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UNDER SEAL

SCHEDULED FOR ORAL ARGUMENT ON JUNE 29, 1998

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

No. 98-3060, 98-3062, 98-3072

IN RE: SEALED CASE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
MISC. NO. 98-95 (NHJ)**

BRIEF FOR APPELLANT WILLIAM J. CLINTON

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**A. Parties and Amici**

The following parties and intervenors appeared before the district court: William J. Clinton, The Office of the President, Bruce R. Lindsey, Sidney Blumenthal, Nancy Hernreich, and the Office of the Independent Counsel. The following are parties in this Court: William J. Clinton, The Office of the President, and the Office of the Independent Counsel. The United States of America, acting through the Attorney General, appeared in the district court as an amicus curiae and is appearing as an amicus curiae in this Court.

B. Rulings Under Review

On May 4, 1998, the United States District Court for the District of Columbia (Johnson, C.J.) ordered Bruce R. Lindsey, a Deputy White House Counsel, to testify before a grand jury concerning matters protected, *inter alia*, by the President's attorney-client privilege and the work product doctrine. The ruling is at page 152 of the Joint Appendix. The opinion is not yet reported in Federal Supplement but is available, in redacted form, on Westlaw. In re Grand Jury Proceedings, Misc. Nos. 98-095, 98-096, and 98-097, 1998 WL 271539 (D.D.C. May 27, 1998).

On May 26, 1998, after the Office of the President filed a motion for reconsideration in part, the district court issued a sealed memorandum order denying reconsideration but modifying footnote 20 of its May 4 opinion. That second ruling is at page 210 of the Joint Appendix. It has not been published.

The unredacted May 4 opinion, the May 26 memorandum order, and the issues presented in this brief all remain under seal.

C. Related Cases

Counsel are not aware of any related cases.

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BRIEF FOR APPELLANT WILLIAM J. CLINTON

JURISDICTION

Jurisdiction in the district court was proper under 28 U.S.C. § 1331 and 18 U.S.C. § 3231. William J. Clinton filed a notice of appeal from the district court's May 4, 1998 order on May 13, 1998. Jurisdiction in this Court is proper under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred in ruling that President Clinton's conversations with Deputy White House Counsel Bruce Lindsey were not privileged when Mr. Lindsey was being used to facilitate the provision of legal advice to the President by personal counsel.
2. Whether the district court erred in failing to recognize that the attorney-client privilege and work product doctrine encompassed confidential communications among

President Clinton, Mr. Lindsey, and the President's personal counsel related to Mr. Lindsey's previous personal representation of President Clinton.

3. Whether the district court erred in holding that the President in his personal capacity and the Office of the President do not have any common legal, factual or strategic interests that are legally cognizable under the attorney-client privilege's common interest rule.

4. Whether the district court erred in holding that personal counsel's confidential sharing of attorney work product with Mr. Lindsey waived the privilege, based solely on its earlier finding that President Clinton and the White House share no common interest.

STATUTES AND RULES

Federal Rule of Evidence 501, Supreme Court Standard 503, and relevant sections of the Ethics in Government Act, 28 U.S.C. § 591, *et seq.*, are reproduced in the Addendum.

STATEMENT OF THE CASE

This case emerges from the confluence of the long-running "Whitewater" investigation with the Paula Jones civil suit. It presents vital issues involving the ability of the President to be defended in such matters with no less effectiveness than any other citizen. Because such investigations and litigation may well recur in future administrations, it is important that a President's personal attorneys and White House counsel be able to consult freely to assure that both the private and public interests of the President are adequately protected. Thus, this case is, at heart, one about the ability of a President to receive, and his lawyers to provide, effective legal services.

A. The "Whitewater" Investigation

In the Presidential campaign of 1992, the unprofitable joint investment of then-Governor and Mrs. Clinton, along with James and Susan McDougal, in a 1978 Arkansas real estate venture known as the Whitewater Development Company became a matter of some comment and criticism. Four years after the investment, in the early 1980's, the McDougals had acquired a savings and loan company, Madison Guaranty Savings & Loan Association, which was taken over by federal regulators in 1989. In 1992, the Resolution Trust Company (RTC) began an investigation of Madison Guaranty, and in the fall of 1993, newspaper articles were published suggesting that the RTC had asked federal prosecutors in Little Rock to investigate various transactions involving the S&L. Recognizing that they might be witnesses in legal proceedings, in early November, 1993, the President and Mrs. Clinton retained the law firm of Williams & Connolly to represent them with respect to the Madison Guaranty investigation. That same month, the Department of Justice assumed responsibility for this probe.

On January 20, 1994, however, the Attorney General appointed Robert B. Fiske, Jr., as independent counsel with jurisdiction to investigate matters arising out of the President or Mrs. Clinton's relationships with Madison Guaranty, the Whitewater Development Company, and/or Capital Management Services. Department of Justice Final Rule, 59 Fed. Reg. 5321 (Feb. 4, 1994). On August 5, 1994, after enactment of the Independent Counsel Reauthorization Act of 1994, 108 Stat. 735, Kenneth W. Starr was appointed by the Special Division to replace Mr. Fiske and was granted jurisdiction similar to that of Mr. Fiske. During the four and one half years of investigation by Messrs. Fiske and Starr, President and Mrs. Clinton have, with the assistance of personal counsel, testified under oath on numerous occasions, personally produced more than 90,000 pages of documents, answered interrogatories, and provided information informally.

B. The Jones Civil Suit

On May 6, 1994, Paula Jones filed suit in the United States District Court for the Eastern District of Arkansas alleging defamation, emotional distress, and violations of 42 U.S.C. §§ 1983, 1985. The President retained Skadden, Arps, Slate, Meagher & Flom, LLP, to represent him in defense of this action. For the next three years, the parties conducted litigation primarily over the legal issue of whether the suit could go forward against a sitting President. On May 27, 1997, the Supreme Court held that it could, and the case was returned to the district court. Clinton v. Jones, ___ U.S. ___, 117 S.Ct. 1636 (1997). Comprehensive discovery began in the fall of 1997.

The breadth and pace of the litigation is manifest from the sheer size of the district court docket, which reflects 332 entries after jurisdiction was returned to the district court.^{1/} Even that number does not fully reflect the demands of the litigation, however. In the 16 weeks between October 1, 1997 and January 31, 1998, plaintiff Jones conducted 35 depositions, the defendants conducted 27 depositions, and approximately 90 motions were litigated in the district court in Arkansas as well as courts in Virginia, Michigan, California and the District of Columbia. In this short time period, plaintiff propounded 23 interrogatories, 72 requests for admissions, and 77 document requests to the President. Plaintiff also obtained leave to file an Amended Complaint, which the President answered. The district court held weekly hearings via conference call throughout this period to hear argument and resolve disputes.

As in any extremely active and aggressively litigated civil case, it was necessary for the President's counsel regularly to update and consult their client concerning substantive and strategic decisions that had to be made with respect to a variety of matters, such as what

^{1/} Much of the material on the docket remains under seal. The publicly available docket reflects the total number of items docketed.

depositions to take, potential areas of questioning and other preparations for depositions, and what positions to take vis-a-vis discovery and other motions. These discussions were in addition to those obviously necessary to enable the President to respond to discovery directed to him. The hectic activity during this period required frequent communications between the President and his private counsel, because the primary focus of discovery sought by plaintiff was the conduct of the President himself. Indeed, most of plaintiff's discovery related to matters far broader than the few purported contacts between the President and Ms. Jones. In particular, plaintiff was permitted to seek discovery about the defendant's alleged conduct with respect to other women over a twenty-year period while he was Governor and Attorney General of Arkansas, as well as the efforts of President Clinton's 1992 campaign to respond to similar unfounded allegations.

