appeals and leaps from the bald assertion that only the President's private conduct is at issue here, to the conclusion that the advice he is given should not be protected. The OIC's contention is based on neither evidence nor logic. With respect to the Lewinsky matter, the grand jury is inquiring into actions allegedly taken by the President while in office—indeed, actions that allegedly occurred in the White House itself. And as to the President's deposition, the mere fact that the *Jones* case involves alleged conduct before the President took office does not mean that the advice he is given concerning his constitutional duties somehow becomes "private." To the contrary, the Supreme Court itself acknowledged the potential impact of the *Jones* litigation on the daily business of the Presidency—an impact that, however unlikely a prospect it was a year ago, is now all too real and tangible. Thus, even if one were to accept the OIC's description of the *Jones* case, or the President's alleged relationship with Ms. Lewinsky, as purely private, that description would be irrelevant to the question whether the communications at issue here are protected by privilege. The critical question is not the nature of the underlying conduct; it is the purpose of the advice being given.²

But if there were any question about the official nature of the matters about which these witnesses have provided advice, one need only look to the ultimate purpose of the OIC's investigation. The Ethics in Government Act requires the OIC to submit to the House of Representa-

² For example, the conversations at issue in *United States v. Nixon*, 418 U.S. 683 (1974), involved a burglary of the DNC offices and efforts to cover it up, and yet were found to be presumptively privileged. See *infra* at 38. See also *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730-31 (D.C. Cir. 1974) (presidential communications relating to the Watergate coverup held presumptively privileged and not disclosed).

tives any evidence of impeachable offenses.³ See 28 U.S.C. § 595(c). Impeachment is, of course, an action specifically directed at the President in his official capacity and is specifically provided for in the Constitution. See U.S. CONST. Art. II, § 4. Indeed, it is uncertain at best whether the OIC constitutionally can even ask the grand jury to take action against the President in his personal capacity. See, e.g., PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) (reasoning that a sitting President could not be subjected to criminal prosecution because “[h]e is the sole indispensable man in government”). Any advice sought by the President to deal with the threat of impeachment is, by its very nature, official—not private.

Even if there were no such threat overhanging the presidency, however, the advice at issue here must be treated as official and, thus, presumptively privileged. The distinction between those who give personal advice and those who give official advice to the President is clear. The President’s *private* counsel provide advice concerning the response he must make to the particular demands the OIC and the *Jones* litigation place on him in his personal capacity. The White House Counsel and the President’s senior advisors, on the other hand, provide advice concerning the official obligations of the President and the Office of the President, and are responsible for ensuring that, despite the pending litigation, he is able to perform his constitutional duties with maximum effectiveness. It is only as to this advice—from senior advisors like Mr. Blumenthal—that the presidential communications privilege has been invoked. Similarly, it is only as to legal advice given by Mr. Lindsey to the President in his official capacity that we have asserted the government’s attorney-client privilege.

Finally, the circumstances under which the Independent Counsel has brought these Motions make clear the overly intrusive nature of his inquiry—one launched with no sensitivity to the most rudimentary constitutional principles and seemingly intended to manufacture a constitutional confrontation. Recognizing the grand jury’s legitimate interest in obtaining the evidence

³ The threat of referral for possible impeachment proceedings is not just hypothetical. There is now pending in the House of Representatives a resolution to impeach President Clinton for an alleged “systematic effort to obstruct, undermine, and compromise the legitimate and proper functions and processes of the [E]xecutive [B]ranch[.]” See H. Res. 304, 105th Cong., 1st Sess.

it needs, we have made clear to the OIC from the beginning our willingness to provide the facts relevant to its investigation to the fullest extent consistent with the President's constitutional obligations. But we have also made clear our firm conviction that the OIC can have no legitimate interest in the White House staff's discussions of political or legal strategy, much less in whether anyone, in or out of the White House, has spoken less than favorably about the OIC.

Consistent with this position, we informed the OIC as early as February 3, 1998, that, in shaping any limited invocation of executive privilege that might be necessary for the President's non-attorney advisors, we would, as we had in other cases, *see, e.g., Sealed Case*, 121 F.3d at 735-36, distinguish between facts and advice. (*See Declaration of Charles F.C. Ruff* ("Ruff Decl.") ¶ 32). This position was reaffirmed in our letter to the OIC of March 4, 1998, but our offer was spurned. (*See Ruff Decl. Exhibits* ("Exs.") 6, 7). Indeed, the OIC moved to compel the testimony of Nancy Hernreich on the very same day that it rejected the White House's offer to withdraw the assertion of privilege as to her. (*See Ruff Decl. Ex. 7*). And two days before that, the OIC rejected the White House's request that, before it launched any litigation, counsel meet to determine whether there could be an accommodation of the grand jury's interests with those of the Presidency—a process specifically contemplated by the Court of Appeals as the vehicle for minimizing the risk of unnecessary constitutional conflict. *See Sealed Case*, 121 F.3d at 735 (OIC's motion to compel production of documents followed considerable negotiations with the White House).

The Independent Counsel comes before this Court seeking essentially unfettered authority to inquire into every conversation the President, his lawyers and his advisors have had about the *Jones* case and the Lewinsky matter. He does so without being willing to proffer to the court the slightest justification for that inquiry—beyond his mere wish—and in direct contravention of the Court of Appeals' mandate that any intrusion into privileged communications must be narrowly focused and specifically justified. As the following discussion will make clear, that wish is grounded neither in good law nor sensible constitutional practice.

BACKGROUND

1. Factual Background

The roots of this dispute date at least back to May 27, 1997, when the Supreme Court decided *Clinton v. Jones*, 117 S. Ct. 1636 (1997). The Court rejected the President's attempt to stay temporarily the ongoing civil proceedings against him in a sexual harassment lawsuit brought by a former Arkansas state employee. In holding that the President was not, despite his unique position in the constitutional structure, entitled to a temporary stay of the civil proceedings against him, the Court opined that "it seems unlikely that a deluge of such litigation will ever engulf the Presidency" and suggested that the *Jones* case, "if properly managed by the District Court, . . . appears to us highly unlikely to occupy any substantial amount of petitioner's time." *Id.* at 1648.

In the wake of *Clinton v. Jones*, the President confronted an unavoidable dilemma. On the one hand, he remained the Nation's chief executive with a full panoply of domestic and foreign obligations which, the Court recognized, regularly required his personal attention for as much as twenty hours a day. *See Clinton v. Jones*, 117 S. Ct. at 1646 & nn.25–26; Ruff Decl. ¶ 6. But on the other hand, by virtue of the Court's decision, the President was obliged to attend to the *Jones* litigation ongoing in Arkansas, including formulating discovery responses, submitting to a deposition, strategizing with counsel, and evaluating and responding to potential avenues of settlement. At its core, the Court's decision in *Clinton v. Jones* meant that the President could not choose one course or the other—doing the job to which he was elected, or defending himself against the *Jones* lawsuit. He was, instead, required to do both. (*See* Ruff Decl. ¶¶ 4, 7; Declaration of Bruce R. Lindsey ("Lindsey Decl.") ¶ 8). How the President reconciles these types of conflicting obligations is the focus of a major portion of the communications over which the White House now invokes the presidential communications privilege, discussed in more detail below.

On Saturday, January 17, 1998, the President gave a deposition in *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.). In this deposition, the President was asked certain questions

relating to Monica Lewinsky, a former White House intern. On or about January 21, 1998, it was publicly announced that the jurisdiction of Independent Counsel Kenneth W. Starr had been expanded to include an investigation of Ms. Lewinsky and whether she or others suborned perjury or violated any other federal laws. (See Ruff Decl. ¶ 10).

In light of the new allegations, particularly those involving alleged obstruction of justice, commentators publicly adverted to the prospects of impeaching the President.⁴ Those prospects took on a heightened reality when the Chairman of the House Judiciary Committee publicly stated that “impeachment might very well be an option” if the OIC substantiated its latest allegations against the President. See Francis X. Clines & Jeff Gerth, *Subpoenas Sent as Clinton Denies Reports of an Affair With Aide at White House*, N.Y. TIMES, Jan. 22, 1998, at A1, A24 (quoting Rep. Henry J. Hyde (R-Ill.)); accord Katharine Q. Seelye, *Clinton’s Rapid-Response Squad Now Moves in Slow Motion*, N.Y. TIMES, Jan. 24, 1998, at A8 (“If indeed the President was guilty of obstruction of justice, I really would think that the word “impeachment” would be one of the words to be used.’”) (quoting Rep. Charles B. Rangel (D-NY)).

2. Prior Proceedings Regarding Mr. Lindsey, Mr. Blumenthal, and Ms. Hernreich

From the outset, the White House has taken expansive measures to cooperate fully with the OIC’s investigation. The White House promptly searched the entire Executive Office of the President for documents responsive to the OIC’s subpoenas, and has produced all responsive materials. (See Ruff Decl. ¶ 13).

On January 30, 1998, the OIC subpoenaed Bruce Lindsey, Assistant to the President and Deputy Counsel, calling for him to appear before the grand jury to testify on February 4, 1998. (See Ruff Decl. ¶ 31). Around this time, the OIC also issued subpoenas to Sidney Blumenthal, Assistant to the President, and to Nancy Hernreich, Deputy Assistant to the President and Direc-

⁴ See, e.g., Guy Gugliotta, *Impeachment Inquiry Discussed in House*, WASH. POST, Feb. 10, 1998, at A9; Katharine Q. Seelye, *Clinton’s Rapid-Response Squad Now Moves in Slow Motion*, N.Y. TIMES, Jan. 24, 1998, at A8 (“George Stephanopoulos, a main campaign aide in 1992 and Mr. Clinton’s senior adviser until after the 1996 election, was among the first to use the word ‘impeachment’ over the allegations[.]”); Tony Mauro & Richard Willing, *Impeachment Talk is Real*, USA TODAY, Jan. 23, 1998, at 3A; Ruff Decl. ¶¶ 21–22.

tor of Oval Office Operations. All three witnesses appeared before the grand jury and offered testimony.

The White House has, at every stage, sought to narrow and focus the issues over which any assertion of privilege may properly be invoked. Although the White House has endeavored to do so in cooperation with the OIC, as is plainly contemplated by *Sealed Case*, 121 F.3d at 735–36, the OIC has generally declined to participate.

For example, Charles Ruff, Counsel to the President, and Lanny Breuer, Special Counsel, met with the OIC on February 3, 1998 to discuss potential privilege concerns that could be raised during the grand jury testimony of Mr. Lindsey and John Podesta, Deputy Chief of Staff. (See Ruff Decl. ¶ 32). Mr. Ruff explained the potential privilege concerns that would necessarily arise if the OIC questioned Mr. Lindsey and other advisors regarding advice given to the President in his official capacity, and asked whether the OIC could specify the subjects about which they wished to elicit testimony. The OIC declined to do so (*id.*), and subsequently informed the White House that they would not recognize the applicability of executive privilege in this case. (See Ruff Decl. ¶ 34). Nevertheless, following the negotiation process contemplated by *Sealed Case*, Mr. Ruff reiterated the White House's desire to seek an accommodation of the parties' respective interests by letter of February 5, 1998. (See Ruff Decl. ¶¶ 35–36 & Ex. 2).

Subsequently, the White House voluntarily and unilaterally narrowed the scope of the communications over which privilege was being asserted. Yet, incredibly, in its haste to provoke a constitutional confrontation, the OIC actually *rejected* the White House's offer to withdraw the assertion of privilege as to Ms. Hernreich, one of the witnesses whose testimony the OIC has moved to compel.

By letter of March 2, 1998, counsel for the White House reiterated the White House's desire to reach an accommodation between the OIC's desire for testimony and the White House's need to ensure the availability of candid advice to future Presidents, and offered to meet with the OIC to discuss the matter. (See Ruff Decl. ¶ 45 & Ex. 4). The OIC responded by asking the

White House to submit its proposal by noon on March 4, 1998. (See Ruff Decl. ¶ 46 & Ex. 5).

The White House complied.

In its proposal, the White House offered to narrow the scope of executive privilege it would assert. The White House's proposal would have relinquished the privilege and allowed non-attorney White House advisors, such as Ms. Hernreich, to testify fully to any relevant facts, including conversations with the President. (See Ruff Decl. ¶¶ 47-59 & Ex. 6). As the proposal stated:

[T]he Office of the President is prepared to instruct White House witnesses along the following general lines:

- White House Advisors (Non-Lawyers): Advisors will be permitted to testify as to factual information regarding the Lewinsky matter, including any such information imparted in conversations with the President. We will continue to assert executive privilege with regard to strategic deliberations and communications.
- White House Attorney Advisors: Attorneys in the Counsel's Office will assert attorney/client privilege; attorney work product; and, where appropriate, executive privilege, with regard to communications, including those with the President, related to their gathering of information, the providing of advice, and strategic deliberations and communications.

(Ruff Decl. Ex. 6, at 2). By confining the assertion of executive privilege to "strategic deliberations and communications" and communications by and among attorneys in the White House Counsel's office (*id.*), the White House believed that its proposal would lead to the accommodation *Sealed Case* contemplates.

Instead, on March 6, 1998, the OIC curtly rejected the White House's proposal outright, *including* the proposed withdrawal of the privilege as to all factual testimony by non-attorneys such as Ms. Hernreich. (See Ruff Decl. ¶ 51 & Ex. 7). The same day, the OIC filed the motions to compel that are at issue here.

Thus, although the White House has reserved the invocation of executive privilege to that inner core of conversations that cannot be disclosed without materially harming the ability of future Presidents to confer with advisors candidly, the OIC has shown itself to be much more

interested in provoking a needless constitutional controversy than in actually obtaining the factual evidence it claims to want. For the reasons that follow, the OIC's Motions must be denied.

ARGUMENT

In this consolidated reply to the OIC's Motions to Compel, we address, first, the attorney-client privilege and the attorney work product doctrine as they apply to the testimony of Bruce Lindsey, Deputy Counsel to the President, and second, the presidential communications privilege as it applies to Sidney Blumenthal, Assistant to the President, and other non-attorney advisors, as well as to Mr. Lindsey.

The OIC seeks to compel Mr. Lindsey to divulge a range of communications presumptively protected by the attorney-client privilege: discussions with the President and senior White House staff for the purpose of affording legal advice; discussions with the President's personal counsel on matters encompassing his private and official interests;⁵ and discussions with counsel for other individuals with whom the White House had a common interest. The absolute privilege protecting communications between an attorney and his client has been recognized since the birth of the common law and is firmly imbedded in the law of the District of Columbia—in both its private and governmental forms. The contrary view of the Court of Appeals for the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.); *cert. denied*, 117 S. Ct. 2482 (1997) ("*Grand Jury Subpoena*"), on which the OIC rests its entire argument, does not control here and, in any event, is deeply flawed. But even if the special circumstances present here suggest the need to balance the values inherent in the privilege against the needs of the grand jury, the OIC has offered absolutely nothing to weigh in that balance.

The OIC proffers only one argument in its attempt to pierce the executive privilege that has protected presidential communications since the dawn of the Republic—an argument that finds no support in the case law. The OIC would have the Court find, based solely on its un-

⁵ Private counsel for the President will raise as well his personal attorney-client privilege to protect discussions with Mr. Lindsey on the occasions in which he served as a conduit for communications between them and their client.

ported claim that the testimony it seeks relates to “private” conduct, that the privilege simply does not apply. Moreover, it asks the Court to bypass the careful analysis of individual communications mandated by the Court of Appeals in *Sealed Case* and require wholesale disclosure of all discussions with the President and his senior advisors. This argument flies in the face of the presumptive privilege that attaches to presidential communications—a presumption that the courts have made clear can be overcome only on the most stringent showing of need on a communication-by-communication basis.

For these reasons, this Court should deny the OIC’s motions to compel.

L THE TESTIMONY THE OIC SEEKS TO COMPEL IS PROTECTED BY THE WHITE HOUSE’S ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protecting communications between a government agency and its attorneys is an established principle under the law of this Circuit. The Court of Appeals for the Eighth Circuit’s contrary opinion, on which the OIC hangs the entire weight of its argument, stands alone in holding the privilege inapplicable when invoked in grand jury proceedings. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997) (“*Grand Jury Subpoena*”). The Eighth Circuit’s decision demonstrably conflicts with precedent binding in this Circuit, and it should not be followed here.

A. The Eighth Circuit’s Deeply Flawed Decision Offers No Persuasive Reason to Depart from the Authorities Recognizing the Governmental Attorney-Client Privilege

1. The Governmental Privilege in General

It is hornbook law that organizations have an attorney-client privilege against compelled disclosure of conversations between the organization’s counsel and the organization’s officials and employees. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Although *Upjohn* arose in the context of the corporate attorney-client privilege, nothing in the Court’s assessment of a organization’s need for freedom to consult with attorneys in confidence was limited to the corporate context. Accepting the logical implications of *Upjohn*, courts in this Circuit routinely

have recognized that the attorney-client privilege protects governmental organizations as well as private ones. See *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997); *Mead Data Central v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Evidentiary privileges such as the attorney-client privilege remain fully applicable in grand jury proceedings. See *Sealed Case*, 121 F.3d at 756 (citing *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (recognizing applicability in grand jury proceedings of “the longstanding principle that ‘the public . . . has a right to every man’s evidence,’ *except for those persons protected by a constitutional, common-law, or statutory privilege[.]*”) (emphasis added, citations omitted);⁶ *United States v. Calandra*, 414 U.S. 338, 346 (1974) (grand jury “may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.”) (citations omitted)). The applicability of the governmental attorney-client privilege has been specifically confirmed in federal grand jury proceedings. See *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989).