Plaintiff also attempted to pursue discovery into matters relating to the defendant's conduct while President, including matters of significant interest to the White House and the Presidency as an institution. For example, plaintiff sought

- to obtain medical records generated by White House physicians;
- to depose members of the Secret Service charged with protecting the President and the White House;
- to depose certain members of the President's staff; and
- to conduct discovery into the President's alleged conduct with respect to two former White House employees, including Monica Lewinsky.

Plaintiff's document requests to the President also required consultation with the White House as to whether the records sought were official White House records or the personal records of the President. Additionally, plaintiff twice issued subpoenas duces tecum to the White House (one was withdrawn, the other quashed).

The President was himself deposed for several hours on January 17, 1998. More than half the questions asked by plaintiff's counsel related to matters occurring at the White House or after Mr. Clinton became President. The interests of the Presidency in this proceeding were such that all parties acknowledged the right of White House Counsel Charles Ruff to be present.

C. Bruce Lindsey's Role

Throughout the civil litigation, and especially during the intense discovery period in late 1997, the President needed to keep abreast of the demands of the litigation while attending to the exigencies of his official duties, and he therefore on occasion needed to rely on someone on his staff to be his agent and to facilitate communications with his personal counsel. Mr. Lindsey served in this capacity. J.A. 44-45, ¶8. He was ideally suited for this liaison role because he was a White House lawyer, a long-time trusted advisor, and a personal friend of the President who could be relied upon to maintain the confidentiality of any such discussions. Mr. Lindsey traveled on almost every trip the President took and had prompt access to the President wherever he was. He was therefore in a position to communicate with the President concerning the Jones litigation at times least disruptive to the President's official duties. J.A. 44-45, ¶8.

Moreover, prior to joining the White House staff, Mr. Lindsey was in private practice in Little Rock, and he and his law firm had served as Governor Clinton's personal attorneys and as counsel to the Clinton presidential campaign in 1992. J.A. 43-44, ¶¶4-5. When plaintiff's attorneys in the Jones case sought to revisit allegations that had surfaced while Mr. Lindsey was Governor Clinton's personal attorney, President Clinton's private counsel consulted Mr. Lindsey about the prior representation.

Because discovery issues trenched upon matters of legal significance to the White House, the President's private counsel found it necessary to consult from time to time with White

House counsel about such matters. Mr. Lindsey participated in these consultations in his role as Deputy White House Counsel. As an incident of this work as a White House lawyer representing the President in his official capacity, he necessarily conferred with the President's personal counsel who were dealing with the Jones case and the "Whitewater" investigation about matters of common interest to both. J.A. 46-47, ¶12. These conversations were intended to remain confidential and occurred within the context of Mr. Lindsey's representation of the White House. J.A. 45-46, ¶10.

D. The Expansion of the OIC's Jurisdiction in January 1998

Just two days prior to the President's deposition in the Jones case, the Office of the Independent Counsel ("OIC") covertly sought on an expedited basis to expand its jurisdiction to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case Jones v. Clinton." Order, Div. No. 94-1 (Jan. 16, 1998) (Div. for Purpose of Appointing Independent Counsels) (D.C. Cir.). The OIC's request was granted by a sealed order of the Special Division on January 16, 1998, the day before the President's deposition. Ibid. On the evening of January 16, according to news reports, the OIC's main cooperating witness with respect to Ms. Lewinsky, Ms. Linda Tripp, met with counsel for Ms. Jones.^{2/} At the President's deposition the following day, Ms. Jones' counsel asked the President 95 questions regarding Ms. Lewinsky.^{3/}

^{2/} See, e.g., Baker, "Linda Tripp Briefed Jones Team on Tapes," The Washington Post (Feb. 14, 1998).

^{3/} Discovery in the Jones matter closed on January 31, 1998. Promptly thereafter, President Clinton filed a motion for summary judgment, which was granted. Ms. Jones' appeal is pending.

E. Mr. Lindsey's Grand Jury Testimony

Mr. Lindsey testified before the OIC's grand jury on February 18 and 19 and on March 12, 1998. J.A. 45, ¶9. He answered numerous questions relating to the Jones litigation and Ms. Lewinsky. J.A. 47-49, ¶¶15-16. He was also asked, however, "a number of questions about [his] 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." J.A. 45, ¶9. Counsel for appellants are not privy to the precise questions asked of Mr. Lindsey in the grand jury,^{4/} but the OIC made an in camera submission of fourteen categories of information it sought from Mr. Lindsey. Because of Rule 6(e) concerns, the court simply summarized these categories as including but not limited to the following:

"Lindsey's conversations with the President regarding the Jones litigation; his conversations with the President regarding Monica Lewinsky and the grand jury's investigation; his communications with White House advisers, including White House Counsel members, about the Jones litigation and the Monica Lewinsky matter; the identities of grand jury witnesses who have been interviewed by the White House after their appearances and the substance of those interviews; his communications with Steven Goodin, a White House employee called to testify before the grand jury; whether Lindsey heard during the weekend of January 24-25, 1998, that Betty Currie was cooperating with the OIC; communications regarding the President's knowledge of whether Betty Currie called Vernon Jordan to help Monica Lewinsky find a job in New York; and communications with Peter McGrath, a New Hampshire lawyer representing a client with information about the Lewinsky matter."

J.A. 198-199 (footnote omitted).

Mr. Lindsey declined, on attorney-client privilege and attorney work product grounds, to answer questions concerning confidential communications with the President's

^{4/} The district court denied Mr. Lindsey's motion for a copy of the transcript but directed the OIC to make the transcripts available to the court. J.A. 147.

personal attorneys because he was serving as a confidential agent and intermediary for the President in dealing with the President's private counsel J.A. 45-46, ¶10, because some of the questions addressed topics with which he was familiar because of his prior service as the President's personal attorney J.A. 43-45, ¶¶3-5, 8-9, and because as Deputy White House Counsel he was addressing issues of common interest to the White House and the President in his personal capacity J.A. 46-47, ¶¶11-12.

F. The District Court's Opinion

On March 6, the OIC moved to compel answers to the questions Mr. Lindsey had declined to answer, *inter alia*, on the basis of the President's personal attorney-client privilege and the work product protections. Both the President and the Office of the President filed oppositions, and the district court heard argument on March 24, 1998. J.A. 86. Pursuant to a subsequent court order, the OIC made an *in camera* submission on April 24, 1998, concerning its need for the testimony. J.A. 149.

On May 4, 1998, the district court issued a sealed opinion, rejecting the President's privilege claims. The court did not question that personal counsel enjoyed a privileged relationship with the President in both the Jones case and the Lewinsky investigation, and it recognized that case law approves the use in certain circumstances of an agent or intermediary to facilitate the provision of legal advice. But it was "not persuaded that the use of an intermediary was necessary" in the instant case. J.A. 169.^{5/}

With respect to the President's assertion of privilege based upon the common interest between the President personally and his Office, the district court recognized that "[t]he

^{5/} The district court did not address the President's separate contention that part of the legal assistance Mr. Lindsey furnished to private counsel arose out of Mr. Lindsey's experience as personal counsel to then-Governor Clinton.

President and the White House certainly share some concerns in a broad sense,” but held that “in terms of the Paula Jones civil suit and the grand jury investigation, they do not share a ‘common interest’ in the legal sense of the phrase.” J.A. 175. This was so, the court concluded, because “the White House cannot be implicated in any criminal or civil action.” J.A. 176. The court construed the need of private and White House counsel to consult in order to coordinate legal advice to the President personally and officially as evidence of a lack of common interest between the two: “[w]hether President Clinton chose to follow the interests of the White House or his own personal interests in this situation, it remains true that the individual and the office have opposing interests.” J.A. 177.