The Supreme Court has recognized that the attorney-client privilege advances important public interests. By “encourag[ing] full and frank communications between attorneys and their clients,” the privilege enables clients “to make full disclosure to their attorneys” without fear that the discussions will become public, and thereby “promote[s the] public interests in the observance of law and administration of justice.” *Upjohn*, 449 U.S. at 389 (internal quotations and citations omitted). This purpose cannot be served unless the client is “free from the consequences or the apprehension of disclosure.” *Id.* (internal quotations and citations omitted); see also *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (“the mere possibility of disclosure” of protected communications “may impede development of the confidential relationship” the privi-

⁶ The Court of Appeals for this Circuit has, similarly, recognized that the attorney-client privilege must be accorded its full sweep even in the face of the argument that it deprives the public of “every man’s evidence”:

The attorney-client privilege is but one of several privileges that prevent parties themselves from adducing particular evidence, and thus create an obstacle to fact finding due to the broad judgment that the value of introducing such evidence is outweighed by the harm inflicted upon other policies and values. . . . [S]uch [evidentiary] burdens are simply a necessary consequence of society’s attempt to balance the value of the complete admissibility of probative evidence with other competing values, such as the protection of vital professional or associational relationships.

Rosen v. NLRB, 735 F.2d 564, 572 (D.C. Cir. 1984) (Starr, J.).

lege exists to protect). These purposes apply with no less force in the present case and compel a very critical evaluation of the OIC's attempt to pierce the privilege.

In the governmental context, the attorney-client privilege advances other public interests as well. “[B]y safeguarding the free flow of information” within the government agency, the privilege fosters fairer and more accurate government decisionmaking. *Murphy v. TVA*, 571 F. Supp. 502, 506 (D.D.C. 1983); *see also Grand Jury Subpoena*, 112 F.3d at 929–32 (Kopf, J., dissenting).

An additional nuance arises here because the client whose confidences are at issue is the President. In this context, the presidential communications and attorney-client privileges are mutually self-reinforcing. Both exist to guarantee that the President receives necessary advice and input with the candor that can be secured only when advisors are free from apprehension about how third parties or the public may view them. When government attorneys or other advisors doubt the confidentiality of their communications, they will of necessity speak guardedly, hedging their recommendations with a view toward preserving the natural human desire to be well thought of by others. Such caution extracts a heavy toll, for it prevents the President from receiving the candid assistance necessary to run the government effectively and thereby serve the national interest. Here, that interest is protected by not just one, but two privileges, one of Constitutional dimension and the other with common-law roots deeper than any other privilege. In this circumstance, fidelity to both these reinforcing lines of authority compels the most intensive and exacting scrutiny of the OIC's attempt to pierce these privileges.

2. Flaws in the Eighth Circuit's Decision

In reaching the contrary result on which the OIC relies, the Eighth Circuit's decision—which is not binding on this Court—committed numerous analytical errors and misread the relevant authorities.

a. This Circuit has Long Recognized the Attorney-Client Privilege in the Governmental Context

To begin with, the Eighth Circuit incorrectly framed the issue before it. The court acted as if it was being asked to recognize a new privilege, and thus as if it must overcome a presumption against protecting the documents that had been subpoenaed. *See Grand Jury Subpoena*, 112 F.3d at 915. But the case before that court, like the instant case, presented no such issue at all. Far from being asked to create a privilege that was in any sense “new,” the court was simply called upon to apply the single best settled and oldest of all the privileges known to the common law, *Upjohn*, 449 U.S. at 389, to the facts before it. There was no occasion for the application of the presumption against the creation of a new privilege, and the court erred in acting as if there was.

Second, the Eighth Circuit treated as a matter of first impression whether a governmental attorney-client privilege existed at all. *See Grand Jury Subpoena*, 112 F.3d at 915 (“We need not decide whether a governmental attorney-client privilege exists in other contexts, for it is enough to conclude that even if it does,” it is inapplicable). Even assuming *arguendo* that the court’s characterization of the question as an open issue in the Eighth Circuit was correct, it would not be relevant here. The governmental attorney-client privilege is a long-established fixture under the law in this Circuit and is in no sense an open question. *See, e.g., Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (“In the governmental context, the ‘client’ may be the agency and the attorney may be an agency lawyer,” although the Court ultimately finds the privilege inapplicable); *Brinton v. Dep’t of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (recognizing governmental attorney-client privilege, although resting decision on deliberative process grounds instead); *Mead Data Central v. United States Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (“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 communica-

tions with its attorneys under [FOIA] exemption five.”). Thus, a central analytical basis for the Eighth Circuit’s decision is not only absent here, but indeed contradicted by settled precedent binding on this Court.⁷ The D.C. Bar’s professional rules also expressly recognize the applicability of the attorney-client privilege in the governmental context. See District of Columbia Rules of Professional Conduct, R. 1.13 & cmt. 7 (the government lawyer “represents the agency acting through its duly authorized constituents.”), 1.6 & cmts. 33–36 (recognizing ethical duty of government lawyers to preserve the client agency’s confidences).

Third, the Eighth Circuit incorrectly assumed, without authority, that the application of the attorney-client privilege turns on the specific circumstances at the time it is raised. Because it found no previous decision applying the privilege in an identical factual context, the Eighth Circuit assumed it was writing on a blank slate. This freed the court, in its view, to engage in a *de novo* assessment of the interests served by, and putative evidentiary costs of, the attorney-client privilege. But this mode of analysis is utterly foreign to the attorney-client privilege. A hallmark of absolute privileges such as the attorney-client privilege—as distinct from qualified privileges such as the protection for attorney work product⁸—is that they do not turn on *post hoc*

⁷ Other courts agree with this one. See, e.g., *Wilder v. C.I.R.*, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985) (it is “well settled” that documents prepared by agency counsel “fall within the ambit of the attorney-client privilege”); *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (attorney-client privilege “unquestionably is applicable to the relationship between Government attorneys and administrative personnel”), *aff’d mem.*, 734 F.2d 18 (7th Cir. 1984); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (explaining that “[c]ourts generally have accepted that attorney-client privilege applies in the governmental context,” so despite “apprehension at [the privilege’s] pernicious potential in a government top-heavy with lawyers . . . [t]his concern does not justify application of a different privilege to governmental attorney-client relationships.”). *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 520 (D. Del. 1980) (“the attorney-client privilege is applicable in the factual context where a government agency is a ‘client’ and agency lawyers are ‘attorneys.’”). *Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975) (“[f]ederal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state”).

⁸ As one treatise on evidence put it:

In other respects, however, the attorney-client privilege provides more protection than the work product doctrine. While the privilege is absolute, the work product doctrine provides only a qualified immunity which in the case of ordinary work product can be overcome by a showing of “substantial need” and “undue hardship” in obtaining the “substantial equivalent of the materials by other means.” . . . The work product doctrine operates primarily as a limitation on pretrial discovery, whereas the attorney-client privilege applies more broadly at all stages of legal proceedings.

2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 204 (2d ed. 1994).

demonstrations of need or balancing of interests at the time the privilege is asserted. A contrary rule effectively vitiates the entire purpose of absolute privileges such as the attorney-client privilege, which is intended to encourage communications that might not be made in its absence. *See Upjohn*, 449 U.S. at 395; *Jaffee*, 116 S. Ct. at 1929 (“[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being”). Allowing the attorney-client privilege to turn on a *post hoc* assessment of the particular circumstances in which it is asserted in litigation prevents the privilege from serving its key function: providing clients assurance in advance that they may speak freely without fear of disclosure.

Other authorities confirm the Eighth Circuit’s error in rejecting the applicability of the governmental attorney-client privilege. For one, the privilege has received express legislative recognition by Congress under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). This exemption allows governmental agencies to withhold from disclosure, in response to a FOIA request, any “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[.]” *Id.* Congress’s clear intent to enact a federal law of governmental attorney-client privilege (and protection for attorney work product) was noted by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (“[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’”). *See also Mead Data Central*, 566 F.2d at 252; *Grand Jury Subpoena*, 112 F.3d at 930 (Kopf, J., dissenting).

The overwhelming weight of scholarly authority recognizes the existence and importance of the privilege in the governmental context. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, Mar. 29, 1996) (“the generally prevailing rule . . . [is that] governmental agencies and agents enjoy the same privilege as non-governmental counterparts.”); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 191 (2d ed. 1994); *see also Grand Jury Subpoena*, 112 F.3d at 930 (Kopf, J., dissenting).

What is more, the Supreme Court's Proposed Federal Rules of Evidence, which have repeatedly been relied on in this Circuit and by the Supreme Court as accurate statements of the common law of privilege,⁹ expressly recognized the applicability of the attorney-client privilege in the governmental context. Proposed Rule 503, dealing with the attorney-client privilege, defined "client" to include a "public officer, . . . or other organization or entity, either public or private[.]" Proposed Federal Rules of Evidence, Rule 503(a)(1), 56 F.R.D. 183, 235 (1972). The accompanying Advisory Committee's Note emphasized that "[t]he definition of 'client' includes governmental bodies." *Id.* R. 503(a)(1) adv. comm. note, 56 F.R.D. at 237. *See generally Grand Jury Subpoena*, 112 F.3d at 926, 928–29 (Kopf, J., dissenting).

**b. Congress Did Not Abrogate the Governmental
Attorney-Client Privilege in 28 U.S.C. § 535(b)**

In reaching its decision, the Eighth Circuit incorrectly relied on a relatively obscure provision of law requiring executive branch employees to report to the Attorney General information relating to criminal acts committed by their colleagues. Citing 28 U.S.C. § 535(b),¹⁰ the

⁹ Although Congress ultimately enacted Fed. R. Evid. 501, which calls upon the federal courts to develop a federal common law of privilege, instead of enacting the specific privileges in the form proposed by the Supreme Court, the Court's Proposed Rules on the subject of privilege have been widely recognized as accurate statements of the common law and are entitled to appropriate consideration. *See, e.g., Jaffee v. Redmond*, 116 S. Ct. 1923, 1927 n.7, 1928, 1930–31 (relying on statement of psychotherapist-patient privilege in Proposed Rules); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) (relying, *inter alia*, on Proposed Rules 503(a)(3) and 503(b) to describe the contours of the attorney-client privilege); *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 n.6 (8th Cir. 1981) ("courts have continued to look to the proposed rules as a source for defining the federal common law of attorney-client privilege."). "Most importantly, the proposed rule covering the attorney-client privilege is still at this point a generally reliable statement of federal common law." 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 589 (6th ed. 1994); *see also Grand Jury Subpoena*, 112 F.3d at 928–29 (Kopf, J., dissenting).

¹⁰ This statute provides that:

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.

28 U.S.C. § 535(b).

majority found it “significant” that government employees, “including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General.” *Grand Jury Subpoena*, 112 F.3d at 920. Neither the plain language of section 535(b) nor its legislative history, however, evinces any intent to vitiate the attorney-client privilege. The text of the provision does not mention the attorney-client privilege and does not, by its terms, command the interpretation the Eighth Circuit adopted. Similarly, there is no evidence of Congressional intent to abrogate the most firmly entrenched common law privilege protecting communications between attorneys and their clients. As the House Report on this provision makes clear, the objective of section 535(b) was simply to settle a jurisdictional battle between investigative agencies:

The purpose of the proposed legislation is to set out the necessary authority for the Attorney General and the Federal Bureau of Investigation to investigate alleged irregularities on the part of Government officers and employees and 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.

H.R. Rep. No. 83-2622, *reprinted in* 1954 U.S.C.C.A.N. 3551.

The absence of case law interpreting this statute’s applicability to government attorneys only enhances the need for clarity in assessing legislative intent. A fundamental axiom of statutory construction is that, where the text of a law is ambiguous, one should not presume a legislative intention to abrogate settled common-law principles. 2B SUTHERLAND STATUTORY CONSTRUCTION § 50.01 (5th ed. 1992 & Cum. Supp. 1997). As the Supreme Court has instructed, “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Congress acts within the framework of existing law, not within a vacuum. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”). Therefore, in the absence of “an indication that the legislature intends a

statute to supplant common law, the courts should not give it that effect.” SUTHERLAND STATUTORY CONSTRUCTION, *supra*.

Fidelity to these settled principles compels the conclusion that section 535(b) should not be read to undermine the well-established attorney-client privilege. As Judge Kopf’s dissenting opinion in the Eighth Circuit noted, the Department of Justice, which section 535(b) charges to enforce the reporting provision, has always interpreted this provision to be consistent with the long-standing protection for confidential attorney-client communications. *See Grand Jury Subpoena*, 112 F.3d at 932 (Kopf, J., dissenting). On several occasions, the Justice Department’s Office of Legal Counsel has expressed the opinion that the attorney-client privilege survives section 535(b). *Id.* According to then-Assistant Attorney General Antonin Scalia, “[g]iven the absence of any discussion of the subject in the legislative history [of § 535(b)], it would in our view be inappropriate to infer a congressional purpose to breach the universally recognized and long-standing confidentiality of the attorney-client privilege.” Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* at 7 (Nov. 30, 1976). Nearly a decade later, the Office of Legal Counsel reconfirmed this interpretation, stating that “the principal reason for our conclusion that the attorney-client privilege overrides § 535(b) is that the confidentiality of communications between client and lawyer is essential if Department attorneys are to be able to provide adequate legal representation.” Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee* at 6 (March 29, 1985). The uniformity of the Office of Legal Counsel’s position, which represents the only precedential authority on the specific application of section 535(b) to this situation, only strengthens the conclusion already reached by applying prevailing principles of statutory construction: this statute clearly does not contravene the attorney-client privilege. *See generally Grand Jury Subpoena*, 112 F.3d at 930–32 (Kopf, J., dissenting).

Because the Eighth Circuit's decision is inconsistent with precedent binding in this Circuit, and out of step with the long-standing consensus of other authorities, this Court should not follow it.

B. The Communications at Issue Here are Privileged

1. Bruce R. Lindsey

Mr. Lindsey's conversations involved the President's attorney-client privilege in both his official and unofficial capacities. First, as Deputy White House Counsel, Mr. Lindsey represents the Office of the President and, in that capacity, has had confidential conversations with the client or the client's representatives relating to the provision of legal advice. (See Lindsey Decl. ¶¶ 9–12). These conversations are directly covered by the White House's attorney-client privilege. Some of Mr. Lindsey's conversations related to providing legal advice on the questions whether the Office of the President should invoke its testimonial privileges, including the attorney-client and presidential communications privileges. (See Lindsey Decl. ¶ 11). The OIC also seeks to compel conversations Mr. Lindsey had relating to possible impeachment proceedings before the House Judiciary Committee. (*Id.*). These discussions, which related directly to Mr. Lindsey's gathering of information to provide legal advice to his client, are plainly covered by the White House's attorney-client privilege. (*Id.*; see also Ruff Decl. ¶ 22). Mr. Lindsey also had discussions with witnesses who testified before the grand jury, or their counsel, during the course of gathering information to use in advising the White House on matters of litigation strategy. (See Lindsey Decl. ¶ 13). These interviews are also protected by the attorney-client privilege.

Second, Mr. Lindsey has stated in his Declaration that he has occasionally communicated with the President's private counsel while acting on behalf of the President in the President's individual capacity. (See Lindsey Decl. ¶ 12). To the extent this latter situation raises issues primarily within the President's individual attorney-client privilege, the White House will not address it in detail herein.

2. Nancy Hernreich

As suggested in the White House's proposal to the OIC of March 4, 1998, the White House withdraws the assertion of privilege as to factual questions submitted to Ms. Hernreich, including factual questions regarding communications with the President.

C. **This Court Should Deny the OIC's Motion Even if the Attorney-Client Privilege is Qualified, Rather than Absolute, in the Governmental Context**

Even assuming the Eighth Circuit majority was correct and a qualified attorney-client privilege, subject to a balancing of interests after the fact, is appropriate in the governmental context, that fact alone would not justify the majority's conclusion that the privilege automatically evaporated in the face of a grand jury subpoena from the OIC. Rather, qualified privileges generally require the party opposing the privilege to make some showing of *need* to surmount the privilege's protection. *See, e.g., Sealed Case*, 121 F.3d at 745–46, 753–57 (discussing showing of need required to overcome qualified presidential communications privilege). By requiring no demonstration at all by the OIC before ruling the privilege unavailable, the Eighth Circuit again made new law that is at odds with settled precedent in this Circuit.

To say that the OIC must make some showing to overcome the attorney-client privilege necessarily raises the question of what that showing should be. We submit that, at least, the same "focused demonstration of need," showing that the evidence is "demonstrably critical to the responsible fulfillment" of the OIC's role, *see infra* at 27, must be required.

This was substantially the position taken by the Department of Justice, speaking through the Solicitor General as *amicus curiae* in support of the petition for certiorari filed by the White House, seeking review of the Eighth Circuit's decision. *See Office of the President v. Office of Independent Counsel*, (U.S., No. 96-1783), Brief *Amicus Curiae* For the United States, Acting

Through the Attorney General, Supporting Certiorari (“DOJ Brief”).¹¹ Evaluating the attorney-client privilege in the unique context of an intra-branch dispute between the White House and the OIC, the Justice Department suggested that

the district court should, in ruling on the motion to compel, accommodate the competing interests at stake in a manner similar to the accommodation that takes place in an ordinary, non-independent-counsel context.

DOJ Brief at 14 (footnote omitted). DOJ argued that a “useful analogy . . . [could] be drawn to the resolution of assertions of executive privilege,” *id.* at 15, and suggested that the test established in *Nixon* and its progeny would best accommodate the competing interests at stake. *See generally id.* at 11–16.

D. Conversations Among Attorneys for the White House and Private Counsel for the President are Privileged from Disclosure Under the Common Interest Rule

The OIC contends that the governmental attorney-client privilege, even if it exists, could not attach to conversations with the President’s private counsel. Again, the OIC is wrong. Every conversation in which private counsel participated is protected from disclosure under the common interest rule.

The Supreme Court’s Proposed Rule 503(b)(3) recognized that “[t]he lawyer-client privilege applies to communications made by the client or his lawyer to a lawyer representing another in a matter of common interest.” 3 WEINSTEIN’S FEDERAL EVIDENCE § 503.13[2] (Joseph M. McLaughlin ed., 2d ed. 1997) (quoting Proposed Rule 503(b)(3), 56 F.R.D. 183, 236 (1972)).¹² The common interest rule recognizes that

[i]n many cases it is necessary for clients to pool information in order to obtain effective representation. So, to encourage information-pooling, the common inter-

¹¹ The OIC’s suggestion that he may second-guess the official position of the United States Government on the scope of the attorney-client privilege, as enunciated by the Department of Justice, is in considerable tension with the statute under which the OIC operates. The statute permits the OIC to deviate from the Department’s view only when it is “not possible” for him to comply. 28 U.S.C. § 594(f).

¹² As already noted, the Supreme Court’s Proposed Rules of Evidence represent highly persuasive statements of the common law of privilege the courts should apply under Fed. R. Evid. 501. *See supra* note 9.

est rule treats all involved attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued.

2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 599 (6th ed. 1994) (footnotes omitted); *accord In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (“The common interest privilege protects communications between a lawyer and two or more clients regarding a matter of common interest.”). Besides preserving the privilege for attorney-client communications made among attorneys for clients with a common interest, the privilege also allows the attorneys to share work product without waiver of the protection the work product rule provides. *See United States v. AT&T*, 642 F.2d 1285, 1299–1301 (D.C. Cir. 1980). The common interest rule applies with equal force in the governmental context as outside. *See id.* at 1300 (“The government has the same entitlement as any other party to assistance from those sharing common interests, whatever their motives”).

In this case, attorneys representing the White House and the President’s private counsel were pursuing a common interest in responding to the allegations made against a sitting President involving his conduct in the White House. (*See Lindsey Decl.* ¶¶ 12–13; *Ruff Decl.* ¶ 30). As discussed herein, the OIC’s investigation, although nominally directed at the President’s personal conduct, has had unavoidable effects on the functioning of the Presidency and the institutions of government. The indisputable need for White House attorneys to confer with the President’s private counsel on matters of common interest shields their discussions from compelled disclosure.

E. Certain of the Materials Sought are Protected from Disclosure Because they Constitute Attorney Work Product

The OIC’s Motion to Compel also intrudes upon matters protected from disclosure by the work product doctrine. *See Hickman v. Taylor*, 329 U.S. 495 (1947). The attorney work-product rule, like the attorney-client privilege, has received official Congressional recognition in the governmental context. *See* 5 U.S.C. § 552(b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983). The Department of Justice has also rec-

ognized the existence of the governmental attorney work product doctrine in circumstances that parallel the OIC's Motions here. *See* DOJ Brief, *supra*, at 18–19.

Among the subjects about which the OIC seeks to compel testimony are attorneys' recollections of their interviews with witnesses who testified before the grand jury. (*See* Lindsey Decl. ¶ 13). Because the OIC has sought to compel government attorneys to disclose the content of witness interviews, the higher standard of protection for attorney opinion work product applies. *See Upjohn*, 449 U.S. at 401 (attorney opinion work product, as distinct from "ordinary" work product, is "entitled to special protection").

II. THE OIC SEEKS TO COMPEL COMMUNICATIONS PROTECTED UNDER THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The OIC has taken a simplistic and absolutist position in its motions to compel: it argues that the presidential communications privilege is inapplicable to any communications that relate to the President's "private" conduct. That contention is flatly wrong. Any conduct by the individual holding the Office of the President, whether it is characterized as private or official, can have substantial impact on a President's official duties. The White House has asserted executive privilege only over those communications that meet that test. For example, the Supreme Court, in *United States v. Nixon*, 418 U.S. 683 (1974), held that the conversations at issue in that case—about a break-in at the Democratic National Committee headquarters, although certainly not about an official function of the President—were presumptively privileged. *See also Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974). Thus, the OIC is urging on this Court a position that the Supreme Court and the D.C. Circuit have long ago rejected.

A. Legal Framework for Evaluating a Claim of Privilege for Presidential Communications

The case law establishes a clear framework for evaluating a claim that the presidential communications privilege protects a conversation or document from compelled disclosure. The

OIC's Motions do not even acknowledge the existence of this framework. Accordingly, we will begin by laying out the key principles.

1. The Presumption of Privilege

"Presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by *in camera* examination of the conversations by a court." *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730 (D.C. Cir. 1974) (quoting *Nixon v. Sirica*, 487 F.2d 700, 717-18 (D.C. Cir. 1973), *quoted with approval in United States v. Nixon*, 418 U.S. 683, 708 (1974)) (footnote omitted); *see also In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). Grounded in constitutional separation of powers concerns, the presidential communications privilege is fully applicable in grand jury proceedings and bars compelled disclosure of the privileged matter. *Sealed Case*, 121 F.3d at 756. Because presidential communications are presumed to be privileged until the privilege is overcome by an extraordinary showing, the OIC is wrong in claiming that the White House has any "burden" to carry.¹³ Rather, the burden is squarely on the OIC to make the showing necessary to overcome the presumption of privilege.

As the Supreme Court has recognized, this long-standing privilege¹⁴ ensures that the President receives "candid, objective, and even blunt or harsh" advice from the inner circle of aides on whom he must, of necessity, rely every day:

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

¹³ *See, e.g.*, OIC's Brief in Support of Motion to Compel Bruce R. Lindsey to Testify ("OIC Lindsey Br.") at 2 n.4 (citing *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997), a case that did not involve the presidential communications privilege). All three of the OIC's supporting briefs cite this same irrelevant case.

¹⁴ *See, e.g.*, *Sealed Case*, 121 F.3d at 739 n.9 (first assertion of a presidential communications privilege came during the Washington Administration). Virtually every Administration since Washington's has invoked the executive privilege in one form or another. *See generally* MARK J. ROZELL, EXECUTIVE PRIVILEGE 32-48, 83-140 (1994) (summarizing invocations of executive privilege by, *inter alia*, Presidents George Washington, John Adams, Thomas Jefferson, James Madison, Andrew Jackson, Abraham Lincoln, Calvin Coolidge, Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Gerald R. Ford, Jimmy Carter, Ronald Reagan, and George Bush).

and, added to those values, is the necessity for protection of the *public interest in candid, objective, and event blunt or harsh opinions in Presidential decision-making*. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

United States v. Nixon, 418 U.S. at 708 (emphasis added).

One cannot overstate the intolerable threat that an unduly constrictive reading of the privilege poses to the President's ability to get frank and candid advice from his advisors. Indeed, many years before the Nixon Presidency rendered discussions of the privilege controversial, President Eisenhower underscored the crucial role the privilege plays in promoting effective governance, going so far as to remark that, if confidential presidential communications were "subject to investigation by anybody," it could "wreck the Government."¹⁵ Scholarly authority confirms the privilege's salutary role in encouraging candid advice to the President:

The president's constitutional duties necessitate his being able to consult with advisers, without fear of public disclosure of their advice. If officers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would suffer serious damage. Indeed, it would be difficult for advisers to be completely honest and frank in their discussions if their every word might someday be disclosed to partisan opponents or the public.

MARK J. ROZELL, EXECUTIVE PRIVILEGE 53-54 (1994).

Affording appropriate deference to a co-equal branch of the government under separation of powers principles, reviewing courts always have recognized that, when the presidential communications privilege has been invoked, a presumption of privilege attaches. *See Sealed Case*,

¹⁵ President Eisenhower stated:

But when it comes to the conversations that take place between any responsible official and his advisers . . . expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; and if they are, will wreck the Government. There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

The President's News Conference of July 6, 1955, 1955 PUBLIC PAPERS OF THE PRESIDENTS 665, 674, quoted in Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1386 (1974). The President continued: "It is exactly, as I see it, like a lawyer and his client or any other confidential thing of that character." *Id.*, 1955 PUBLIC PAPERS OF THE PRESIDENTS at 674.

121 F.3d at 744 (“If the President does so [invokes the privilege], the documents become presumptively privileged.”); *Senate Select Committee*, 498 F.2d at 730; accord *United States v. Nixon*, 418 U.S. at 713 (“Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the district court to treat the subpoenaed material as presumptively privileged[.]”). This Court should reject the OIC’s invitation to become the first court ever to adopt a contrary rule.

2. Communications to Which the Privilege Applies

The “presidential communications” privilege covers a significantly broader range of communications than its name suggests. In *Sealed Case*, the fullest recent explication of the privilege, the Court of Appeals for this Circuit squarely rejected the notion that the privilege attaches only to communications directly to or from the President. *See generally Sealed Case*, 121 F.3d at 746–53. Instead, the Court applied a more discerning analysis, which recognized the privilege’s “root[s] in the constitutional separation of powers principles and the President’s unique constitutional role,” *id.* at 745—a role the President cannot perform without the close cooperation of an inner circle of advisors and assistants. Thus, to effect the purposes of the privilege, the Court recognized that it must protect not only the President’s own communications, but also communications to and from the persons on whom the President directly relies for decisionmaking assistance:

[C]ommunications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President. Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser’s staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.

Id. at 751–52.

The privilege also covers individuals outside the President's inner circle, and even outside the White House, if those individuals relate "communications authored or solicited and received by members of an immediate White House adviser's staff[.]" *Id.* at 752; *see also id.* at 758 (although legal extern "did not exercise broad and significant responsibility," all the extern's relevant communications "were clearly created at the request of" those who did, and were therefore privileged); *id.* (documents for which no author was listed had plainly been solicited by individuals with key responsibility for advising the President, and were therefore privileged).

While scrupulously protecting the public interest in the effective operation of the highest levels of the Executive Branch, *Sealed Case* fully recognized and accommodated the public interest in ascertaining the truth in grand jury proceedings. Thus, the OIC is wrong to assert (OIC Lindsey Br. at 5–6) that the mere potential relevance of evidence is sufficient to overcome the protection of the privilege in a grand jury proceeding. The grand jury is not, as *Sealed Case* recognized, free to disregard established testimonial privileges. The presidential communications privilege in particular advances a substantial public interest on which the grand jury may not infringe:

[W]e are ever mindful of the dangers involved in cloaking governmental operations in secrecy and placing obstacles in the path of the grand jury in its investigatory mission. *There is a powerful counterweight to these concerns, however, namely the public and constitutional interest in preserving the efficacy and quality of presidential decisionmaking.*

Sealed Case, 121 F.3d at 762 (emphasis added).

3. The Showing Required to Overcome the Presumption

The presumptive privilege, once invoked by the President, is not easily overcome. "[A] party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need[.]" *Sealed Case*, 121 F.3d at 746. "Efforts should first be made to determine whether sufficient evidence can be obtained elsewhere, and the subpoena's proponent should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed." *Id.* at 755. The "need" inquiry "turn[s], *not on the nature of the*

presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment.” *Senate Select Committee*, 498 F.2d at 731 (emphasis added); *accord Sealed Case*, 121 F.3d at 746. That this is a high hurdle indeed is shown by *Senate Select Committee*’s observation that the “showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment” of the function of the entity seeking to compel production.¹⁶ *Senate Select Committee*, 498 F.2d at 731. A mere showing of “an asserted power to investigate and inform,” *id.* at 732, does not suffice. The Court’s holding that “the Select Committee has failed to make the requisite showing,” *id.* at 731, reinforces that the standard of need requires a very strong substantive showing that a court must scrutinize with the greatest care.

Moreover, the Court must assess the sufficiency of the showing of need without reference to the privileged communications themselves. *Sealed Case* makes very plain the steps involved in evaluating an attempt to overcome the privilege. Once the presumption of privilege attaches, the party seeking the information becomes obliged to make a “focused demonstration of need.” *Sealed Case*, 121 F.3d at 746. Only after the party opposing the claim of privilege makes a sufficient showing does the President become obliged to cede control of the privileged materials. The “focused demonstration of need” does not itself require the President to turn over the information to the party seeking it, however, but only to submit it under seal to the district court for *in camera* review. *Id.* at 759–60. The district court reviews the items and extracts the specific relevant portions as to which the privilege has been overcome, and then those extracts and no other parts of the privileged communications may be provided to the party opposing the claim of privilege.

¹⁶ Although *Sealed Case*, like the present case but unlike *Senate Select Committee*, involved the Executive Branch’s opposition to compulsory judicial process, rather than a legislative inquiry (see *Sealed Case*, 121 F.3d at 753), *Sealed Case* repeatedly employed (and necessarily adopted) *Senate Select Committee*’s explication of the need requirement, suggesting that, at least as to this element, the standards for evaluating any given assertion of the presidential communications privilege are identical no matter which branch of government is seeking to overcome the privilege.

Sealed Case also makes clear that this Court must scrutinize communications individually to determine whether the OIC has met this standard. The blanket ruling the OIC seeks, declaring all the communications at issue here to be outside the scope of the privilege, is precisely what the Court of Appeals forbade in *Sealed Case*. See 121 F.3d at 740 (criticizing the District Court for issuing “a blanket ruling, with no individualized discussion of the documents”); see also *id.* (“the court also failed to provide any explanation of its legal reasoning”).

The high standard of need is intended to prevent precisely the misuse of the grand jury process in which the OIC has engaged here. It effectuates the principle that “presidential communications should not be treated as just another source of information”¹⁷ by requiring the OIC first to develop sufficient evidence from other sources to substantiate its showing of need, before intruding on the President’s communications with his advisors:

Nor do we believe the *Nixon/Sirica* need standard imposes too heavy a burden on grand jury investigation. In practice, the primary effect of this standard will be to *require a grand jury to delay subpoenaing evidence covered by presidential privilege* until it has assured itself that the evidence sought from the President or his advisers is both important to its investigation and practically unavailable elsewhere. As was true in *Sirica*, a grand jury will often be able to specify its need for withheld evidence in reasonable detail based on information obtained from other sources.

Sealed Case, 121 F.3d at 756–57 (emphasis added); see also *id.* at 761 (“it is hard to conclude that the OIC issued its subpoena to the White House as a last resort.”). By turning to privileged presidential communications as its first resort, the OIC has turned the *Nixon/Sirica/Sealed Case* paradigm on its head and sparked a premature confrontation on an inadequate record.

B. The Conversations at Issue Here are Privileged

As shown below, application of the established analytical framework to the communications at issue here shows unmistakably that the communications are privileged. In arguing the contrary, the OIC contends that this case involves allegations about the President that relate to private activity. This argument, however, fails both legally and factually. As a legal matter, the

¹⁷ *Sealed Case*, 121 F.3d at 755.

OIC's argument misreads the Supreme Court's decisions both in *Nixon* and in *Clinton v. Jones*, as well as authorities from the D.C. Circuit, involving the distinctions between official and personal conduct relevant to the assertion of privilege. And as a factual matter, the OIC ignores that, from the beginning, the Lewinsky matter has unavoidably involved the functioning of the President in his official capacities as head of government and head of state.

1. The Communications at Issue Involved Official Presidential Decisions

Allegations about "private" conduct by a sitting President can and do have a substantial impact on his official duties and activities. The OIC's argument ignores the many factual respects in which the instant litigation unavoidably intersects with the President's performance of his constitutional duties.¹⁸

Contrary to the OIC's assertions, not one of the witnesses who have testified before the grand jury, including the three whose testimony the OIC now seeks to compel, have ever invoked a blanket assertion of privilege to refuse to answer "any questions concerning conversations about Monica Lewinsky that occurred among White House staff." (OIC Lindsey Br. 1, *see also* OIC Hernreich Br. 2;¹⁹ OIC Blumenthal Br. 2). Mr. Lindsey, for example, has appeared three times before the grand jury and has testified in great detail, to the extent of his personal knowledge, about discussions inside and outside the White House relating to the Lewinsky matter. (*See* Lindsey Decl. ¶¶ 9, 14, 15, 16(a)-(i), 17). The White House has invoked the privilege only as to communications designed to aid the President in the execution of his official duties. (*See id.* ¶ 17).