Finally, the district court ruled that any personal work product protection was waived when material otherwise covered by that doctrine was shared with Mr. Lindsey, since “the White House and President Clinton in his personal capacity do not face the OIC as an ‘opposing party’ and do not share a common interest in the matter.” J.A. 179.

The President in his personal capacity filed a timely notice of appeal. J.A. 206.^{6/}

SUMMARY OF ARGUMENT

The decision below improperly denies President Clinton, in his personal capacity, the protections of the attorney-client privilege and the work product doctrine available to all other litigants. The decision incorrectly interprets or fails to recognize four independent but overlapping reasons why the communications at issue here are privileged. First, the district court erred in holding that President Clinton’s attorney-client privilege was breached by his use of Deputy White House Counsel Lindsey to facilitate the provision of legal advice to him by personal counsel. Second, the district court erred in failing to recognize that Mr. Lindsey’s prior

^{6/} On May 28, 1998, the OIC filed a petition for certiorari before judgment, which the Supreme Court denied on June 4, 1998. 66 U.S.L.W. 3778 (U.S. June 9, 1998).

personal representation of President Clinton made privileged communications among Mr. Lindsey, President Clinton, and President Clinton's current personal counsel relating to the earlier representation. Third, the district court erred in holding that the President and the Office of the President do not have any common legal, factual or strategic interests that are cognizable under the common interest rule. Finally, the district court erred in holding that its decision that President Clinton and the Office of the President could not share a common interest necessarily meant that personal counsel's confidential sharing of work product with Mr. Lindsey waived that privilege.

ARGUMENT

It is uncontested and indisputable that President Clinton, like every other citizen, enjoys the right to personal legal counsel. The district court decision does not purport to question this right, but it nonetheless directly challenges the President's ability to receive appropriate and fully informed legal advice.

If the ruling below stands, the President's personal and official counsel cannot communicate in confidence. As a result, the President cannot obtain from his personal counsel legal advice informed by the possible ramifications of that advice for his official duties. Nor may the President determine for himself how to seek and obtain confidential legal advice without undue intrusion on his constitutional obligations under Article II. The district court has second-guessed, and disallowed, his chosen course.

One key guiding principle emerges from a review of the law governing attorney-client privilege: the need to be flexible in defining the workings of the privilege to achieve the paramount goal of assuring that individuals are able to obtain fully informed and factually well-founded legal advice. The doctrines at issue here – the absolute nature of the privilege, the permissible use of intermediaries, and the protection of communications in the common interest

– reflect the courts’ longstanding effort to find practical solutions to encourage and facilitate the receipt of such advice. The district court decision flies directly in the face of these core principles. It ignores the practical need of the President to obtain meaningful personal legal advice and instead throws insurmountable obstacles in the path of that effort. It does so based on fundamental misinterpretations of governing law and cannot stand.

I. STANDARD OF REVIEW

This appeal addresses conclusions of law by the district court concerning the attorney-client privilege and the work product doctrine. Conclusions of law are subject to de novo review. United States v. Abdul-Saboor, 85 F.3d 664, 667 (D.C. Cir. 1996). Where the district court made factual findings dependent on, and related to, an erroneous legal understanding, review also is de novo. See F.T.C. v. Texaco, 555 F.2d 862, 876 n.29 (D.C. Cir. 1977).

II. COMMUNICATIONS BETWEEN PRESIDENT CLINTON AND HIS LEGAL COUNSEL ENJOY THE ABSOLUTE PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE

It has long been settled that the societal benefits of an absolute attorney-client privilege outweigh any intrusion that the privilege may have on the factfinding process. Recognizing the value of certainty that derives from the guarantee of confidentiality, once courts determine that a communication is made in confidence for the purpose of obtaining or providing legal advice, they do not consider the need for particular information, or the context of the request.

The privilege “is the oldest of the privileges for confidential communications known to the common law.” Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citation omitted). Its purpose is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration

of justice.” Ibid. It “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” Id. at 390.⁷¹

Testimonial privileges like the attorney-client privilege are justified “by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth,” Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quotations omitted). As the Supreme Court has observed, “[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” Upjohn, 449 U.S. at 389. See also Hunt v. Blackburn, 128 U.S. 464, 470 (1888). Thus, although the attorney-client privilege may sometimes have the effect of withholding relevant information from the factfinder, the privilege is justified by larger public benefits – the greater law compliance and fairer judicial proceedings resulting from the “sound legal advice [and] advocacy” the privilege promotes. Upjohn, 449 U.S. at 389.

Moreover, any loss to the factfinder engendered by the privilege is more apparent than real. Because the privilege only protects communications “which might not have been made absent the privilege,” Fisher v. United States, 425 U.S. 391, 403 (1976), the factfinder loses access only to a communication that may never have been made without the assurance of confidentiality. “Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken ‘evidence’ will therefore serve no

⁷¹ The elements required to establish the existence of the attorney-client privilege are: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of obtaining or providing legal assistance for the client. Restatement (Third) of the Law Governing Lawyers §118 (Proposed Final Draft No. 1, 1996) (tentatively approved May 1996) (“Restatement of the Law Governing Lawyers”). Relevant sections of the Restatement of the Law Governing Lawyers are included in the attached Addendum.

greater truth-seeking function than if it had been spoken and privileged.” Jaffee, 518 U.S. at 12; see also Upjohn, 449 U.S. at 395.

Once the privilege has been held applicable, it is absolute and cannot be overcome by a showing of a prosecutor’s or factfinder’s need. As the Supreme Court explained in Upjohn, the very effectiveness of the attorney-client privilege depends upon its absolute nature because “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” 449 U.S. at 393. The Court again emphasized this same point in a related context in Jaffee, explaining that “[m]aking the promise of [a therapist’s] confidentiality contingent . . . would eviscerate the effectiveness of the privilege.”^{8/} 518 U.S. at 17. Accordingly, the attorney-client privilege remains absolute irrespective of the nature of the legal issues or forum involved. It applies with equal force in criminal and civil settings, see, e.g., Fed. R. Civ. Evid. 501 advisory committee notes (“privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases”) (emphasis added), and it is well settled that the privilege remains absolute even in the grand jury setting. Although the Supreme Court’s decision in Branzburg v. Hayes, 408 U.S. 665, 688 (1972), often is cited as support for the right of the grand jury to “every man’s evidence,” in that same sentence the Court went out of its way to except privileged evidence, stating in full that even in a grand jury setting “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).

^{8/} The absolute nature of the attorney-client privilege has been recognized by more than 170 years of Supreme Court opinions. See, e.g., Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826); Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1876).

III. COMMUNICATIONS AMONG MR. LINDSEY, THE PRESIDENT, AND/OR THE PRESIDENT'S PERSONAL COUNSEL ARE PRIVILEGED AND CONFIDENTIAL

The questions asked of Mr. Lindsey in the grand jury, to which he has been ordered to respond, implicate three separate but overlapping roles that he played in relation to personal legal matters of the President. First, he communicated with the President and the President's personal counsel in his role as an agent and intermediary for the purpose of facilitating the President's ability to obtain legal advice in the Jones litigation. Second, he consulted with the President and the President's personal counsel in his role as a former personal counsel to Mr. Clinton on matters related to current legal disputes. And third, as Deputy White House Counsel, he discussed issues of common legal interest with personal counsel in the Jones and Lewinsky matters. As set forth below, the law recognizes and protects the confidentiality of communications made in each of these roles, or in any combination of them. The district court erred by failing to give effect to these protections here.