¹⁸ Even the President's political opponents have recognized the impact of the OIC's investigation on the functioning of the Presidency as an institution. *See* David Rogers, *Lott Says Clinton-Starr Standoff Hurts Government and Urges Both Sides to Act*, WALL ST. J., Mar. 10, 1998, at A24 (quoting Senate Majority Leader Trent Lott (R-Miss.) as saying the Lewinsky matter is "getting to be a distraction in Washington and affecting the president and perhaps even the Congress, in doing the people's business[.]"). *See also id.* ("I don't think it's good for the presidency. I don't think it's good for the country," he [Lott] said in a later interview."). (*See also* Ruff Decl. ¶ 24).

¹⁹ Consistent with the White House's proposal of March 4, 1998, submitted as part of the White House's performance of the constitutionally mandated accommodation process recognized by *Sealed Case*, the White House withdraws the assertion of executive privilege over factual matters, including communications with the President, on behalf of non-attorney advisors such as Ms. Hernreich.

What the OIC apparently fails to understand, or is unwilling to admit, is that this case has in fact had a demonstrable effect on the operations of the White House as an institution. Several examples will illustrate the profound impact the Lewinsky matter has had on the functioning of the Presidency. The White House offers these examples solely for illustrative purposes. Nothing in *Nixon* or *Sealed Case* suggests that the question whether a particular issue calls for direct involvement and decisionmaking by the President is amenable to judicial review. Similarly, the cases do not suggest that the President's determination to seek advice on a particular subject, or his choice of sources of advice on which to rely, are open to question after the fact by the OIC. Thus, although the presidential communications privilege provides the President with a "qualified" protection that a court may overcome on a sufficiently strong showing of need by the opposing party, *Sealed Case*, 121 F.3d at 745, the predicate issues—whether a given subject requires the President's attention, whether the President should seek advice on the matter, and from whom—are for the President and his advisors alone. The White House does not concede the contrary by discussing the following examples of presidential decisionmaking.

These examples make clear that the OIC's effort to eliminate all conversations relating to the Lewinsky matter from the protection of the presidential communications privilege is glaringly misdirected.

a. Discussions Relating to the President's State of the Union Address

The Constitution requires the President periodically to report to Congress on the State of the Union. U.S. CONST. Art. II, § 3, cl. 1. Advisors made certain of the communications that the OIC seeks here in the course of advising the President on the performance of that duty, (*see* Blumenthal Decl. ¶¶ 5, 13), and those communications are squarely covered by the presidential communications privileges. *Cf. Sealed Case*, 121 F.3d at 752 (communications presumptively privileged because they "were generated in the course of advising the President in the exercise of . . . a quintessential and nondelegable Presidential power.").

The President addressed the nation on January 27, 1998 and did not discuss the Lewinsky matter. *See Address Before a Joint Session of the Congress on the State of the Union*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 129 (Jan. 27, 1998). Leading up to the address, though, conversations took place within the White House about how the President should handle the matter. Senior White House advisors also advised the President how to respond to the many questions reporters asked him concerning how he would treat the allegations in the State of the Union speech.²⁰ (*See Lindsey Decl.* ¶ 11; *Ruff Decl.* ¶ 23; *Declaration of Sidney Blumenthal* (“Blumenthal Decl.”) ¶¶ 5, 13–15). Thus do allegations related to ostensibly “private” conduct have a substantial impact on the President’s constitutional duties. These discussions occurred in the course of advising the President on his discharge of a core constitutional obligation, and are presumptively privileged from disclosure.

b. Matters of Foreign Policy and Military Affairs

In the weeks since the allegations involving the President surfaced, it has become abundantly clear that the OIC’s current investigation has consequences even for the nation’s foreign policy and military affairs, and the President’s roles as head of state and Commander-in-Chief—core Executive Branch functions which have long merited the greatest deference from the other branches of government. *See U.S. CONST.* Art. II, § 2 cl. 1, § 3 cl. 3. Reporters have questioned visiting foreign heads of state about the OIC’s investigation.²¹ Other foreign government offi-

²⁰ *See, e.g., Excerpt of a Telephone Interview With Morton Kondrake and Ed Henry of Roll Call*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 115 (Jan. 21, 1998); *Interview With Mara Liasson and Robert Siegel of National Public Radio*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 116, 117 (Jan. 21, 1998).

²¹ *See The President’s News Conference With Prime Minister Blair*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 213–22 (Feb. 9, 1998); *see also* John M. Broder, *Clinton Refuses to Discuss Independent Counsel’s Request That He Testify Before Grand Jury*, N.Y. TIMES, Mar. 12, 1998, at A24 (reporters ask questions about the Lewinsky matter during the President’s public appearance with United Nations Secretary General Kofi Annan, prompting Secretary General Annan to complain, “I wish you would concentrate on my issues. I don’t come every day.”).

The early days of the Lewinsky matter also coincided with official state visits by Israeli Prime Minister Benjamin Netanyahu and Palestinian Authority Chairman Yasser Arafat. The President, in one of his first public interviews after the OIC began probing the Lewinsky-related allegations, mentioned the extraordinary steps he had endeavored to take to ensure that the burgeoning controversy not distract him from the proper conduct of the nation’s foreign policy. *See Interview With Jim Lehrer of the PBS “News Hour”*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 104–05, 106–07, 114 (Jan. 21, 1998).

cial have expressed their concern that the investigation must not be allowed to detract from the United States' ongoing and crucial role as peacemaker.²² Some of the conversations over which the White House has invoked the presidential communications privilege involved the formulation of advice for the President as to the appropriate White House response when foreign officials inquired about, or were questioned about, the Lewinsky matter. (See Blumenthal Decl. ¶¶ 10–11, 13–15).

What is more, the current investigation has unfolded during a turbulent period in the nation's international relations, when the President and his advisors have been formulating a response to continued violations by Iraq of United Nations Security Council resolutions on weapons inspection adopted in the wake of the 1991 Persian Gulf War. Although the immediate threat of military conflict appears to have diminished somewhat at this moment, certain conversations at issue here occurred at a time when military confrontation appeared highly likely and the President's need to concentrate on the nation's military and foreign affairs was at its peak. Deliberations within the White House about how to keep the controversy related to the Lewinsky matter from hampering the President's conduct of the nation's military and foreign policy formed a part of the discussions over which the White House has invoked the presidential communications privilege. (See Ruff Decl. ¶ 27; Blumenthal Decl. ¶ 15). For the foregoing reasons, the conversations at issue here plainly fall under the presumptive privilege established in *Nixon* and *Sealed Case*.

c. Discussions of Possible Referral by the OIC to the House Judiciary Committee

As the discussion of the facts surrounding the expansion of the OIC's inquiry in mid-January 1998 makes clear, the immediate effect of the new allegations of possible obstruction of justice led commentators and reporters to discuss the issue of impeachment and, therefore,

²² See, e.g., *supra* note 21; Alessandra Staley, *American Puritanism or Zionist Plot? The World Weighs In*, N.Y. TIMES, Jan. 24, 1998, at A9 (discussing, *inter alia*, the effect of the Lewinsky-related allegations on the Middle East peace process); *Remarks Prior to Discussions With Chairman Yasser Arafat of the Palestinian Authority and an Exchange With Reporters*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 123, 124 (Jan. 22, 1998) (reporters question the President about the Lewinsky matter at a press conference with Chairman Arafat).

placed it on the discussion agenda of senior White House advisors.²³ (See Lindsey Decl. ¶ 11). The White House received many inquiries from the press on this possibility. (See Ruff Decl. ¶ 22). Indeed, the President himself has been questioned by reporters on the subject.²⁴ Senior advisors to the President, including attorneys in the White House Counsel's office, have a duty to obtain factual information relevant to the investigation to advise the President concerning this issue. (See Ruff Decl. ¶ 22).

Impeachment is the one remedy expressly provided in the Constitution (Art. II, § 4) that can be directed against the President, and it is fatuous for the OIC to contend that discussions of the prospect between the President and his core advisors could, in any sense, be considered "personal" or "unofficial." In part because of the formal responsibilities of the Counsel to the President in the event of impeachment proceedings, "even the mere speculation of such proceedings raises serious issues that a President and his advisors must address." (Ruff Decl. ¶ 19). Because of the constitutional concerns directly implicated by an investigation that threatens possible impeachment proceedings against the President, conversations on this subject must be deemed presumptively privileged.

d. Allocation of the President's Time Between Public Responsibilities and Defending Himself in the *Jones* Litigation and the Lewinsky Matter

The expansion of the OIC's jurisdiction in mid-January 1998 immediately returned to the forefront of the White House's agenda an issue that had been lingering since the Supreme Court's decision in *Clinton v. Jones* the preceding summer. The Court's decision declining to stay the *Jones* proceedings during the President's term of office immediately raised the issue of

²³ The possibility of proceedings in the House Judiciary Committee had, of course, been discussed within the White House even before the Lewinsky-related allegations surfaced. See H. Res. 304, 105th Cong., 1st Sess. (Nov. 5, 1997). (See also Ruff Decl. ¶¶ 19-21).

²⁴ See *Excerpt of a Telephone Interview With Morton Kondracke and Ed Henry of Roll Call*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 115 (Jan. 21, 1998).

how the President should defend himself in the litigation without, in the Court's words, allowing the case to "engulf the Presidency." *Jones*, 117 S. Ct. at 1648.

The Court's decision allowing the case to proceed necessarily required the President to devote part of his schedule to the conduct of his defense. Questions as to how the President allocates his time, however, are imbued with a public, official nature, for every moment the President must spend defending himself in private litigation is a moment in which he is unavailable to execute the duties of the office to which he was elected. Thus, the question of how to minimize the *Jones* litigation's interference with the President's performance of his official duties was an important subject of discussion among the President's senior advisors. (See Lindsey Decl. ¶ 8).

The U.S. Department of Justice's brief as *amicus curiae* in *Jones*, for example, succinctly described the public significance of the issue:

As a practical matter, the countless issues of domestic and foreign policy that demand the President's attention fully occupy, and indeed outstrip, the capacity of the President to respond. . . . As a result, the Presidency's most precious commodity is time, and one of the most vexing problems for the President and his staff is how to divide that time among the disparate issues that call for his attention.

Clinton v. Jones, 117 S. Ct. 1636 (1997), Brief for the United States as *Amicus Curiae* in Support of Petitioner at 10–11 (emphasis added); *accord Jones*, 117 S. Ct. at 1646 (recognizing demands on a sitting President's schedule). Notably, presiding Judge Wright permitted the Counsel to the President to attend the President's deposition in the *Jones* case, a recognition that the case has important consequences for the nation and for the institution of the Presidency, not merely for the individual who currently holds that office.

Many of the communications the OIC seeks to compel relate to the President's decisions about strategy regarding how to prevent the *Jones* litigation and the Lewinsky investigation from "engulf[ing] the Presidency." (See Lindsey Decl. ¶¶ 9–11). The demands of discovery and the forthcoming trial have required the President to, in some cases, delegate to subordinates within the White House the task of attending to scheduling matters not requiring the President's per-

sonal attention. Before making each of these decisions, the President gathered recommendations and advice from his aides on how best to meet the scheduling demands of the *Jones* litigation without detracting from the execution of the duties of his office.

e. Ongoing Strategy Discussions Relating to the OIC's Investigation

When an issue requiring a rapid presidential decision arises, the President's need for advice and recommendations is correspondingly accelerated. To perform their advisory function in such a context, it is crucial that the President's advisors remain abreast of breaking developments as they occur, rather than "reinventing the wheel" every time the President solicits their opinions. Presidential advisors have an on-going duty to gather the facts necessary to render sound advice on short notice when so requested by the President. To that end, discussions of strategic and policy matters are a staple of every White House advisor's daily routine. (See Ruff Decl. ¶¶ 29–30).

The incursion of the OIC's investigation into the daily operations of the White House is no exception to this principle. Many of the conversations the OIC seeks to compel involved discussions among senior presidential advisors concerning how the White House should respond to the OIC's investigation, what effect the investigation would have on presidential scheduling (including prearranged travel abroad by the President on diplomatic matters), what effect the investigation would have on the formulation and announcement of new policy initiatives, dealings with Congress, and the like. (See Lindsey Decl. ¶ 12; Ruff Decl. ¶¶ 29–30). Because these discussions formed an on-going part of the advisors' function to counsel the President on decisions he must make, they are presumptively privileged.

f Discussions as to Whether to Assert the Presidential Communications Privilege

Irrespective of whether the invocation of the privilege may be communicated to a Court through one of the President's intermediaries,²⁵ the decision whether to claim the privilege is necessarily a matter that falls squarely within the execution of the President's official duties.

Some of the conversations the OIC seeks involved discussions among the President's closest advisors about whether the President should claim a privilege, or refrain from doing so. Such discussions have occurred in the White House virtually every day since the Lewinsky-related allegations surfaced. (*See generally* Lindsey Decl. ¶ 11; Ruff Decl. ¶¶ 26–28). The need to balance the twin aims of appropriate disclosure with the institutional need to preserve candid and open communication among advisors presented questions of the most exacting subtlety. The inevitable risk that an invocation of the privilege, no matter how strongly justified under the law, would prompt unfavorable public commentary also factored into advisors' candid, even fractious, discussions of what advice to give the President. Because all these discussions occurred while advising the President in connection with a decision only he could make in his official capacity, they are presumptively privileged from disclosure.

2. The OIC's Argument Misconstrues the Relevant Authorities

Besides being inconsistent with the facts, the OIC's argument that the presidential communications privilege is subject to an implicit exception for "personal" or "unofficial" presidential conduct is at odds with precedent from both the Supreme Court and the Court of Appeals for this Circuit.

The Court of Appeals' opinion in *Senate Select Committee* holds squarely against the argument the OIC makes here. In *Senate Select Committee*, an investigating arm of the Congress attempted to compel the President to produce "taped recordings of five conversations . . . 'between President Nixon and John Wesley Dean, III, discussing alleged criminal acts occurring

²⁵ *See Sealed Case*, 121 F.3d at 744–45 n.16 (the cases do not establish whether the privilege must be claimed by the President personally).

in connection with the Presidential election of 1972.’ ” *Senate Select Committee*, 498 F.2d at 727. These conversations related to acts far outside the boundaries of the President’s official duties, namely, the ransacking of the DNC’s Watergate offices. Under the OIC’s theory here, these conversations would not have been presumptively privileged.

The D.C. Circuit held precisely to the contrary. *See id.* at 730. Moreover, the Court found the Senate Select Committee’s showing of need for the tapes inadequate, and denied the Senate’s motion to compel. *Id.* at 731 (“we find that the Select Committee has failed to make the requisite showing” to overcome the presumption).

The OIC’s argument is also at odds with the Supreme Court’s decision in *United States v. Nixon*. The presidential communications at issue in that case involved private conduct by other individuals, but nonetheless were held presumptively privileged by the Supreme Court. *See Nixon*, 418 U.S. at 713–14. Indeed, nothing in *Nixon* suggests that the conversations at issue were characterized by an overarching public or official purpose, as distinct from discussions pertaining to the potential individual liability of the President (who had, after all, been named an unindicted co-conspirator by the grand jury, and whose subordinates had already been convicted of Watergate-related crimes).²⁶ Thus, the OIC’s legal theory has been rejected by both the D.C. Circuit and the Supreme Court.²⁷

The contents of the presidential conversations the Supreme Court held presumptively privileged in *Nixon* indicate that the OIC cannot circumvent the privilege merely by claiming that its sole interest is in the President’s actions in his personal, rather than official, capacity. For

²⁶ President Nixon did not contend that any of the subpoenaed conversations revealed diplomatic or military secrets. *See Nixon*, 418 U.S. at 706, 710. In holding that the conversations were, nevertheless, presumptively privileged (*id.* at 713–14), the Court obviously rejected any notion that the presidential communications privilege is limited to communications implicating foreign policy or national security. *Accord Sealed Case*, 121 F.3d at 757–58 (presidential communications privilege protects internal White House discussions of investigation of Secretary of Agriculture, which did not implicate military or diplomatic concerns). The OIC’s suggestion that the privilege cannot come into play here because no “national security or diplomatic secrets” are involved (OIC Lindsey Br. at 4) ignores *all* the relevant precedent.

²⁷ The Court in *Nixon* ultimately held that, in the unique circumstances of that case, the Special Prosecutor had made a sufficient showing to support turning over the subpoenaed materials for *in camera* review by the district court. *See Nixon*, 418 U.S. at 713–14. It did so only after finding the materials presumptively privileged, however.

example, some of the conversations that the Supreme Court held presumptively privileged were three discussions between President Nixon and H.R. Haldeman on June 23, 1972. *See Statement Announcing Availability of Additional Transcripts of Presidential Tape Recordings*, 1974 PUBLIC PAPERS OF THE PRESIDENTS 621. These conversations involved President Nixon's attempt to derail the FBI's investigation of the Watergate break-in by falsely alleging a foreign connection over which the FBI had no authority. By contrast, the conversations over which the President has asserted the privilege here are plainly related to his legitimate official functions.

Nor does *Clinton v. Jones* erase the presumption of privilege that attaches to presidential communications under *Nixon* and *Sealed Case*. The OIC suggests that the Supreme Court's characterization of the *Jones* case as "unrelated to any of [the President's] official duties," 117 S. Ct. at 1640, forecloses any application of the presumptive privilege. The Court's holding, however, is in no way inconsistent with the presumptive privilege recognized in *Nixon* and *Sealed Case*. To the contrary, the Court instructed that great deference was owed to the "unique position in the constitutional scheme" the President holds. 117 S. Ct. at 1646 (internal quotations omitted). Although *Clinton v. Jones* held that the Constitution did not mandate a stay of civil proceedings against a sitting President during his term of office, the Court never held or suggested that presidential communications relating to that litigation during the President's term of office were entitled to any less protection than were presidential communications on other subjects. Indeed, *Jones* nowhere suggested that the interests the Court in *Nixon* recognized to underlie the rule of presumptive privilege—the President's need to obtain candid and objective advice and to consider all alternatives in formulating decisions (*see Nixon*, 418 U.S. at 708)—

carry any less force in the context of the public ramifications of civil litigation about personal matters.²⁸

C. The OIC Has Made No Showing, Least of All the Extraordinary Showing Required, to Overcome the Privilege

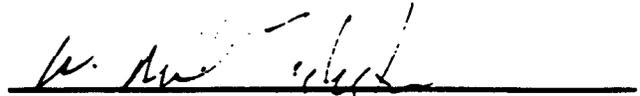
As previously discussed, the case law requires the OIC to make a “focused demonstration of need” before presidential communications may even be turned over to the Court for *in camera* review. *See generally supra* at 25–27. But, in another example of its total disregard of the governing analytical framework, the OIC explicitly concedes that it has made no such showing. (OIC Lindsey Br. at 8). Rather, the OIC asks instead that it be allowed to do so at some unspecified future time. Whether the OIC is allowed the second bite at the apple it has attempted to reserve for itself is a question for another day. For present purposes, the point is merely that nothing on the record now suggests that the OIC can make the showing the law requires. In these circumstances, the OIC plainly cannot overcome the presumptive privilege that attaches to the communications at issue here.

²⁸ It is easy to conceive of other instances in which Presidents’ “private” concerns have affected the operation of the Presidency as an institution. The question frequently arises, for example, in connection with Presidents’ health problems, such as President Reagan’s cancer surgery in 1985 or President Bush’s treatment for an irregular heartbeat in 1991. Although the health of the individuals holding the Office of the President is no doubt a “private” concern as the OIC uses the term, these incidents raised a plethora of issues regarding the appropriate governmental response to presidential incapacity, the possibility of invoking the Twenty-Fifth Amendment, and related matters—all of which would unmistakably be considered “official,” and therefore protected, notwithstanding that they arose out of a President’s private concerns.

CONCLUSION

Accordingly, for the reasons stated, the OIC's Motions to Compel should be denied.

Respectfully submitted,



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Dated: March 17, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum of the White House in **Opposition to OIC's Motions to Compel Bruce R. Lindsey and Sidney Blumenthal to Testify Concerning Conversations Protected by the Attorney-Client, Presidential Communications, and Work Product Privileges** were served by hand or Federal Express, this 17th day of March, 1998 upon each of the parties listed below:

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W. NEIL EGGLESTON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SEALED CASE. _____

)
)
)
Misc. No. 98-95
(UNDER SEAL)

DECLARATION OF CHARLES F.C. RUFF

I, Charles F.C. Ruff, do hereby declare:

I. Introduction

1. I am Counsel to the President of the United States. I have held this position since February 10, 1997. Prior to that time, from 1995 to 1997, I served as Corporation Counsel to the District of Columbia. From 1982-95, I was a partner at the Washington, D.C. law firm of Covington & Burling. During that time, from 1989-90, I served as president of the District of Columbia Bar. I also served as United States Attorney for the District of Columbia from 1979-82. From 1975-77, I served as Watergate Special Prosecutor.

2. In my capacity as Counsel to the President, I provide legal advice to the President regarding a wide variety of matters relating to his constitutional, statutory, ceremonial, and other official duties and the effective functioning of the Executive Branch. At the President's direction, I review various matters that have legal implications and advise him on particular courses of conduct. Those matters include, among numerous others, the assertion of privileges in response to requests for materials and testimony, including executive privilege, attorney-client privilege, and attorney-work-product privilege.

3. The White House Counsel's Office, as a whole, provides confidential counsel to the President, in his official capacity, to the White House, as an institution, and to senior advisors, in

particular, about matters that affect the White House's interests, including investigative matters. To this end, the Counsel's Office receives confidential communications from and provides advice to current and former White House personnel about matters of institutional concern. These individuals provide this information to and solicit advice from our Office with the expectation and understanding that such communications will remain confidential.

II. The Jones Litigation

4. In May 1997, the Supreme Court held in *Clinton v. Jones* that the Constitution does not require a stay of private litigation involving the President until after his term. *Clinton v. Jones*, 117 S. Ct. 1636 (1997). Thus, the *Jones* litigation was permitted to proceed during the President's term, with the Court making particular note that the potential burdens that this litigation may place on the President need to be taken into account by the trial court. This decision requires the President to balance two competing demands on his time: (1) his need to defend the *Jones* lawsuit and (2) the absolute requirement that he devote his full time and attention to performing his duties as President.

5. From my experience as a defense attorney in private practice, a civil lawsuit involving these kinds of allegations and monetary claims requires a substantial time commitment by a client, especially during the discovery phase of the litigation. I also found that most of my individual clients, in addition to fulfilling their obligations as a litigant, have a genuine and important interest in being actively involved in the ongoing litigation, including participating in strategy discussions and decisions. This level of commitment necessarily places a substantial burden on a client's schedule.

6. The President, as the Chief Executive of our Nation, has extraordinary demands placed on his time. His schedule cannot accommodate the many demands of his office, independent of his personal and family responsibilities. In most instances, the many competing obligations

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facing the President require him to rely on his advisors to meet with certain people, attend meetings, gather information and advise him on particular matters.

7. Thus, the progress of the *Jones* litigation concurrent with President's second term has placed additional obligations on the President's schedule that, under the law, he must fulfill despite the current demands of his office. Consequently, the President must look to his advisors to assist him in determining how he can fulfill the requirements of the lawsuit while not abandoning his duty to the American people.

8. The lawsuit has also spawned issues and the need for decisions (*e.g.*, discovery, the deposition of the President, and the possibility of a resolution of the litigation prior to trial) that affect the Presidency and the President's ability to perform his duties effectively. The President's advisors, who know the scope and weight of matters before the President at any given time, are best situated to advise the President as to how various aspects of the *Jones* litigation may affect the Presidency or official matters. Accordingly, presidential advisors need to know about and discuss those litigation-related issues or matters that may affect the office so that they can give the President informed advice as to how he should proceed.

9. The media's interest in the *Jones* litigation has generated inquiries in hundreds of official presidential press conferences and briefings by the President, his press secretary, and other White House staff, whether held here or in other countries. Indeed, the volume of *Jones*-related inquiries that the White House receives sometimes eclipses the inquiries generated by official White House policy matters. Therefore, presidential advisors need the ability to have informed, candid, and frank discussions about the *Jones* litigation to prepare the President for these inquiries.

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III. The Expansion of the Office of Independent Counsel Starr's Jurisdiction

10. On January 16, 1998, at the request of the Attorney General, the Special Division conferred jurisdiction on the Office of Independent Counsel Kenneth Starr ("OIC") to investigate whether "Monica Lewinsky or any other individual" suborned perjury or committed other federal crimes.¹ The allegations surrounding the OIC's investigation involve the President during his tenure, the White House, and many White House employees.

11. Since that time, the OIC has served 13 subpoenas for documents on the White House or current White House employees containing more than 30 separate requests relating to the Lewinsky investigation and calling for expedited production. The OIC has also served at least 25 current and former White House employees with subpoenas calling for their testimony before the grand jury. The OIC also has requested interviews from more than 30 current and former White House employees.

12. Every day since January 21, 1998, the White House has received a flood of press inquiries related to the Lewinsky investigation, and the subject has been raised in virtually every White House press briefing and presidential press appearance.

IV. White House Cooperation with the OIC Investigation

13. Consistent with the practice of my predecessors, as Counsel to the President, I have endeavored to cooperate with the OIC by maintaining an open and constructive dialogue and by responding expeditiously to its requests. Indeed, the White House has responded in a timely fashion to the OIC's document subpoenas and has produced all responsive materials it has

¹ *Text of Reno's Petition for Starr*, ASSOCIATED PRESS NEWSDAY.COM, Jan. 29, 1998.

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located, usually by the designated production date. To accomplish this task, the Counsel's Office circulated a directive to the entire Executive Office of the President's staff and, where appropriate, performed several targeted searches for information.

14. Many current and former White House staff members, other than Mr. Lindsey and Mr. Blumenthal, have been subpoenaed to testify before the grand jury regarding their knowledge of facts pertaining to the relevant time period surrounding the Lewinsky investigation. Others have been asked to submit voluntarily to an interview. I understand that all of these individuals have cooperated with the OIC, and none has asserted privilege over any information that they possess. In particular, the following individuals have provided testimony about their knowledge of this matter: Betty Currie, Patsy Thomasson, Timothy Keating, Stephen Goodin, Kris Engskov, George Stephanopoulos, Deborah Schiff, Marsha Scott, Leon Panetta, Evelyn Leiberman, Carolyn Huber, and Bayani Nelvis.

15. As explained more fully below, with respect to certain individuals subpoenaed to testify, I anticipated that their testimony might implicate confidential communications and information. In an effort to avoid any unnecessary delay in the investigation and needless confrontation, my staff notified the OIC that the issue might arise and discussed ways to reach a mutually agreeable accommodation prior to or following an individual's appearance.

V. **Certain Information and Discussions Relating to the Lewinsky Investigation are Subject to Privilege**

16. It is my understanding that this and prior administrations, Republican and Democratic, have recognized that, with respect to matters that relate to the President's performance of his duties and the functions of the Executive Branch, presidential advisors, and their staff, must be able to inquire into matters in detail, obtain input from all others with significant expertise in the area, and perform detailed analyses of all possible alternatives before deciding what advice and

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information to provide the President. *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997).

The President has an important confidentiality interest in seeking and receiving advice – an interest that is constitutionally based “to the extent this interest relates to the effective discharge of a President’s powers.” *United States v. Nixon*, 418 U.S. 683, 711 (1974).

17. Moreover, we treat executive privilege as extending to communications among advisors and their staff, even if not communicated directly to President, *In re Sealed Case*, 121 F.3d at 751-52, and to communications in their entirety, not just the deliberative or advice portions, including pre-decisional, final, and post-decisional materials. *In re Sealed Case*, 121 F.3d at 745.

18. The Lewinsky investigation involves allegations regarding the President’s conduct toward a federal government employee during his tenure in office. This matter is inextricably intertwined with the daily presidential agenda, and thus has a substantial impact on the President’s ability to discharge his obligations. Accordingly, in the course of executing his duties, there have been discussions among advisors and the President involving the Lewinsky investigation, and these discussions have been held in confidence and treated as subject to privilege.

A. Discussion of Possible Proceedings by the House Judiciary Committee

19. Under Article II of the Constitution, Congress possesses the power to initiate proceedings against a sitting President that can ultimately result in his removal from office. Thus, even the mere speculation about such proceedings raises serious issues that a President and his advisors must address.

20. In November 1997, an impeachment resolution was introduced in the House of

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Representatives. The resolution did not contain specific allegations regarding the President. Rather, it broadly claimed that there was considerable evidence developed from various "credible sources" that the President had engaged in conduct designed to obstruct the legitimate Executive Branch functions. See H. Res. 304, 105th Cong., 1st Sess. (Nov. 5, 1997).

21. Only days after the Special Division expanded the scope of the OIC's investigation, members of the House Judiciary Committee renewed their public discussions about the possibility of initiating proceedings against the President in light of the allegations arising from the Lewinsky investigation.² Weeks later, the press continued to report that many people "would like to see [the President] impeached or forced to resign."³ Congressman Robert Barr recently went so far as to state that "the Republican leadership is beginning to lay the groundwork . . . [for] impeachment proceedings . . ."⁴ Thus, the Lewinsky investigation not only relates to and affects the Presidency -- it also threatens it.

22. Statements by members of Congress and related reports have generated numerous inquiries, some directed at the President, about the possibility of impeachment proceedings.⁵

² *Bryant suggests Clinton should consider stepping aside*, GANNETT NEWS SERVICE, Jan. 27, 1998.

³ N. Gibbs, *Twin Perils of Love & War*, TIME, March 2, 1998, p.36-39; see *Clinton Accused: Guide to Impeachment* THE INDEPENDENT, Jan. 23, 1998, p.8; *'Smoking Gun' Could Trigger Bid to Boot Bubba*, NEW YORK POST, Jan. 23, 1998, p.9; *Clinton Is Becoming Increasingly Isolated As His Latest Crisis Deepens*, THE SCOTSMAN, Jan. 23, 1998, p.15; *Excerpt of A Telephone Interview With Morton Kondrake and Ed Henry of Roll Call*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 115 (Jan. 21, 1998).

⁴ *Bob Barr Discusses Impeachment Process for Bill Clinton*, CNN BOTH SIDES WITH JESSE JACKSON (Feb. 15, 1998).

⁵ JOINT PRESS CONFERENCE OF THE PRESIDENT AND PRIME MINISTER TONY BLAIR OF GREAT BRITAIN, Feb. 6, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 26, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 23, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 21, 1998.

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Consequently, presidential advisors must gather information and formulate advice for the President about the Lewinsky investigation to address the myriad of issues and inquiries that the investigation raises in this context. In addition, the Counsel's Office must prepare to defend against any such proceeding.

B. Domestic and Foreign Policy Matters

23. The President's State of the Union address occurred days after the press reported the expansion of the OIC's jurisdiction and the allegations surrounding Ms. Lewinsky. The White House received numerous inquiries as to whether the President would address these allegations in his State of the Union address.⁶ The President's advisors obviously were required to gather information, consider available options, and advise the President about how to handle this and related matters.

24. The President's ability to work with Congress to enact legislation is likewise affected by the Lewinsky investigation. Certain legislators have been described as "throwing up their hands at the prospect of doing any serious business,"⁷ thereby significantly affecting the President's domestic agenda.⁸ Indeed, Senate Majority Leader Trent Lott recently remarked that the Lewinsky investigation "is beginning to have an impact on the presidency, on the president and on his ability to deal with many very important issues for the future of our country -- from Social

⁶ E.g., PRESS BRIEFING BY MIKE MCCURRY, Jan. 26, 1998.

⁷ *Clinton Under Fire*, LOS ANGELES TIMES, Jan. 26, 1998, p.A17; see also *The President Under Fire: The Public View*, NEW YORK TIMES, Jan. 27, 1998, p.A1 ("most Americans fear that the scandal will interfere with his future ability to perform his job effectively"); *Alleged Clinton Affair Boosts call for Impeachment Probe*, STATES NEWS SERVICE, Jan. 22, 1998.

⁸ See *Lawmakers Return Amidst Scandal*, AP ONLINE, Jan. 26, 1998.

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Security to what's going on in Iraq to now what's going on in Kosovo."⁹ Therefore, in discussing with the President his ability to achieve the Administration's domestic policy objectives, advisors must take into account the impact of issues arising out of the Lewinsky investigation on his efforts and advise him accordingly.

25. Based upon information from others, I understand that the Lewinsky investigation also affected the President's ability to address foreign policy matters. For example, during the recent crisis with Iraq, certain people speculated that the Lewinsky investigation might harm the President's ability to "influence" the public, thus rendering him incapable of garnering support for the U.S. position on this issue and ultimately negotiating a successful resolution with Iraq.¹⁰ These same concerns were raised when the President addressed Middle East issues, including his recent meetings with Prime Minister Netanyahu and Mr. Arafat.¹¹ Therefore, the President's advisors necessarily discussed the Lewinsky investigation and advised the President so that he could effectively execute his constitutional duties regarding foreign policy matters.

C. Discussions Regarding the Assertion of Applicable Privileges

26. When an investigative body subpoenas the White House or one of its staff members for

⁹ *Lott Urges Clinton to Give Details*, ASSOCIATED PRESS, March 9, 1998.

¹⁰ *Crisis Develops Inside the White House*, CNN LATE EDITION WITH WOLF BLITZER (Jan. 25, 1998); *see also*, *Twin Perils of Love & War*, TIME, March 2, 1998, p.36-39 ; *Republicans End Silence On Troubles Of President*, THE NEW YORK TIMES, March 1, 1998, sec.1, p.20, col.1; *It's Hard To Believe The Clintons*, CHICAGO TRIBUNE, Jan. 29, 1998, p.19; *Echoes of the past but a far cry from Watergate*, FINANCIAL TIMES, Jan. 24, 1998, p.3; *Scandal tests Clinton on Iraq crisis*, AGENCE FRANCE PRESSE, Jan. 24, 1998.

¹¹ *N.J. lawmakers worry Clinton's woes could hurt host of issues*, GANNETT NEWS SERVICE, Jan. 30, 1998; *It's Hard To Believe The Clintons*, CHICAGO TRIBUNE, Jan. 29, 1998, p.19 ; *Letters to the Editor: Sex and the president through media eyes*, THE SAN DIEGO UNION-TRIBUNE, Jan. 27, 1998, p.B-7.