A. Communications Facilitating the Provision of Personal Legal Advice to President Clinton

In rejecting the President's claim of a temporary immunity from civil litigation during his term in office, the Supreme Court predicted that the Jones v. Clinton suit, if properly managed by the courts below, would be "highly unlikely to occupy any substantial amount of [the President's] time." Jones, 117 S.Ct. at 1648. To this end, however, the Court stressed that courts below should display a keen sensitivity to the burden on the President of having to defend the Jones litigation while discharging the duties of his Office:

Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the Office of the Chief Executive, though not justifying a rule of

category immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.

Jones, 117 S.Ct. at 1650-51 (emphasis added).

Here, far from displaying the requisite sensitivity, the district court stripped the President of the ability to balance the demands of his office and the Jones litigation through the use of an agent to facilitate his receipt of personal legal advice. The district court reached this result by turning the Jones caution on its head: the court limited the means available to the President to defend the litigation by construing the scope of the attorney-client privilege as it applies to agents more restrictively than this Court and courts generally have done in litigation involving parties other than the President. This cramped interpretation of the privilege as it applies to agents constitutes legal error.

1. The Privilege Extends to Agents Who Facilitate the Provision of Legal Advice

After Clinton v. Jones was remanded, the trial court set a brisk discovery and motions schedule. The President concluded that without some assistance, he could not properly attend to his official duties while simultaneously attending to his defense in the Jones litigation. Accordingly, the President asked Bruce Lindsey to serve as his agent to assist him at times in marshalling information for, and securing advice from, private counsel. J.A. 45-46, ¶10. For the many reasons set forth above, Mr. Lindsey was ideal for this responsibility. See pp. 4-7, supra.

In determining to use Mr. Lindsey as a privileged agent, the President acted in conformity with well-established law in this Circuit and elsewhere. Where a client utilizes an intermediary to develop and present information to his counsel, or to assist counsel otherwise in the formulation and presentation of legal advice to the client, the protections of the attorney-client privilege apply to communications involving the client, the agent, and counsel.

The district court recognized that the President had designated Mr. Lindsey as his agent for purposes of securing legal advice in the Jones litigation. However, it asserted that “[t]he D.C. Circuit has never explicitly decided whether a client’s agent, such as Lindsey, can claim the attorney-client privilege.” J.A. 168. That is flatly incorrect. On two separate occasions in recent years, this Court has stated that where an agent is used to facilitate the provision of legal advice to a client, the communications between client and agent are privileged.

In Linde, Thomson, Langworthy, Kohn & Van Dyke, P.C. v. Resolution Trust Corporation, 5 F.3d 1508 (D.C. Cir. 1993), this Court observed that where an insurer facilitates an insured’s receipt of legal advice through its communications with the insured and with counsel, the attorney-client privilege protects those communications, notwithstanding the absence of a general insurer/insured privilege:

Certainly, where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege.

5 F.3d at 1515. The “critical factor” in determining the existence of the privilege is whether communications with the agent are made “in confidence for the purpose of obtaining legal advice from the lawyer” for the client. 5 F.3d at 1514 (quoting ETC v. TRW, 628 F.2d 207, 212 (D.C. Cir. 1980) (emphasis omitted)).

In TRW, this Court likewise declared that the use of an agent in facilitating the provision of advice from attorney to client falls within the protections of the attorney-client privilege. The Court noted that “[a] line of appellate cases beginning with Judge Friendly’s opinion for the court in United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), has recognized that the attorney-client privilege can attach to reports of third parties made at the request of the

attorney or the client where the purpose of the report was to put in usable form information obtained from the client.” 628 F.2d at 212. This Court stressed that it believed such “holdings to be correct and necessary to preserve the effectiveness of counsel in our legal system.” *Id.* Only because it could not be sure that the third party’s communications in the case before it had been made to obtain legal advice for the client did this Court find the privilege inapplicable. *Id.* at 212-13.

Supreme Court Standard 503^{9/} incorporates this principle into its definition of the privilege, see §§(a)(4) and (b)(1) and (4), and the evidence treatises have given full recognition to it as well. See, e.g., 8 Wigmore, Evidence § 2317 at 618 (McNaughton rev. 1961) (“[a] communication . . . by any form of agency employed or set in motion by the client is within the privilege) (“Wigmore”); Jack B. Weinstein et al., Weinstein’s Federal Evidence § 503.15[3] (2d ed. 1997) (privilege applies to communications involving “non-client [who] furthers the interest of effective representation”) (“Weinstein”).

The district court failed to recognize the force of this authority. Here, there is no dispute that Mr. Lindsey’s role was to facilitate the provision of legal advice to the President through the communication of information to the President’s private counsel and the communication in return of counsel’s questions and advice to the President. The district court’s failure to hold accordingly was legal error.

2. The President Is Not Required to Establish Necessity and, in Any Event, the Use of Mr. Lindsey Was Necessary

The district court offered several other reasons for denying the protections of the attorney-client privilege to the President in connection with his use of Mr. Lindsey in

^{9/} While this Standard was not enacted by Congress, this Court has looked to it for guidance. See, e.g., Linde, 5 F.3d at 1514.

communicating with private counsel. The first of these was that the court was “not persuaded that the use of [Mr. Lindsey] was necessary.” J.A. 169. In superimposing a necessity requirement on the use of agents, the district court again committed legal error.

This Court has never held that the privilege applies in agency situations only when “necessary.” To the contrary, this Court quite plainly has avoided adoption of such a requirement. In Linde, for example, it was sufficient to warrant application of the privilege that the client and counsel intended that the communications be confidential, and that they facilitated the client’s receipt of legal advice. Indeed, it was irrelevant to the Linde analysis whether or not the insured could have communicated directly with counsel. Similarly, in TRW, this Court nowhere stated that communications between an agent, counsel and client are privileged only where the use of the agent is a necessity.

The evidence treatises have also rejected necessity as a prerequisite to application of the privilege, focusing instead, as has this Court, on whether the use of an agent facilitates the provision of legal advice. Thus, Weinstein writes that “the question should not be whether the third person is necessary, but whether he or she is helpful to the interests of the lawyer-client relationship.” Weinstein § 503.15[3] (emphasis added). Wigmore states quite plainly that “a communication . . . by any form of agency employed or set in motion by the client is within the privilege.” Wigmore § 2317 (emphasis in original). And McCormick declares that it should not matter whether the use of an agent “was in the particular instance reasonably necessary to the matter in hand.” McCormick on Evidence § 91 at 335 (4th ed. 1992).

An examination of the “necessity” for an agent’s use would embroil the courts in second-guessing the determinations of attorney and client that the utilization of an agent would better help the client secure proper legal advice. This is second-guessing that the courts are

poorly equipped to handle, as amply illustrated by this case. As noted above, see p. 4, supra, when the Jones case was remanded to the district court in 1997, a hectic period of discovery ensued, involving numerous depositions, motions, and pleadings of all kinds, including numerous interrogatories and admissions requests. In the face of this intensive litigation, the President determined that, without the assistance of an agent, he simply could not attend to his defense while fulfilling his official duties. J.A. 44-45, ¶8. That this was the case is hardly surprising. As one of the most respected scholars of the modern Presidency has written, official deadlines “rule [the President’s] personal agenda, . . . drain[ing] his energy and crowd[ing] his time regardless of all else.”^{10/} Indeed, based on numerous authorities, the Supreme Court accepted the premise that the President “occupies a unique office with powers and responsibilities so vast and important that the public interest demands he devote his undivided time and attention to his public duties.” Clinton, 117 S. Ct. at 1646.

The district court’s statement that it was inappropriate for a government lawyer to serve as the President’s agent because this meant the use of “White House staff for personal matters,” J.A. 172, reflects a fundamental misunderstanding of the Supreme Court’s explicitly expressed concerns. Mr. Lindsey’s efforts made it possible for the President to transact his official business more efficiently. The Supreme Court admonished that the lower courts must give “the utmost deference to Presidential responsibilities,” Jones, 117 S.Ct. at 1652; indeed, there are fundamental separation-of-powers limitations on the ability of a court to supervise how the Executive and Legislative branches organize themselves to discharge their constitutional responsibilities, see Wimpisinger v. Watson, 628 F.2d 133, 140 & 141 n.30 (D.C. Cir. 1980) (“[t]he judiciary is not to act as a management overseer of the Executive Branch”); see also

^{10/} Richard E. Neustadt, Presidential Power and the Modern Presidents: The Politics of

United States v. Rostenkowski, 59 F.3d 1291, 1307-11 (D.C. Cir. 1995) (holding that separations-of-powers concerns render questions whether Congressional employees are performing permissible “official work” as opposed to impermissible “personal service” non-justiciable unless Congress has supplied clear rule of decision).

Instead of recognizing the extent of the President’s burdens, the district court cavalierly dismissed the determination of the President that he needed an agent to facilitate communications with his personal counsel. Remarkably, the only evidence the district court cited for its position were two oral argument statements by the President’s counsel, both of which the court misconstrued. In the first, the President’s counsel in the Jones case explained that he would use Mr. Lindsey to obtain information from the President, having Mr. Lindsey speak directly to the President when he was travelling with him, or having Mr. Lindsey call the President otherwise. J.A. 170. The district court questioned why counsel could not call the President directly instead of Mr. Lindsey. It completely ignored counsel’s point that Mr. Lindsey usually travels with the President, and hence is best positioned to raise issues with him at a time that is least intrusive on other matters. It also overlooked the fact that even when Mr. Lindsey is not travelling with the President, he still is in frequent contact with him on a variety of matters and is far better positioned than counsel to raise issues with the President at times least likely to disrupt the President’s official duties.

In the second statement, counsel for the President in the OIC investigation stated that they had not yet found it necessary to use Mr. Lindsey to facilitate their communications with the President in that new matter. The district court declared that this “fact strongly suggests . . . that Lindsey was not ‘reasonably necessary’ as the President’s agent for communication with

respect to the Jones case.” J.A. 170-71. In doing so, the district court completely ignored the second half of counsel’s statement, that it had not been necessary to rely on Mr. Lindsey as an agent in the OIC matter “because we haven’t had the immediacy of the civil litigation.” J.A.

133. The district court simply failed to distinguish between the requirements of the two matters.

Ultimately, the most troubling aspect of the district court’s determination that Mr. Lindsey was not a “necessary” agent is its misreading of the Jones decision. Far from “giving ‘the utmost deference,’” 117 S.Ct. at 1652, to the President’s decision that he should use an agent to secure proper advice in the Jones litigation while fulfilling his constitutional duties – a deference compelled both by that decision and the separation of powers principles it reflects – the court imposed a “necessity” requirement that is not the law of this Circuit, and then applied that test in a manner that ignored the President’s own determination of how best to fulfill his constitutional duties while meeting the pre-trial schedule in the Jones matter.

3. That Mr. Lindsey Served In More Than a Ministerial Capacity Does Not Disqualify Him as a Privileged Agent

The district court also refused to apply the privilege because Mr. Lindsey was not used as a “true intermediar[y], [someone] whose function is simply to ensure that messages from a client to his or her attorney are received and understood.” J.A. 171. This holding also was legal error.

On numerous occasions, courts have held that the privilege can apply in situations where an agent, far from just passing information back and forth between counsel and client, has enhanced the value of those communications. In TRW, for example, the district court had held that the privilege could not apply to a study of the client’s credit reporting system that had been prepared by a third party consultant, on the grounds that only “ministerial agents” who do not engage in the “independent compilation and analysis” of information can be brought within the

ambit of the privilege. 628 F.2d at 212. This Court affirmed the result, but expressly not for the reasons articulated by the district court. *Id.* Rather, the Court stated that the privilege would attach to the agent's report if it had been prepared for the purpose of obtaining legal advice from counsel. *Id.* at 212-13. That the agent had plainly done more than relay information from the client did not affect the analysis.

A host of other courts have held the privilege applicable to agents who have added value to attorney-client communications. *See, e.g., United States v. Judson*, 322 F.2d 460, 462-63 (9th Cir. 1963); *Miller v. Haulmark Transport Systems*, 104 F.R.D. 442, 445 (E.D.Pa. 1984). Perhaps no court has made the point more emphatically than did Judge Friendly in *Kovel*: “[w]e cannot regard the privilege as confined to ‘menial or ministerial’ [agents].” 296 F.2d at 921. He provided several examples of agency situations in which the privilege might apply, including “where [an] attorney, ignorant of [a] foreign language [spoken by his client], sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney’s behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice.” *Id.* (emphasis added).

In holding to the contrary, the district court cited Restatement of the Law Governing Lawyers § 120, cmt (f). But those very examples confirm that a privileged agent can do more than serve as a conduit for information. Thus, the Restatement describes as privileged agents parents who accompany their 16-year-old to a meeting with the child’s lawyer, and the “Accountant [who] accompan[ies] Client to a consultation with Lawyer so that Accountant can explain the nature of Client’s legal matter to Lawyer.” *Id.* In these situations, the agents are clearly doing more than passing messages between counsel and client – they are enhancing the

quality of the communication between the two. These examples also make clear the district court's error in concluding that the privilege does not attach to meetings at which the President, private counsel and Mr. Lindsey were all present. See J.A. 167 n.7. Mr. Lindsey was not limited in his role as agent to the ministerial task of relaying messages, but could properly assist the President by providing additional insight and information during such discussions. See also In Re Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190 (4th Cir. 1991).

B. Communications Related to Mr. Lindsey's Former Representation

Prior to 1993, Mr. Lindsey served as then-Governor Clinton's personal counsel on a number of occasions. He dealt in that capacity with issues that the President's present personal counsel also have had to address. J.A. 43-44, ¶¶3-5; J.A. 171. The district court noted that "Lindsey was consulting with [personal counsel] regarding litigation strategy and describing his past representation of President Clinton," J.A. 171, but it overlooked entirely the point that conferences between present and prior counsel as to such issues fall squarely within the attorney-client privilege.

Three points are indisputable. First, attorney-client confidences remain privileged after the termination of a representation. Supreme Court Standard 503(c) (former attorney can invoke the privilege); Restatement of the Law Governing Lawyers § 45(2) (former lawyer must continue to protect the client's confidences); ABA Model Rule 1.6, cmt. 22 ("[t]he duty of confidentiality continues after the client-lawyer relationship has terminated). Second, consistent with the privilege, prior counsel can –indeed must – communicate confidences to subsequent counsel to facilitate the ongoing representation of the client. Restatement of the Law Governing Lawyers § 45, cmt (b) ("[t]he lawyer must make the client's . . . papers available to the client or the client's new lawyer"); § 58 (2)-(3) (same). Third, information acquired by counsel

subsequent to a representation relating to the subject matter of the representation remains confidential. *Id.* § 111 and cmt. (c) (“Confidential client information consists of information relating to that client, acquired by a lawyer . . . in the course of or as a result of representing the client. . . . Information acquired . . . after the representation is confidential so long as it is not generally known and relates to the representation.”).