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information, White House confidentiality interests are often implicated. The Counsel's Office has always attempted to deal with these privilege issues in a careful and deliberate manner.

27. After ascertaining that a subpoenaed individual possesses confidential information, the decision whether to assert privilege over such communications or information is one that the White House approaches thoughtfully, deliberately, and seriously. First, we carefully review the nature and substance of the communication to determine its confidential nature. Second, we evaluate whether the assertion of the privilege is legally sustainable and otherwise appropriate. Finally, we brief the President and advise him in making the ultimate decision. Thus, this process involves core presidential decisionmaking.

28. Accordingly, presidential advisors have engaged in deliberations to determine whether it is necessary to advise the President to assert privilege over certain communications. These discussions are presumptively privileged.

D. Strategy Sessions involving Presidential Advisors and Counsel

29. The President is unable personally to keep abreast of every matter that is handled by or could possibly affect him or the Executive Branch. Accordingly, the President must rely on advisors to ensure the progress and development of these matters and, when appropriate, brief the President with information and advice that will permit him to make decisions and respond to inquiries. Often, issues arise unexpectedly, and thus advisors must always be prepared to assist the President on a moment's notice with the most recent, accurate and comprehensive information, and the full range of options relating to a particular decision.

30. The Lewinsky investigation is no exception to this process. As illustrated in the examples presented above, since first reported, this investigation has affected the President's

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ability to execute his constitutional obligations and has been the primary subject of press inquiries. This investigation has also intruded on the work of the President and his immediate advisors and staff, and has raised issues involving privilege, witness availability and subpoena compliance. As a result, the President's advisors and counsel have held regular meetings to gather and exchange information, as well as to formulate recommendations, for the President.

VI. The Subpoenas to Bruce R. Lindsey and Sidney Blumenthal

A. Communications with the OIC before Grand Jury Appearances by Mr. Lindsey and Mr. Blumenthal

31. On January 30, 1998, the OIC served on Bruce Lindsey, Assistant to the President and Deputy Counsel, a subpoena calling for his appearance to testify on February 4, 1998 before the grand jury.

32. In an effort to address, prior to Mr. Lindsey's appearance, the scope of the matters that the OIC sought to discuss with Mr. Lindsey and other senior advisors to the President and to address potential privileges that might be implicated, I contacted the OIC to discuss the matter. On February 3, 1998, Special Counsel Lanny Breuer and I met with Kenneth Starr, Robert Bittman, Steve Collatan, and Jackie Bennett. I explained the nature of the privilege concerns that would arise from broad-ranging inquiries into staff discussions and communications with the President, and I asked OIC to describe with particularity the possible areas of inquiry. They declined to do so.

33. The OIC informed me that it had postponed indefinitely Mr. Lindsey's appearance, and therefore a discussion of their examination of Mr. Lindsey was premature. As a result, our discussions about his testimony were curtailed, and instead we focused on the pending appearance of another presidential advisor, Deputy Chief of Staff John Podesta.

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34. On February 4, 1998, Mr. Starr sent me a letter indicating that they intended to inquire into privileged areas based upon their view that executive privilege was inapplicable to information relating to the Lewinsky investigation. (2/4/98 Letter from Starr to Ruff, attached as Exhibit 1).

35. On February 5, 1998, I responded to Mr. Starr's letter and stated that, under the principles of *In re Sealed Case* and other relevant authority, conversations among advisors were presumptively privileged. (2/5/98 Letter from Ruff to Starr, attached as Exhibit 2).

36. I pointed out that the "discussions among and between the President's senior staff involve the very capacity of the President and his staff to govern—to pursue his legislative agenda, to ensure the continued leadership of [the] United States in the world community, and to maintain the confidence of the people who elected him—all of which lie at the heart of his role under Article II of the Constitution." (*Id.* at 2). I concluded by indicating my willingness to explore all possible accommodations of our respective interests. (*Id.*).

37. On February 6, 1998, the OIC sent me a letter rejecting my offer and restating its position regarding the communications about which it intended to inquire. In rejecting my offer, the OIC did not articulate any need for this information, as required by *In re Sealed Case*, but simply asserted that its desire "to resolve this matter in a timely fashion" compelled disclosure. (2/6/98 Letter from Starr to Ruff at 1, attached as Exhibit 3).

38. Finally, on the issue of discussions between witnesses and White House counsel, the OIC stated that, under the Eighth Circuit decision in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), it intended to question White House personnel as to the substance of such communications, and that if a witness asserted the attorney-client privilege, the OIC intended to "take such further steps as are appropriate." (*Id.* at 2).

B. Mr. Lindsey's Communications are Presumptively Privileged

39. As described in his declaration, filed in connection with the White House's opposition to the OIC's motions to compel, Mr. Lindsey testified before the grand jury on February 18 and 19, 1998, and on March 12, 1998. (Declaration of Bruce R. Lindsey ("Lindsey Dec.") ¶ 9).¹² Over the course of those three days of testimony, Mr. Lindsey willingly answered questions about his personal knowledge with respect to any allegations of a personal relationship between Ms. Lewinsky and the President, and any allegations of suborning perjury in connection with the *Jones* litigation, as well as several questions about Mr. Lindsey's discussions with others that involved Ms. Lewinsky. (Lindsey Dec. ¶¶ 15-17).

40. Mr. Lindsey declined to answer other specific categories of questions relating to the *Jones* litigation and the Lewinsky investigation on the grounds that they are subject to executive privilege, attorney-client privilege, attorney-work product privilege, and/or the common interest doctrine. (Lindsey Dec. ¶¶ 10-14).

41. The confidential communications that Mr. Lindsey declined to disclose to the grand jury are presumptively privileged. They occurred while performing his duties as Deputy Counsel to the President and as one of the principal advisors to the President, or as the President's personal attorney prior to the President taking office. (Lindsey Dec. ¶¶ 4-6, 8-14, 17). Mr. Lindsey had these discussions with the President, other White House attorneys, presidential advisors to the President, and/or with the President's private attorneys. (*Id.*). The communications contain information and advice relating to the *Jones* litigation or Lewinsky investigation that Mr. Lindsey gathered or provided for the purpose of assisting the President in making decisions in connection with his official duties or to ensure that the allegations and inquiries surrounding these matters did not impair the President's discharge of his official duties. (*Id.* ¶¶ 10-14).

¹² Mr. Lindsey's entire declaration is incorporated by reference.

C. Mr. Blumenthal's Communications are Presumptively Privileged

42. On February 26, 1998, Mr. Blumenthal testified before the grand jury. (Declaration of Sidney Blumenthal ("Blumenthal Dec.") ¶ 16).¹³ Mr. Blumenthal declined to answer certain questions on the grounds that they are subject to executive privilege. (*Id.*).

43. In his capacity as Assistant to the President, Mr. Blumenthal participates in and is consulted on a wide variety of matters, including domestic policy issues, presidential speeches, (including the State of the Union address), national security issues, and international freedom of the press issues. (*Id.* ¶¶ 4-7). Mr. Blumenthal also serves as the liaison for the President to the office of the Prime Minister of Great Britain; a role that requires him to interact with the Prime Minister and his advisors on a variety of subjects, including United States foreign policy matters. (*Id.* ¶¶ 8-12).

44. To perform his duties, Mr. Blumenthal consults with other presidential advisors to gather information and formulate advice to give to the President. (*Id.* ¶¶ 3, 14-15, 17). In carrying out these duties, Mr. Blumenthal has had discussions with the President, First Lady, and other senior advisors regarding the allegations and inquiries surrounding the Lewinsky investigation. (*Id.*). These discussions took place in the context of Mr. Blumenthal's assisting the President to perform his duties; in particular, the President's State of the Union address and the visit by the Prime Minister of Great Britain. (*Id.* ¶¶ 14-15). Accordingly, these discussions are presumptively privileged.

¹³ Mr. Blumenthal's entire declaration, filed in connection with the White House's opposition to the OIC's motions to compel, is incorporated by reference.

VII. Communications with the OIC in early March 1998

45. The White House sought to avoid needless confrontation by reaching a mutually agreeable accommodation that would permit the OIC access to the information that it purportedly needed to conduct its investigation while maintaining the legitimate confidentiality interests of the White House. On March 2, 1998, W. Neil Eggleston, the attorney representing the Office of the President in connection with litigation arising out of the Lewinsky investigation, sent a letter to the OIC requesting that the White House be consulted about whether such an accommodation was reachable. (3/2/98 Letter from Eggleston to Starr, attached as Exhibit 4). Mr. Eggleston also described to the OIC the well-established accommodation process that the White House historically followed, citing the *Espy* litigation as an example. (*Id.* at 1). Finally, Mr. Eggleston offered to meet with the OIC to discuss the areas of inquiry that implicated privilege concerns and to consider any articulation of need that the OIC might make. (*Id.* at 2).

46. On that same day, the OIC replied to Mr. Eggleston's letter, reiterating its earlier position that executive privilege did not apply to information relating to the Lewinsky investigation. (3/2/98 Letter from Bittman to Eggleston, attached as Exhibit 5). The OIC also stated that the White House was using executive privilege as a dilatory tactic. (*Id.* at 20). Finally, the OIC took the view that the White House was in the better position "to identify the areas it wishe[d] to withdraw the invocation of executive privilege," and thus requested that the White House submit a proposal by noon on March 4, 1998. (*Id.*).

47. On March 4, 1998, Mr. Eggleston responded to the OIC's letter. He began by underscoring the principle that, although the parties may disagree as to whether certain information is privileged, the accommodation process requires the parties to set aside any difference over the applicability of the privilege and focus on trying to reach an acceptable

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agreement. (3/4/98 Letter from Eggleston to Starr, attached as Exhibit 6). Mr. Eggleston continued:

Your Office was unwilling to describe the subject matters about which you intended to question White House officials prior to their testimony. After several weeks of grand jury testimony by White House officials, we now have a sense of the areas that we believe are of interest to your investigation. It appears that, in addition to seeking facts about this matter, you are seeking ongoing advice given to the President by his senior advisors, including attorneys in the Counsel's Office, as well as the substance of these advisors's discussions as to how to address the Lewinsky investigation in a manner that enables the President to perform his constitutional, statutory, and other official duties.

(*Id.* at 1).

48. Mr. Eggleston then explained that the Office of the President was prepared to instruct White House witnesses along the following general lines:

- (1) White House Advisors (Non-Lawyers): Advisors will be permitted to testify as to factual information regarding the Lewinsky investigation, including any such information imparted in conversations with the President. We will continue to assert executive privilege with respect to strategic deliberations and communications.
- (2) White House Attorney Advisors: Attorneys in the Counsel's Office will assert attorney/client privilege; attorney work product; and, where appropriate, executive privilege, with regard to communications, including those with the President, related to their gathering of information, the providing of advice, and strategic deliberations and communications.

(*Id.* at 2).

49. Mr. Eggleston stated that he believed that this approach would accommodate the parties' respective interests. (*Id.*) He also stressed that, because the White House did not know the specific questions the OIC intended to ask a particular witness, we would evaluate the application of these instructions in response to specific questions and were willing to discuss any

particular issue. (*Id.*).

50. Mr. Eggleston also rejected the OIC's suggestion that the White House's assertion of privilege was a delaying tactic, pointing out that during the six weeks of the investigation, numerous White House witnesses either appeared or were interviewed, and each had answered all legitimate questions. Moreover, the White House had attempted to address and resolve all privilege issues prior to the appearance or interview of a White House official. (*Id.*).

51. On March 6, 1998, the OIC responded to Mr. Eggleston's letter, maintaining its position that executive privilege did not apply, and rejecting Mr. Eggleston's proposed approach. (3/6/98 Letter from Bittman to Eggleston, attached as Exhibit 7). On that same day, the OIC filed its motions to compel.

VIII. Disclosure of these Communications will Debilitate this and Future Presidencies

52. The President's advisors have not merely assumed that the Lewinsky investigation is a matter that has substantially affected the Presidency. They have taken it upon themselves to evaluate carefully how, if at all, it relates to the President's discharge of his duties. Politicians (both Democratic and Republican), political analysts (both domestic and foreign), and the media have all pronounced that the investigation affects the President's ability to achieve his foreign policy objectives and domestic agenda, and even poses a real threat to his ability to remain in office. In response to these reports, advisors have acted to ensure that they completely understand the scope and ramifications of the Lewinsky investigation so that they can give well-informed advice to the President to enable him to fulfill his responsibilities to the American people.

53. Disclosure of these communications will have a chilling effect on these and future presidential advisors. When a matter like the Lewinsky investigation affects the President's ability to execute his duties, his advisors cannot sit idly by and hope that it will resolve itself with little impact on the President. The President relies on them to assess a particular issue and to help him make sound decisions. To be effective, these advisors need the ability to evaluate relevant information, explore novel approaches, engage in heated debate, and provide blunt, candid, and even harsh, advice to the President. The President has a constitutionally based confidentiality interest in this process, and "the critical role that confidentiality plays in [this process] cannot be gainsaid." *In re Sealed Case*, 121 F.3d at 750.

54. If advisors must perform these duties with the knowledge that they have no expectation of confidentiality, that at some point their deliberations and advice will be disclosed, and that they will be held publicly accountable for their recommendations, they will be disinclined to gather all of the relevant information about a matter and avoid giving novel and frank advice to the President. They will fail in their duty to assist the President in dealing with matters that have an impact on his office and the Executive Branch. In turn, the President will be hindered in performing his duties because he will not receive the full benefit of his advisors' skills. He also will have to waste much of his time performing the functions that intermediaries normally would -- and should -- handle.

55. To strip a President of the core assistance and critical advice that are the lifeblood of his ability to execute his duties will inevitably result in the erosion of the effectiveness of the Office of the President. Such an outcome conflicts with basic constitutional principles and our country's notion of an effective Presidency and a well-balanced, democratic government.

Declaration of Charles F.C. Ruff
Page 19

IX. The Decision to Assert Privilege

56. I have discussed with the President these areas of inquiry and the privileged nature of the information sought. The President has directed me to invoke formally the privileges applicable to these communications.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

March 17, 1998
Date

Charles F.C. Ruff
Charles F.C. Ruff
Counsel to the President

Tab 1

**Office of the Independent Counsel**

*1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802*

February 4, 1998

The Honorable Charles F.C. Ruff
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Ruff:

I write in response to your visit of yesterday concerning the sensitive matter of Executive privilege. As you know, at the request of the Attorney General, the Special Division recently conferred jurisdiction on this Office to investigate whether "Monica Lewinsky or others" suborned perjury, obstructed justice, or committed other federal crimes. We understand from your discussion that certain witnesses employed by the White House may invoke Executive privilege in response to questions posed by the grand jury in its continuing investigation of that matter. After careful consideration of your comments, including consultation with our Ethics Counselor Samuel Dash, we believe strongly that the grand jury is entitled to inquire into discussions of senior White House staff members, both among themselves and with the President, concerning the Monica Lewinsky matter.

As we understand your comments, there are two principal areas of testimony where the White House may invoke Executive privilege. The first includes discussions, to which the President was not a party, among what you have described as "senior staff." The discussions at issue occurred after the Lewinsky matter became public last month. You indicated that these discussions may have encompassed such topics as how to respond publicly to the news, what political strategies to adopt, and how to advise the President concerning these matters. We further understood you to say that the White House did not expect to assert Executive privilege with respect to whatever factual information, if any, was discussed among the staff.

The second area involves communications between members of the White House staff and the President himself that took place after the public revelations concerning our new jurisdiction. We did not understand you to take a firm position on the question whether the President would assert Executive privilege with respect to his own communications with advisors on this subject.

As a threshold matter, we believe there is serious doubt whether communications of

The Honorable Charles F. Ruff
February 4, 1998
Page 2

senior staff and the President concerning the Lewinsky matter fall within the scope of Executive privilege. When the Supreme Court recognized a "presumptive privilege for Presidential communications," United States v. Nixon, 418 U.S. 683, 707 (1974), it explained that the privilege attached to communications in the exercise of the President's Article II powers. Id. at 705. The privilege is limited to communications "in performance of the President's responsibilities," id. at 711, "of his office," id. at 713, and "made in the process of shaping policies and making decisions." Id. at 708 (quoted in Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977)).

The actions of the President and the White House in response to the Lewinsky matter do not, as we see it, carry out a constitutional duty of the President. Monica Lewinsky was a prospective witness in civil litigation in which the President is a private party. In more recent days, this Office has been charged by the Attorney General and the Special Division with responsibility to conduct a criminal investigation of "Ms. Lewinsky and others." These matters concern the President in his personal capacity. They do not involve the President's execution of the laws. Accordingly, we doubt that presidential and senior staff communications on these matters are entitled to a presumptive Executive privilege.

In any event, assuming the presumptive applicability of an Executive privilege, we are confident that many communications among White House staff and/or the President constitute important evidence in the grand jury's investigation that is not reasonably available elsewhere. See In re Sealed Case, 121 F.3d 729, 753 (D.C. Cir. 1997). The President's own statements are of critical importance to the grand jury's investigation. His statements to advisors represent highly relevant information not available from any other source. Particularly given the President's refusal to make public statements concerning the Lewinsky matter, and his recent decision to decline our invitation to appear before the grand jury, there is no alternative source that even approaches a substitute for direct evidence of the President's statements.