The application of these principles here is straightforward. Where Mr. Lindsey has communicated confidences arising out of his representation of then-Governor Clinton to the President’s present counsel, those confidences have not lost their privileged status. By the same token, where present counsel have communicated information to Mr. Lindsey relating to his prior representation of the Governor, “for example, in the form of information on subsequent developments,” *id.*, those communications are also privileged. The district court committed legal error in holding that Mr. Lindsey’s testimony about such matters could be compelled before the grand jury.^{11/}

C. Communications in the “Common Interest”

The court below held that “President Clinton in his personal capacity does not share a legal ‘common interest’ with the White House such that communications between White House attorneys and the President’s personal attorneys fall within the attorney-client privilege.” J.A. 178. More generally, the district court held that a “federal government agency cannot share a ‘common interest’ with a private individual against the United States, here represented by the OIC.” J.A. 175. The court based these holdings on the grounds that (1) “the White House cannot be implicated in any criminal or civil action and thus does not share President Clinton’s

^{11/} Lawyers who enter government service are not exempt from the duty to ensure an orderly transition in the representation of their former clients, and no authority suggests that they breach the privilege or violate their public obligations in doing so.

legal interests, J.A. 176; and (2) that President Clinton and the White House necessarily have opposing interests with respect to issues such as whether to invoke privileges, *id.*, and whether to offer a particular defense in the Jones litigation, J.A. 177. The district court committed legal error both in these statements of the common interest rule and in its refusal to recognize its applicability here.

1. The Common Interest Doctrine Is a Well-Established Component of the Attorney-Client Privilege

The common interest rule is an application of the attorney-client privilege that is uniformly accepted and endorsed, particularly in this Circuit. See In Re Sealed Case, 29 F.3d 715, 719 (D.C. Cir. 1994).^{12/} It enables counsel for clients who share a common interest “to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege.” Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992). The rationale behind this doctrine is the same as the attorney-client privilege itself – that the sharing of information between counsel for clients with a common interest will “encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn, 449 U.S. at 389. As noted by one court, “[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.” United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (citation omitted).^{13/}

^{12/} See also John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 555-56 (8th Cir. 1990); United States v. AT&T, 642 F.2d 1285, 1300-01 (D.C. Cir. 1980) (application of common interest privilege in work product context); Supreme Court Proposed Rule 503(b)(3).

^{13/} See also 2 Stephen A. Saltzberg et al., Federal Rules of Evidence Manual 599 (6th ed. 1994) (“Saltzberg”).

The doctrine covers an array of communications, including among counsel for clients with common interests, between two sets of clients and their lawyers, and between an individual, her personal counsel, and an attorney for a different party with a common interest, as long as the purpose of the communication is to obtain legal advice in the common interest. Indeed, the doctrine encompasses communications between a defendant client and a co-defendant's agents,^{14/} communications between clients jointly represented by a single attorney,^{15/} communications between in-house counsel for a corporation and outside counsel,^{16/} communications between governmental and private entities,^{17/} and communications between two governmental entities^{18/} – again, as long as a common interest is pursued and the communications are for the purpose of providing effective legal advice. Since the privilege belongs to both clients, it may be invoked by either and cannot be waived unilaterally.^{19/}

Two additional observations demonstrate the legal error in the district court's determination that President Clinton "does not share a legal 'common interest' with the White House." First, courts generously construe the kinds of overlapping concerns that constitute a

^{14/} See Schwimmer, 892 F.2d at 244; United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979).

^{15/} See United States v. Moscony, 927 F.2d 742, 753 (3d Cir. 1991).

^{16/} See, e.g., Natta v. Zletz, 418 F.2d 633, 637 (7th Cir. 1969) (collecting cases); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 36 (D. Md. 1974) (collecting cases).

^{17/} See, e.g., United States v. AT&T, 642 F.2d at 1300-01 (common interest rule applied to documents shared between the government and MCI).

^{18/} See Chan v. City of Chicago, 162 F.R.D. 344, 345-46 (N.D. Ill. 1995) (draft affidavits of an FBI agent held to be privileged under a joint defense agreement between the FBI and the City of Chicago, despite fact that the FBI was not party to the suit).

^{19/} See, e.g., John Morrell & Co., 913 F.2d at 556; Interfaith Hous. Delaware, Inc. v. Town of Georgetown, 841 F. Supp. 1393, 1400-02 (D. Del. 1994).

“common interest.” The shared interest may take many forms and may be “legal, factual, or strategic in character.”^{20/} Often, a common interest exists where two or more clients face the same adversary or are involved in the same investigation, including both grand jury and administrative investigations,^{21/} but that need not be the case, as long as there is a legal, factual, or strategic overlap. Nor must the client be actively involved in litigation or even facing immediate exposure; witnesses in the same investigation share a common interest, as do clients who engage in a joint effort to avoid litigation, even if the litigation is not imminent or probable.^{22/}

The district court’s second error was its failure to recognize that even clients with interests that are not generally congruent may still have sufficient common interest to permit confidential information sharing.^{23/} The courts and other authorities repeatedly have made this

^{20/} Restatement of the Law Governing Lawyers § 126, cmt e; see also Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (plaintiffs in separate litigation found to have sufficient mutuality of factual and/or legal interest to invoke common interest privilege).

^{21/} See Continental Oil Co. v. United States, 330 F.2d 347, 349-50 (9th Cir. 1964) (common interest privilege applied to corporations which exchanged witness interviews of their respective employees who had testified before a grand jury); Matter of Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 389-92 (S.D.N.Y. 1974)(common interest privilege applied to clients facing SEC investigation).

^{22/} See, e.g., SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn.) (“The privilege need not be limited to legal consultations . . . in litigation situations Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it.”), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976); United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987) (common interest found among those present in “sorting out the respective affairs of the Church and Mr. Hubbard” even though some of the persons present had not been sued and did not face any immediate liability), aff’d in part on other grounds and vacated in part on other grounds, 491 U.S. 554 (1989).

^{23/} The district court misapplied two factually distinct cases to support its view that there could be no legally cognizable common interest between President Clinton and the Office of the President. The court in United States v. MIT, 129 F.3d 681 (1st Cir. 1997), enforced an IRS summons for documents that MIT previously had shared with the

point. “The fact that clients with common interests also have interests that conflict, perhaps sharply, does not mean that communications on matters of common interest are non-privileged.” Restatement of the Law Governing Lawyers §126, Reporter’s Notes cmt. e.^{24/} Indeed, “[m]ost courts broadly construe the phrase ‘common interest,’ and deny the privilege only if the interests of the parties are completely antagonistic.” Weinstein § 503(b)[06] (emphasis added). “That a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense.” In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 392 (S.D.N.Y. 1974). The privilege remains intact as long as there is a shared legal, factual or strategic interest at the time of the communication.^{25/}

2. **Communications Between Personal and White House Counsel Are Privileged Under the Common Interest Rule**

In ruling that the President and the Presidency do not share a common interest, as a matter of law, the district court overlooked the significant congruence of interests between the

Defense Contract Audit Agency, despite MIT’s argument that they were protected under the common interest doctrine, because the only “common interest” the court could find was the highly “abstract” interest in “the proper performance of MIT’s defense contracts and the proper auditing and payment of MIT’s bills.” 129 F.3d at 686. This comes nowhere near the multitude of interests shared by President Clinton and the White House in connection with the swirl of civil litigations and congressional and grand jury investigations with which they both are so entwined. The decision in United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996) is totally inapposite; since Aramony had been accused of defrauding the party with which he asserted a common interest, their relationship was plainly adversarial.

^{24/} See also Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir. 1985) (“Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests.”) (collecting cases); McPartlin, 595 F.2d at 1336-37 (common interest privilege does not require complete compatibility of interests).

^{25/} See, e.g., Proposed Supreme Court Rule 503(b), advisory committee notes (common interest rule applies “where different lawyers represent clients who have some interests in common”) (emphasis added).

President personally and his Administration in all matters, including the Paula Jones suit and the Lewinsky investigation.^{26/} It reached this erroneous result with dramatically unrealistic references to the “White House” as a party,^{27/} appearing to posit some abstract entity that exists wholly apart from its current occupant. As a party in this case, the “White House” is not simply a building or even an institution; it is a group of people assembled by a particular elected President at a distinct time in history. The Clinton Administration is, obviously, not fungible with some previous Presidency but is comprised of specially selected people pursuing specific goals, and the current President’s mandate to do this stems from election by the populace.

These observations may seem elementary, but they were entirely ignored by the district court. In a very real and significant way, the objectives of William J. Clinton, the person, and his Administration (the Clinton White House) are one and the same. The latter would not exist without the former and without the former’s electoral success. Innumerable decisions that he makes affect him both officially and personally.

Indeed, the “commonality” at issue here is more significant than in the usual “common interest” cases discussed above involving two separate clients. In this proceeding, of course, President Clinton and William J. Clinton, the person, are one and the same. This one individual has separate roles, and separate sets of counsel to advise him in each role, and in this respect resembles a corporate officer who may in a grand jury investigation be advised by

^{26/} The common interest analysis of the Eighth Circuit in In re Grand Jury Subpoena, 112 F.3d 910 (8th Cir. 1997), on which the district court relied, is not applicable here given the unique constitutional status of the President.

^{27/} While the district court stated that “the OIC is not investigating the White House, . . . [and] [t]he White House is not involved in any adversarial proceeding,” J.A. 202, the OIC has in fact issued many subpoenas to the White House, both for documents and testimony, and has examined before the grand jury many Administration officials, sometimes several times.

corporate counsel with respect to business matters and by private counsel with respect to personal matters. In such circumstances, a common interest privilege is recognized to allow corporate and personal counsel to consult candidly and comprehensively, thereby assuring that factually well founded legal advice is given.^{28/} But the case is even stronger here because, with respect to both personal and official interests, the President is the ultimate decisionmaker. (In this respect he is more akin to one client with two sets of counsel.)^{29/} No matter how disparate these interests may be, he ultimately must fuse them into one decision for which he is responsible.

The district court's comment that "[a] federal government agency cannot share a 'common interest' with a private individual against the United States, here represented by the OIC," J.A. 175, is therefore both mistaken and a considerable oversimplification. First, of course, a government entity and a private one may share a common interest for purposes of preserving the attorney-client privilege for conferences between their respective counsel. See, e.g., AT&T, 642 F.2d 1285. Second, however, the comment misstates the issue. The OIC

^{28/} See, e.g., Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (communications between counsel for corporation and corporate officer's personal counsel covered by common interest rule).

^{29/} Professor Geoffrey Hazard has observed in a letter to White House Counsel John M. Quinn, that:

"One way to analyze the situation is simply to say that the 'President' has two sets of lawyers, engaged in conferring with each other. On that basis there is no question that the privilege is effective. Many legal consultations for a client involve the presence of more than one lawyer.

Another way to analyze the situation is to consider that the 'President' has two legal capacities, that is, the capacity *ex officio* – in his office as President – and the capacity as an individual. The concept that a single individual can have two distinct legal capacities or identities has existed in law for centuries. . . ."

represents only the prosecutorial interests of the "United States" in this case, pursuant to 28 U.S.C. § 594(a). The Ethics in Government Act specifically authorizes the Department of Justice to represent the broader interests of the United States with respect to "issues of law" by filing a brief *amicus curiae* in any proceeding in which the OIC is involved. 28 U.S.C. § 597(b). Finally, the interests of the "United States" may be sufficiently divergent within the Executive Branch as to make justiciable a dispute between a President and a special prosecutor. See *United States v. Nixon*, 418 U.S. 683, 697 (1974). In this case, the Department of Justice, the Clinton White House, and the OIC each in a significant sense constitutes a facet of the "United States," and they have surely found themselves on opposing sides in these matters, in which they have advocated significantly different views on various legal questions.

The district court also supported its holding that there was no common interest "in the legal sense of the phrase," J.A. 175, between the President personally and officially with the observation that "[i]n the situation at hand, the White House cannot be implicated in any criminal or civil action and thus does not share President Clinton's legal interests," J.A. 176. But that is demonstrably false. The White House is, from time to time, sued civilly.^{30/} Moreover, the impeachment and removal of a President obviously has a catastrophic effect on that President's "White House," subjecting the individuals working there to termination and the Administration's policy initiatives to extinction. And, in this very case the President is facing investigation by a prosecutor challenging him simultaneously in his personal and official capacities. Under the governing statute, the independent counsel is mandated to investigate conduct both in the traditional role of a prosecutor and, also, as an agent of the House of Representatives to report

^{30/} See, e.g., complaint in *Alexander v. The Executive Office of the President, et al.*, Civ. No. 96-2123 (D.D.C.), alleging that the Executive Office of the President acquired FBI

“any substantial and credible information . . . that may constitute grounds for an impeachment.” 28 U.S.C. § 595(c). The OIC’s investigation, therefore, necessarily “implicates” both the President personally and the Clinton Presidency as well, contrary to the district court’s assertion.

The court below also appeared to suggest that the common interest cases require a similarity of legal jeopardy, but that also is not the case. When this Court recognized in AT&T that the Justice Department and MCI shared a common interest in a civil antitrust case for purposes of pooling attorney work product, it did not do so because the two entities faced similar perils. It rather recognized that the work product umbrella could cover both the government agency and the private telecommunications corporation because in conducting the civil litigation, they had a common objective in successfully prosecuting their respective actions against AT&T. As the Court observed there, “[t]he Government has the same entitlement as any other party to assistance from those sharing common interests, whatever their motives.” AT&T, 642 F.2d at 1300. Since there can be no question that both the OIC, by virtue of its statutory duties, and the House of Representatives, by virtue of its constitutional duties and its public statements,^{31/} are adverse to this President in many respects requiring common legal and strategic responses, there should be no doubt as to its applicability here.

The district court also gave an erroneous significance to the fact that there may at times be tension between the interests of the President personally and those of his Administration, ruling that the doctrine did not apply “precisely because the President as an individual has interests that conflict with the interests of the Office of the President.” J.A. 176. But as indicated above, for the common interest protection to apply, there need not be a perfect

file summaries in violation of the Privacy Act.

^{31/} See, e.g., “House Funds Path to Impeachment,” Washington Times (March 26, 1998).

identity of interest but only a commonality of some interests. The ruling also ignores the very rationale for the doctrine. It is because President Clinton personally starts out with significant common interests with his own Administration that there is a need, and a justification, for the two sets of counsel to confer. The frank discussions and ironing out of differences in a way that will best maximize, within the bounds of the law, both the personal and official objectives of the President is exactly what the common interest is designed to protect. Indeed, it is plain from this Court's decision in the AT&T case that the Department of Justice and MCI had many different goals and strategies, but protection of the confidential discussions of their attorneys about legal issues in the law suits enabled both entities to conduct their cases with as much harmony and synergy as possible toward the achievement of the goals they shared. The case is even stronger here, precisely because the President must himself confront and resolve any competing interests of the kind on which the district court focused.

Finally, the court totally dismissed the compelling practical need of personal counsel to confer confidentially with White House counsel on myriad topics to assure that sound and factually based legal advice is given to the President personally and in his role as Chief Executive. The very matters that personal counsel must attend to with respect to the Jones civil suit and the Whitewater grand jury investigation are also possible grist for the OIC and impeachment inquiries, which obviously affect William J. Clinton in both his official and personal capacities. Neither set of counsel can provide fully informed legal advice unless they are able to confer candidly on a host of legal, factual and strategic matters, such as considering the appropriateness of asserting various defenses, objections, and privileges, analyzing tactical decisions that may have significant long-term ramifications, dealing with leaks from the OIC, assigning responsibility for document searches and production to assure a comprehensive

subpoena response is made, understanding how requests for official information – such as White House medical records – should be addressed, dealing responsibly and accurately with public and press inquiries, monitoring factual developments, assuring that different counsel do not take inconsistent or uninformed legal positions, assuring that the client fulfills his constitutional duties while aware of their impact on his personal interests, and the list goes on. Absent the ability to confer, private counsel cannot assure they are fully apprised of the official implications of decisions to be made and advice to be given, and their own advice is necessarily of limited use. The same is true of official counsel, who must be able to advise the President qua President cognizant of any personal detriment to which their advice might expose him.