Similarly, the statements of senior White House staff will in many instances be important to the grand jury's investigation. For example, just as factual information in the possession of presidential advisers may reveal the nature of the President's deliberations, see In re Sealed Case, 121 F.3d at 750-51, so too may the discovery of deliberations among the White House staff concerning strategy give the grand jury unique insight to the factual premises on which the President and his staff are operating. Where the grand jury's investigation focuses on not merely "an immediate White House advisor," id. at 755, but on conduct of the President himself, we believe the courts will recognize that evidence of senior staff communications will be "particularly useful" to the grand jury. Id.

If the President ultimately does assert Executive privilege with respect to any evidence sought by the grand jury, then we expect that the district court will be required to determine whether the President's claim of privilege should be upheld under the circumstances. We agree

The Honorable Charles F. Ruff

February 4, 1998

Page 3

with your suggestion that a log of conversations among senior staff, including a list of participants and a specific, generic description of the subject matter, may facilitate the process of resolving any such disputes. If you are in a position to provide such a log in fairly short order, then we would consider whether the log is sufficient from our point of view to frame the issues properly for decision by the Court.

If you believe that further discussions of these matters would be helpful, we would be pleased to visit with you again at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth W. Starr". The signature is written in a cursive, flowing style with some loops and flourishes.

Kenneth W. Starr
Independent Counsel

2100

Tab 2

2103

THE WHITE HOUSE

WASHINGTON

February 5, 1998

BY FACSIMILE

**Kenneth W. Starr, Esq.
Independent Counsel
Suite 400 North
1001 Pennsylvania Ave., NW
Washington, D.C. 20004**

Dear Mr. Starr:

This is in response to your letter of February 4, 1998.

First, I want to inform you that within 45 minutes of its delivery, James Bennet of the New York Times called the White House Press Office to ask whether I had received a letter from you concerning executive privilege. Since there could have been only a few persons on your staff who were aware of the letter's delivery, I ask that you immediately request that the FBI, using agents not affiliated with your office, investigate to determine who disclosed the existence of the letter and its substance (as well as, presumably, the fact and substance of our meeting) to the press. I and the three members of my staff who were aware of the letter before Bennet's call will be happy to be interviewed (under oath) in connection with any such investigation.

Let me move now to the substance of your letter.

As you will not be surprised to learn, I disagree with your position on the applicability of executive privilege to discussions among senior White House staff and between senior staff and the President concerning the Lewinsky matter. In particular, I disagree with your contention that, under In re Sealed Case or any other authority, the grand jury would be permitted to inquire into the substance of deliberations among the President's most senior advisors in order to determine on what factual predicate those deliberations were based. Such an argument would swallow up the entire premise of the court's decision. Indeed, your argument, if followed to its logical conclusion, would mean that the President would be barred from seeking the advice of those responsible for assisting him in carrying out his constitutional responsibilities because every conversation would be the subject of grand jury inquiry.

Kenneth W. Starr, Esq.
February 5, 1998
Page 2

To the extent that you rely on the fact that the President's counsel has declined your invitation to appear before the grand jury, I find it curious that your office would issue an invitation to the President to appear on a date less than a week hence – when it is a matter of public knowledge that he is to begin a state visit by the Prime Minister of Great Britain and when, as you are also fully aware, the United States is confronting a major international crisis – and then argue that the President's declining of that invitation justifies intrusion into his discussions with his advisors. Nor can the President's decision not to comment on the Lewinsky matter – other than to deny that he had sexual relations with Ms. Lewinsky and that he ever asked her to lie – justify such an intrusion.

Let me also clarify three points I made in our meeting. First, discussions among and between the President's senior staff involve the very capacity of the President and his staff to govern – to pursue his legislative agenda, to ensure the continued leadership of the United States in the world community, and to maintain the confidence and support of the people who elected him – all of which lie at the heart of his role under Article II of the Constitution. Second, as to what position the President himself might take on the assertion of executive privilege as to his communications if he were to be questioned, I did not purport to take any position – “firm” or otherwise. And third, I indicated that, in deciding whether to assert privilege, we have historically sought to distinguish the substance of advisory and deliberative discussions from segregable facts, not available elsewhere, that may be contained in otherwise privileged communications.

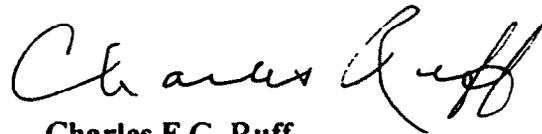
Finally, I remain willing to explore all avenues for resolving our disagreement, although I admit to being more than a little uncertain as to how to conduct discussions without reading about them simultaneously in the press. I am also uncertain about your office's current position with respect to the questioning of senior staff members before the grand jury. Although we had initially been informed that your office did not intend to inquire into the substance of any staff discussions or communications with the President, but rather only to identify the circumstances (date, attendees, general subject matter, etc.) of such discussions in order to establish an appropriate record, we have now been advised that you do intend to pursue such inquiries. We had also been informed that witnesses were not to be questioned concerning communications with White House counsel, but we now understand that you do not intend to follow that practice where there is more than one non-lawyer present – a rule that I must say seems to have no rational basis.

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Kenneth W. Starr, Esq.
February 5, 1998
Page 3

If we can come to some preliminary agreement as to the protocol that will be followed in connection with Mr. Podesta's appearance and that of other senior staff, it may be that there remains some prospect for addressing both your interests and our very serious concerns. If you believe that further discussions would be fruitful, please call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles F.C. Ruff". The signature is written in a cursive style with a large, prominent initial "C".

**Charles F.C. Ruff
Counsel to the President**

Tab 3

**Office of the Independent Counsel**

*1001 Pennsylvania Avenue, N.W.
Suite 490-North
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(202) 514-8688
Fax (202) 514-8802*

February 6, 1998

The Honorable Charles F. C. Ruff
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Ruff:

I write in response to your February 5 letter.

Let me reiterate the scope of our inquiry: We do not intend to question senior staff about deliberative matters beyond the jurisdictional grant recently crafted by the Attorney General and the Special Division. We do not seek information about discussions that relate solely to the President's foreign policy or his legislative agenda. We do not seek information about military or diplomatic secrets. We do intend to ask about discussions concerning an alleged relationship between Monica Lewinsky and the President, acting in his private capacity.

As to your contention that such discussions fall under Executive privilege, we must respectfully disagree. We believe that the President's relationship with Ms. Lewinsky, and the President's response to a private, civil lawsuit or a criminal investigation, fall outside the scope of his Article II duties. Executive privilege, as a threshold matter, thus appears to us inapplicable.

Even if the privilege did attach, we believe we would satisfy the test set forth in United States v. Nixon. The grand jury is investigating the conduct of Ms. Lewinsky and others with respect to a civil lawsuit against the President in his private capacity. This Office was given responsibility over that investigation after the Attorney General's representative, under exigent circumstances, made an extraordinary oral submission to the Special Division. The grand jury's need for information to resolve this matter in a timely fashion could hardly be more compelling.

In your letter, you suggest that our invitation to appear before the grand jury provided the President with insufficient notice. We fully recognize that the President, in the discharge of his constitutional duties, may have valid scheduling reasons for declining a first invitation to the grand jury. We simply noted the President's response as a partial explanation for why the grand jury needs evidence of his statements from other sources.

Under the circumstances, we do not believe that Executive privilege allows the withholding of important, relevant information that the grand jury needs to complete its inquiry. We cannot agree with you that when senior staff discuss how to handle allegations of the President's private

The Honorable Charles F.C. Ruff
February 6, 1998
Page 2

misconduct, they are aiding the President in the performance of his constitutional duties -- which is the only basis for asserting Executive privilege. Your expansive view of the privilege, it seems to us, could equally cover the communications at issue in Nixon.

You express uncertainty about our position with respect to questioning senior staff members before the grand jury. We will be specific: We intend to inquire into the substance of staff discussions and communications with the President concerning Ms. Lewinsky and related matters. If the witness asserts Executive privilege in the grand jury, we will limit our questioning to those matters necessary to establish an appropriate record for the district court (e.g., whether the communication was for the purpose of advising the President, the official government matter to which the communication relates, date, attendees, etc.). If there is no assertion of privilege, then we will proceed with questions.

You also raise the issue of communications between witnesses and White House Counsel. We hereby notify you that in light of In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), we intend to question witnesses as to the substance of such communications. If a witness asserts attorney-client privilege, we will take such further steps as are appropriate.

Finally, you suggest that someone in this Office disclosed details of our conversations and correspondence to the New York Times. On several occasions in recent weeks, we have been falsely accused of such disclosures. In this particular instance, reporters had been questioning the White House Press Secretary about Executive privilege since January 22; the Wall Street Journal had reported on January 29 that the White House was preparing to assert the privilege (indeed, this was our first notice of your plans); we took extensive steps to arrange for your confidential visit to our offices; subsequent media information plainly came from the White House (e.g., the Associated Press reported on February 5 that "individuals familiar with the letter" said that "Starr's letter left the White House convinced there was no more room for goodwill negotiating"); and the reporter who asked you about our letter covers the White House, not the Office of the Independent Counsel. Under the circumstances, we respectfully suggest that your suspicions are misdirected.

If we can provide further information that may help forestall or resolve any disputes, please let me know.

Yours sincerely,

Kenneth W. Starr
by [Signature]
KENNETH W. STARR
Independent Counsel

Tab 4

HOWREY & SIMON

Attorneys at Law
 1000 Pennsylvania Avenue, N.W.
 Washington, D.C. 20004
 (202) 295-2900
 FAX (202) 295-1800

W. Neil Eggleston
 ATTORNEY
 eggleston@howrey.com

March 2, 1998

VIA HAND DELIVERY

Kenneth W. Starr, Esq.
 Independent Counsel
 Office of the Independent Counsel
 1001 Pennsylvania Avenue, N.W.
 Suite 490 North
 Washington, DC 20004

Dear Mr. Starr:

I represent the Office of the President of the United States in connection with any litigation impacting that Office arising out of your current Grand Jury investigations. This representation extends to potential litigation over the applicability and extent of privileges.

Before you initiate litigation, the White House requests that we be consulted about whether an accommodation is reachable between the President's interest in confidentiality and whatever need the Grand Jury may have for the testimony.

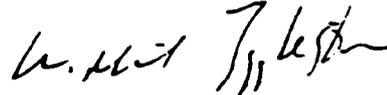
Because these matters involve clashes between branches of government, the usual practice has been for the respective parties to attempt to reconcile their differences and accommodate the needs of the other party to the extent possible.

That was certainly the course that we followed in the Espy litigation. We released to the Espy Independent Counsel documents for which the Independent Counsel had articulated a substantial showing of need. Indeed, the White House determined to release one of these privileged documents during the litigation itself. The White House only invoked privilege over those documents, the release of which we believed would hindered the President's ability to discharge his duties.

OWREY & SIMONKenneth W. Starr, Esq.
March 2, 1998
Page 2

We believe a similar attempt to accommodate the respective interests would be appropriate in this matter as well. We would be prepared to meet with you, review the proposed areas of witness questioning, and consider any need you may demonstrate on why any applicable privileges should not be asserted.

Very truly yours,



W. Neil Eggleston

cc: Charles F. C. Ruff, Esq.

Tab 5



Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
 Suite 490-North
 Washington, DC 20004
 (202) 514-8688
 Fax (202) 514-8802

March 2, 1998

HAND DELIVERED

W. Neil Eggleston, Esq.
 Howrey & Simon
 1299 Pennsylvania Ave., N.W.
 Washington, DC 20004-2402

Dear Mr. Eggleston:

We are in receipt here in Washington of your letter dated today to Judge Starr, who is currently in meetings in Little Rock. We have, however, communicated at length with him, and this letter reflects the evaluation and considered judgment of this Office. In brief, you have asked "whether an accommodation is reachable" between the White House and this Office as to the President's invocation of executive privilege, and you suggest a meeting to "reconcile" these differences.

As you are aware, this Office met with White House Counsel a month ago at his request in -- what we believed then to be -- a good-faith attempt to resolve any disputes over privilege without the need to resort to time-consuming litigation. At that meeting and in subsequent correspondence, White House Counsel expressed an unyielding view of the applicability of executive privilege in this setting. Then and since, we have set forth our view that White House Counsel's reading of executive privilege and its applicability to the Monica Lewinsky matter is, with all respect, entirely misplaced. As a threshold matter, the President's communications with regard to Ms. Lewinsky are purely private in nature and therefore fall outside the scope of executive privilege. Such communications were not made in the exercise of the President's Article II powers nor were they made "in performance of the President's responsibilities." United States v. Nixon, 418 U.S. 683, 708, 713 (1974); see also In Re Sealed Case, 121 F.3d 729, 752 (1997) (executive privilege "only applies to communications . . . on official government matters"). In addition, we find the instant invocation of executive privilege odd, given the reported statement of then-White House Counsel Lloyd Cutler that it was the White House's "practice" not to assert executive privilege in "investigations of personal wrongdoing by government officials."

W. Neil Eggleston, Esq.
March 2, 1998
Page two

Since our exchanges with White House Counsel, many White House employees have been questioned before the grand jury about Ms. Lewinsky. Several of these witnesses have invoked executive privilege at the direction of the White House. You propose we meet to "review" the areas of questioning and demonstrate our need for the information in an effort to avoid litigation. With all respect, we fail to discern the purpose of such a meeting at this juncture. First, the White House has already begun to litigate these issues as evidenced by Chief Judge Johnson's ordering Bruce Lindsey to testify or invoke a privilege. Second, we have, as you know, already asked the specific questions and identified the "areas of witness questioning." Third, there is no need -- and indeed no requirement -- that we demonstrate why we need these communications, since executive privilege is, for the reasons already stated, simply inapplicable to the personal communications of the President at issue here.

That being said, we are willing to consider any good-faith attempt to resolve these issues promptly. We were in discussions with the White House several weeks ago, but the President subsequently chose to invoke executive privilege as to virtually every communication relating to Ms. Lewinsky. In this respect, we are constrained to make this point clear: this investigation has confronted numerous delaying tactics. Yet we have repeatedly stressed to the White House that the public interest demands a swift resolution of all matters involving Ms. Lewinsky. We believe, moreover, given this history, that the White House is in a better position to identify the areas it wishes to withdraw the invocation of executive privilege. We warmly welcome such a proposal so that we can move the grand jury's investigation forward. If you wish to submit a proposal, kindly do so in writing by noon, Wednesday, March 4, 1998.

Sincerely,

Handwritten signature of Robert J. Bittman in cursive script.

Robert J. Bittman
Deputy Independent Counsel

cc: Honorable Charles F.C. Ruff

Tab 6

HOWREY & SIMON

Attorneys at Law
1299 Pennsylvania Ave. NW
Washington, DC 20004-2902
(202) 783 0900
FAX (202) 383 6610

W. Neil Eggleston
(202) 383 7433
eggleston@howrey.com

March 4, 1998

VIA FACSIMILE and HAND DELIVERY

Kenneth W. Starr, Esq.
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, DC 20004

Dear Mr. Starr:

I received a letter from Deputy Counsel Robert J. Bittman in response to my March 2, 1998 letter outlining our wish to ensure that we had explored, prior to any litigation, all reasonable accommodations to avoid or limit litigation.

Mr. Bittman responded by restating your Office's view that executive privilege does not apply to any questioning of White House officials regarding the Lewinsky investigation—something upon which, as you know, we disagree. Indeed, the impetus for my letter was that we disagree on the law. Despite our legal disagreements, however, we are duty bound to attempt to reach a mutually agreeable accommodation that provides the grand jury with the information it needs while preserving this and future Presidents' legitimate interests in receiving candid and frank advice in confidence from their advisors.

Your Office was unwilling to describe the subject matters about which you intended to question White House officials prior to their testimony. After several weeks of grand jury testimony by White House officials, we now have a sense of the areas that we believe are of interest to your investigation. It appears that, in addition to seeking facts about this matter, you are seeking ongoing advice given to the President by his senior advisors, including attorneys in the Counsel's Office, as well as the substance of these advisors' discussions as to how to address the Lewinsky investigation in a manner that enables the President to perform his constitutional, statutory and other official duties.

In light of these areas of inquiry, we are prepared to discuss an approach that we believe will accommodate our respective interests. To that end, the Office of the President is prepared to instruct White House witnesses along the following general lines:

- White House Advisors (Non-Lawyers): Advisors will be permitted to testify as to factual information regarding the Lewinsky investigation, including any such information imparted in conversations with the President. We will continue to assert executive privilege with respect to strategic deliberations and communications.
- White House Attorney Advisors: Attorneys in the Counsel's Office will assert attorney/client privilege; attorney work product; and, where appropriate, executive privilege, with regard to communications, including those with the President, related to their gathering of information, the providing of advice, and strategic deliberations and communications.

At this point, the instructions that we intend to provide to White House advisors and attorneys are necessarily general, since we do not know the questions you intend to ask. We of course will evaluate the application of these instructions to the advisors and attorneys in response to specific questions and would welcome an opportunity to meet and discuss any particular issues, as needed.

The accommodation we are proposing will permit the grand jury to complete its work in a timely fashion and will provide the factual information that it needs for this investigation. We do not believe, however, that you have demonstrated, or can demonstrate, a need for information about the strategic discussions of White House advisors about this matter.

Although you argue that the Lewinsky investigation is purely private, the intersection of this matter with, for example, the State of the Union, an enumerated duty under Article II, section 3 of the Constitution, and Prime Minister Blair's visit and their joint press conference make it abundantly clear that this investigation has implications for the President's performance of his official duties. These instances also illustrate the very obvious need for the President to receive the candid and frank counsel of his advisors in confidence.

I also reject out-of-hand your suggestion that the assertion of privilege is a delaying tactic or that the White House has in any manner delayed your investigation. While you have been investigating this matter for merely six weeks, numerous White House witnesses have appeared or been interviewed by your agents. None has refused to appear and each has answered all legitimate inquiries. Moreover, we have made every attempt to discuss and resolve potential privilege issues with you before the grand jury appearance of particular White House officials. As you surely are aware, the President's invocation of privilege to permit him and future Presidents to discharge their duties under Article II of the Constitution is a fundamental obligation, not a delaying tactic.

HOWREY & SIMON

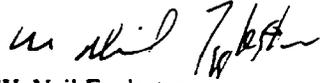
Kenneth W. Starr, Esq.

March 4, 1998

Page 3

In sum, it is our mutual constitutional obligation to seek a reasonable accommodation of our interests. We are prepared to meet for that purpose at your earliest convenience.

Very truly yours,



W. Neil Eggleston

Attorney for the Office of the President

cc: The Honorable Charles F.C. Ruff
Robert J. Bittman, Esq.

Tab 7

**Office of the Independent Counsel**

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, DC 20004
(202) 514-8688
Fax (202) 514-8802

March 6, 1998

HAND DELIVERED

W. Neil Eggleston, Esq.
Howrey & Simon
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2402

Dear Mr. Eggleston:

This responds to your letter to this Office dated March 4, 1998.

As you know, since early February we have been in discussions with the White House regarding the applicability of executive privilege to the matters involving Monica Lewinsky. We have great respect for the Office of the President and the important duties and responsibilities of the President. In this case, we have not sought nor will we seek any information implicating state secrets or diplomatic relations. The matters involving Ms. Lewinsky, moreover, relate only to the President acting in his personal capacity, as a private citizen. If there are any communications relating to Ms. Lewinsky which legitimately jeopardize state secrets or diplomatic relations, please identify them and we will review our request.

As fully outlined in our correspondence to you and the White House, the matters regarding Ms. Lewinsky do not involve the President acting his official capacity. Consequently, executive privilege is inapplicable as a threshold and fundamental matter. Any communication pertaining to Ms. Lewinsky is thus not privileged -- no matter the title or position of the person involved in the communication. We therefore cannot agree with your suggestion to keep such highly probative, relevant information from the grand jury.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Bittman".

Robert J. Bittman
Deputy Independent Counsel

cc: The Honorable Charles F.C. Ruff

GRAND JURY MATTER - FILED UNDER SEAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
IN RE GRAND JURY PROCEEDINGS.)	Misc. Nos. 98-095, 98-096
)	and 98-097
)	

DECLARATION OF BRUCE R. LINDSEY

1. I am competent to testify from personal knowledge as to the matters set forth in this Declaration. I am filing this Declaration in connection with the Motion to Compel recently filed by the Office of Independent Counsel (OIC).

2. I am an attorney admitted to practice law in Arkansas. From June 1976 until November 1978, and from November 1981 until January 1993, I was an associate and later a partner at Wright, Lindsey & Jennings, a Little Rock, Arkansas law firm.

3. I have known President Bill Clinton for approximately 30 years, and over that period I have worked for and with him in a number of capacities. In 1981 and 1982, President Clinton was affiliated with Wright, Lindsey & Jennings in an "of counsel" capacity. Prior to January 1993, Wright, Lindsey & Jennings also acted on several occasions as personal counsel to Governor Clinton, and as counsel to the 1992 Clinton campaign for the Presidency.

4. For example, during then Governor Clinton's 1990 campaign for re-election, Wright, Lindsey & Jennings acted as personal counsel to Governor Clinton in connection with a lawsuit filed by Larry Nichols, an Arkansas political activist. Mr. Nichols' lawsuit, which was eventually dismissed, asserted that Governor Clinton should be required to reimburse the State of Arkansas for travel and entertainment expenses that the Governor allegedly had incurred on behalf

of several women. Some of those same allegations have “resurfaced” in connection with discovery conducted by attorneys for the plaintiff in *Jones v. Clinton*.

5. In addition, during Governor Clinton’s 1992 campaign for the presidency, allegations arose concerning Governor Clinton’s relationships with various women, including Gennifer Flowers. These allegations also have been the subject of inquiry during the discovery process in *Jones v. Clinton*.

6. Since President Clinton’s inauguration in January 1993, I have served as an Assistant to the President, and first as Senior Advisor and later as Deputy Counsel to the President. In both those capacities, I have been one of the President’s principal advisors on the full range of issues and decisions relating to the President’s duties and the effective functioning of the Executive Branch. I have broad responsibility for gathering and providing information and forming advice to give to the President on many matters, and I travel with the President for that purpose. To formulate appropriate advice for the President, I typically gather information and advice from White House staff, other federal employees, and private presidential advisors.

7. The White House Counsel’s Office provides confidential counsel to the President in his official capacity, to the White House as an institution, and to senior advisors about legal matters that affect the White House’s interests, including investigative matters. To this end, the Counsel’s Office, in which I serve as Deputy, receives confidential communications from individuals about matters of institutional concern. White House personnel provide this information to the Counsel’s Office with the expectation and understanding that it will remain confidential.

8. In light of the United States Supreme Court decision that the *Jones v. Clinton* litigation could proceed during the President’s term in office, the President had to develop a method

of communicating with and assisting his private counsel that would minimize distractions from his official duties, which consume his efforts and attention well beyond the limits of a normal working day. Because of my role as the President's longtime confidential advisor and attorney, I often have served as a conduit or intermediary for communications between the President and his private lawyers. Typically, when the President's private lawyers need information in connection with the *Jones* lawsuit, they telephone me with questions for the President. I present questions to the President at opportune times, and later relay the President's answers back to private counsel. I have been able to do this on occasions when the President's official functions and duties are least disrupted by the demands of defending the *Jones* lawsuit. The President knows I serve as an intermediary between him and his lawyers, and he intends that our communications remain private and confidential. In accordance with the President's wishes, I have maintained the confidentiality of these communications.

9. During my two days of grand jury testimony on February 18 and 19, 1998, and more recently on March 12, 1998, I was asked a number of questions about my private communications with the President, with the President's private counsel in *Jones v. Clinton*, with the President's private counsel in the OIC investigation, and with other senior advisors to the President. Those questions concerned both the *Jones v. Clinton* litigation in general and the effect of the recent controversy regarding the President's alleged relationship with Monica Lewinsky on the President's and the White House's performance of their official responsibilities.

10. With respect to communications that I had with the President or his private attorneys concerning *Jones v. Clinton*, I declined to answer on the ground of attorney-client privilege or the common interest doctrine where an answer would disclose confidential communications

between or among the President, his private attorneys and myself, when I was acting as Deputy Counsel, or when I served as a confidential intermediary as described above.

11. I also declined to answer questions concerning the *Jones v. Clinton* litigation, and the allegations regarding Ms. Lewinsky, to the extent that I was asked to reveal discussions that I had with the President, other senior advisors to the President within the White House, or personal advisors to the President about decisions that the President needed to make in connection with his official duties. For example, such discussions focused on issues surrounding the propriety and the wisdom, from an institutional perspective, of the President's seeking a disposition of the *Jones v. Clinton* litigation short of trial; whether the President should refer to the allegations surrounding Ms. Lewinsky during his State of the Union address; and whether the President should invoke executive privilege in connection with these proceedings. Other discussions involved advice to the President as to how best to ensure that the allegations concerning Ms. Lewinsky and their political and media ramifications would not impair the President's handling of his official duties. Such senior staff discussions included, for example, how the President should respond to the demands of the media and members of Congress for further information about the Lewinsky allegations, and how the President and White House should address the prospects for referral of the Lewinsky matter to the House of Representatives for a possible inquiry concerning impeachment.

12. The OIC also has inquired about my discussions with the President's private attorneys and other attorneys in the White House Counsel's Office regarding aspects of the grand jury investigation in this matter. In these discussions, I was acting as Deputy Counsel to the President and representing him in his official capacity, and I shared privileged information with other White House attorneys and the private attorneys representing the President in his personal capacity.

I declined to answer questions about these discussions because to do so would require me to reveal confidential communications that I believe to be protected from disclosure by executive privilege, attorney-client privilege, the attorney work product doctrine, and the common interest doctrine.

13. In addition, during my grand jury testimony, the OIC asked several questions about discussions between the White House Counsel's Office and other grand jury witnesses or their counsel. Those discussions were for the purpose of providing legal and other advice to the witnesses and to the President in connection with the ongoing grand jury investigation and potential Congressional proceedings and, therefore, I believe they were protected from disclosure by executive privilege, attorney-client privilege, the attorney work product doctrine, and the common interest doctrine.

14. In the OIC's Brief in Support of Motion to Compel Bruce R. Lindsey to Testify, at page 1, the OIC reports that I stated during my grand jury testimony that I was "not willing to answer any questions concerning conversations about Monica Lewinsky that occurred among White House staff." I do not recall this precise question being asked of me, nor that I answered such a question with a blanket invocation of privilege. In any event, it was my intent to decline to answer such questions that occurred among White House staff, only to the extent that such conversations involved the gathering of information and the formulation of advice to assist the President in the performance of his official responsibilities. Moreover, as I recall my testimony on February 19, I declined the OIC's invitation to invoke a privilege with respect to every conversation that I had had concerning the *Jones v. Clinton* litigation, whether or not other attorneys were present.

15. During the first two days of my grand jury testimony, the OIC's representatives failed to ask me about a number of questions concerning Ms. Lewinsky as to which I was prepared

to testify. But even during those first two days I answered several questions about my discussions with others that involved Ms. Lewinsky. I also testified that I had no knowledge concerning the origins of a document identified as "talking points" given to Linda Tripp by Monica Lewinsky.

16. After the pending Motion to Compel my testimony was filed, the OIC requested me to appear before the grand jury investigating the Lewinsky allegations for a third time. I appeared for approximately 2.5 hours on March 12, 1998. During that session, I was asked, for the first time, whether I had ever met or spoken with Ms. Lewinsky. I testified that I had not. I also testified in some detail about the following matters:

a. Two telephone conversations, the first of which was initiated by Linda Tripp, in which Ms. Tripp told me about a story that a *Newsweek* reporter was then preparing regarding an alleged encounter between the President and Kathleen Willey;

b. The fact that I took no actions relating to Monica Lewinsky immediately following President Clinton's deposition in the *Jones* litigation;

c. My lack of knowledge about certain communications between Vernon Jordan and Betty Currie regarding Monica Lewinsky;

d. My lack of knowledge concerning drafts of an affidavit prepared by Ms. Lewinsky in the *Jones* litigation;

e. My lack of knowledge concerning efforts by individuals at the White House to page Monica Lewinsky during the period January 18-19, 1998;

f. My brief discussions with Vernon Jordan about Monica Lewinsky, his efforts to help her obtain a position in private industry, the fact that she had been described in an

Internet report authored or distributed by Matthew Drudge, and my delivery of a copy of the so-called Drudge Report to Mr. Jordan on January 19, 1998;

g. My knowledge of certain efforts by a *Newsweek* reporter to contact Betty Currie about packages or envelopes that had been delivered to Ms. Currie by Monica Lewinsky;

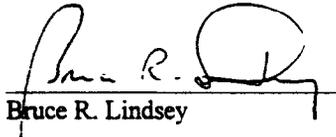
h. My lack of knowledge of any efforts undertaken by Nathan Landow to speak to Kathleen Willey about her role as a witness in the *Jones* litigation; and

i. My lack of knowledge concerning any role performed by Terry Lenzner or Jack Palladino in the *Jones* litigation.

17. The questions that I have declined to answer based on the invocation of privilege all involved my confidential discussions with the President, with other White House attorneys, with senior advisors to the President, and with the President's private attorneys about the *Jones* litigation, the current OIC investigation, or the White House's efforts to respond to the political and media controversy engendered by the *Jones* litigation and the OIC's investigation.

18. I declare under penalty of perjury that the foregoing is true and correct.

See 28 U.S.C. §1748.


Bruce R. Lindsey

Executed on March 17, 1998.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE GRAND JURY PROCEEDINGS,)
_____)

Misc. Nos. 98-95, 98-098 and 98-097

DECLARATION OF SIDNEY BLUMENTHAL

Sidney Blumenthal, under penalty of perjury, hereby declares as follows:

1. I am competent to testify from personal knowledge as to the matters set forth in the Declaration. I am filing this Declaration in connection with the Motion to Compel recently filed by the Office of the Independent Counsel ("OIC").

2. I am an Assistant to the President of the United States of America. My office is in the West Wing of the White House.

3. I assumed this position August 11, 1997. Prior to that time, I was a working journalist and was not employed by the White House. My job duties require me to consult with other White House advisors and with private presidential advisors to gather information and advice so that I can properly advise the President.

4. As a part of my job, I participate in the following policy issues in the White House: global warming, "fast track" trade authority, tobacco issues, health care, general economic issues, Social Security, education, crime, welfare, urban centers, the Race Initiative, environmental issues, and the District of Columbia.

5. As part of my job, I am also responsible for writing major presidential speeches. For example, I was heavily involved in writing the State of the Union Address given by the President January 27, 1998. Under Article II, section 3 of the Constitution, the President has the duty to provide the Congress with "information of the State of the Union." The content

of that address is an important presidential decision on which the President's advisors provide input.

6. I am involved in national security policy as it relates to Latin America, China, Bosnia, Germany, the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), Iraq, Turkey, Israel, Africa, the United Nations, the Landmines Treaty, Ireland, and Northern Ireland.

7. I am the principal White House official on freedom of the press issues internationally.

8. I am also the liaison for the President to the office of the Prime Minister of Great Britain. In that role, I communicate regularly with Prime Minister Tony Blair directly, his Chief of Staff Jonathan Powell, Director of Policy David Miliband, Official Spokesman Alistair Campbell, Minister Without Portfolio Peter Mandelson, and various other aides, ministers, and members of the British Government.

9. I have had substantial involvement in the foreign relations between the United States and Great Britain. I regularly brief the President on matters concerning Great Britain. I participated in the First Lady's visit to Ireland, Northern Ireland, and England in October and November of 1997. I also participated with the First Lady in the Northern Ireland peace process. That process included talks with British Minister Mo Mowlam. I also assisted the United States delegation at policy discussions held with the Prime Minister of Great Britain and various ministers at Chequers November 1, 1997.

10. I participated in the visit by the Prime Minister of Great Britain to the United States in early February 1998. One of the core functions of the President involves foreign policy, including meetings with Heads of State of foreign countries. The internal discussions as well as the manner in which those meetings are portrayed are important to United States foreign policy.

11. I was responsible for official statements made by the President, for joint appearances of the President and the Prime Minister, a joint press conference, an informal lunch,

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a joint radio address on Iraq, an official White House dinner, and a Blair House dinner hosted by the United States and United Kingdom ambassadors of official delegations. I also directed the United States delegation at joint policy discussions that were held during the visit. The coordination of these events, including joint press conferences, is important to the international relations between countries.

12. I am currently involved in arranging the President's trip to the G-8 meeting in Birmingham, England, and his subsequent visits to London, all of which are set to occur in May 1998. In regard to that trip, I am responsible for coordinating policy, drafting statements, planning appearances, and planning and directing the United States delegation in policy discussions with the Prime Minister and various ministers at Chequers. In addition, I am planning the United States delegation in meetings with British ministers and senior aides to the Prime Minister of Great Britain.

13. In carrying out these duties, I am in almost daily contact with the President and other senior administration officials. In the course of carrying out my official duties, I have discussed with the President, the First Lady, and other senior administration officials certain matters and allegations pertaining to the investigation being conducted by the Independent Counsel. The First Lady functions as a senior advisor to the President, and it was in that capacity that I had discussions with her about the Independent Counsel's investigation. The discussions with the President, the First Lady, and with other senior advisors to the President enabled me to advise the President and his advisors concerning the effect of the investigation on his official duties, including how best to frame his public statements, his legislative agenda, and his dealings with foreign countries in light of that investigation. For example, these discussions enabled me to advise the President and his advisors with respect to the content of the State of the Union address and with respect to press relations and other aspects of the visit of Prime Minister Blair.

14. Confidentiality is critical to my ability to provide open, frank, and candid advice at all times, not only to the President, but to other senior advisors as well. Based on my experience in the White House, I believe that the ability of advisors to the President to provide

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him with the type of candid advice the President needs would be hindered if the discussions among staff and with the President were not confidential.

15. On February 26, 1998, I testified before a grand jury sitting in the District of Columbia. I had been instructed by the Office of the Counsel to the President to assert executive privilege in response to certain of the questions the Independent Counsel asked me. An answer to those questions would have revealed the communications that I had with other senior advisors, and the confidential advice and counsel that I gave to the President, with regard to policy issues, including the policy issues discussed in the foregoing paragraphs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 1998.


Sidney Blumenthal