It is undeniable that both the President personally and his White House have faced numerous and complicated legal demands as a result of the Jones suit and the OIC's investigation. It is only by "encourag[ing] full and frank communication between attorneys" for the President personally and for the White House that the "broader public interests in the observance of law and administration of justice" can effectively be promoted. Upjohn, 449 U.S. at 389.^{32/}

^{32/} As the Brief for the White House demonstrates, the attorney-client privilege applies to confidential communications between government attorneys and their government clients in the same absolute manner in which it applies to communications between private counsel and their clients. If this Court were to conclude, however, that as a general matter the privilege that applies to government attorneys may be qualified rather than absolute, this should not dilute the absolute nature of the privileged common interest communications with personal counsel, whose privilege indisputably is and must remain absolute to effectuate its underlying purpose.

The absolute personal privilege must trump a hypothetical qualified privilege in the common interest context in order to be consistent with the common interest rule's unanimity requirement for waiver. An integral component of the common interest rule is that the privilege cannot be waived without the consent of all parties to the confidential communication. See p. 27 and n.19, supra. The unanimity requirement is necessary to guarantee the confidentiality that makes the attorney-client privilege work. See, e.g., Interfaith Housing Delaware, Inc. v. The Town of Georgetown, 841 F. Supp. 1393, 1400-

IV. COMMUNICATIONS WITH PERSONAL COUNSEL ARE PROTECTED BY THE WORK-PRODUCT DOCTRINE

The district court held that the work product protection was waived when information was shared with Mr. Lindsey, based on its earlier finding that President Clinton and the White House share no common interest. J.A. 179. This holding is in error both because President Clinton and the White House do share “common interests,” as set out previously in Part III(c)(2), and because, in any event, the attorney-client common interest inquiry and the attorney work product waiver inquiry are not the same.

“The work product doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-client privilege.” In re Grand Jury, 106 F.R.D. 255, 257 (D.N.H. 1985). It covers “not only confidential communications between the attorney and client. It also attaches to other materials prepared by attorneys (and their agents) in anticipation of litigation.” In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). See generally Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). However, litigation need only be contemplated at the time the work is performed for the doctrine to apply, see Holland v. Island Creek Corp., 885 F. Supp. 4, 7 (D.D.C. 1995), and the term “litigation” is defined broadly to encompass any adversary proceedings, including legislative, administrative and other federal investigations, and grand jury proceedings, as well as civil litigation.^{33/}

01 (D. Del. 1994). To treat the government attorney-client privilege as qualified in the common interest context would undermine the guarantee of confidentiality just as would allowing one party’s waiver to govern the privilege for all others.

^{33/} See, e.g., In re Grand Jury Proceedings (Doe), 867 F.2d 539 (9th Cir. 1989) (grand jury investigation); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) (SEC and IRS investigations); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 846 (8th Cir. 1973) (“policies supporting protection of an attorney’s work product . . . are even more strongly applicable in criminal proceedings”); In re Grand Jury Subpoena Duces Tecum, 685 F. Supp. 49 (S.D.N.Y. 1988) (grand jury investigation); see also Restatement of the Law

The doctrine applies with even greater force in criminal litigation, where “its role in assuring the proper functioning of the criminal justice system is even more vital,” since “[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.” United States v. Nobles, 422 U.S. 225, 238 (1975).^{34/} The doctrine also applies with equal force to work product that is shared among attorneys having a common interest, including government and private attorneys.^{35/}

This Court addressed work product waiver in the AT&T case. The question was whether MCI had waived its attorney work product rights to documents that had been prepared by MCI during the course of its prosecution of a civil antitrust suit against AT&T and then shared with the government in a different case brought by the government against AT&T. AT&T then sought those documents from the government. The Court reviewed the case law and noted that the more modern cases tended to hold that “despite voluntary disclosure of the documents to persons not on the same side of the litigation, the privilege remained intact.” 642 F.2d at 1298. The Court explained that “the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent.” Id. at 1299. Thus, while “[t]he existence of common interests between transferor and transferee is relevant to

Governing Lawyers § 136 & cmt h (anticipation of litigation includes “a proceeding such as a grand jury . . . or an investigative legislative hearing”).

^{34/} The Supreme Court in Nobles recognized that the work product doctrine applies to the “files of the prosecution” even though the government plainly does not risk sanction or imprisonment in a criminal case. 422 U.S. at 238 & n.12.

^{35/} See, e.g., AT&T, 642 F.2d at 1300; Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1466-67 (11th Cir. 1984) ; In re Sunrise Sec. Litig., 130 F.R.D. 560, 583 (E.D. Pa. 1989).

deciding whether the disclosure is consistent with the nature of the work product privilege," the ultimate inquiry is whether the disclosure is "inconsistent with maintaining secrecy against opponents." *Ibid.* (emphasis added).^{36/}

The district court erred in concluding on the common interest issue alone that President Clinton's personal counsel's work product privilege was waived. As AT&T makes clear, the absence of a common interest is not sufficient to conclude that there has been a waiver. Indeed, "[a]s articulated by most courts, [a work product] waiver will be found only if the party has voluntarily disclosed the work-product in such a manner that it is likely to be revealed to his adversary. Thus, disclosure simply to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of the protection of the rule." Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 479 (S.D.N.Y. 1993).

If the district court had examined the circumstances surrounding the disclosure of work product to Mr. Lindsey, beyond its common interest analysis, it would have found that the disclosures had been made consistently with "maintaining secrecy against [the adversary]." AT&T, 642 F.2d at 1299. The record is clear and undisputed that disclosures made to Mr. Lindsey were made in confidence and that Mr. Lindsey "maintained the confidentiality of these

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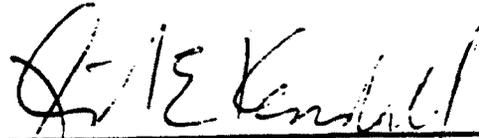
See also In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) ("because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party"); United States v. Gulf Oil Corp., 760 F.2d 292, 295 (Temp. Emergency Ct. of Ap. 1985) ("A transfer made to a party with 'strong common interests in sharing the fruit of trial preparation efforts,' or such a transfer made concurrently with a guarantee of confidentiality, does not necessarily constitute a waiver of the work product privilege") (quoting AT&T; Latin Investment Corp. v. Drabkin, 160 B.R. 262, 264 (D.C. Bank. Ct. 1993)).

communications." J.A. 44-45, ¶8. The district court's failure to examine and be guided by this record was legal error.

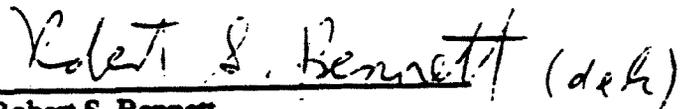
CONCLUSION

The district court's order should be reversed.

Respectfully submitted,



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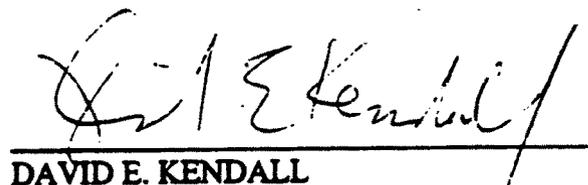
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CERTIFICATION OF WORD COUNT PURSUANT TO CIRCUIT RULE 28(d)(1)

According to the law firm's word processing system, the preceding brief does not contain more than 12,500 words, including footnotes and citations.



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