WHITE HOUSE LITIGATION - S. CT. FILINGS

SUPREME COURT OF THE UNITED STATES

Office of the President
Petitioner

vs.

Office of Independent Counsel, et al.
Respondent

No. 96-1783

To Kenneth Starr & John D. Bates Counsel for Respondent:

YOU ARE HEREBY NOTIFIED pursuant to Rule 12.3 that a petition for a writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on May 12, 1997, and placed on the docket _____. Pursuant to ~~Rule 15.3~~ Agreement, the due date for a brief in opposition is May 29, 1997. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday, or federal legal holiday.

An appearance form is enclosed and should be sent to the Clerk only in the event you **do not** intend to file a response to the petition for a writ of certiorari. No appearance form is enclosed if the Solicitor General of the United States represents the respondent.

Your attention is directed to Rule 9 of the Rules of the Supreme Court reproduced on back of the appearance form. Only counsel of record will receive notification of the Court's action in this case.

Andrew L. Frey
Counsel for Petitioner

2000 Pennsylvania Avenue, N.W.
Number and Street

Washington, D.C. 20036
City, State, and Zip Code

(202) 778-0602
Telephone Number

NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.

APPEARANCE FORM / WAIVER

SUPREME COURT OF THE UNITED STATES

No. _____

_____ v. _____

(Petitioner) (Respondent)

I do not intend to file a response to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☐ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed from when you were admitted):

Signature _____

Date: _____

(Type or print) Name _____

☐ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm _____

Address _____

City & State _____ Zip _____

Phone ( ) _____

A copy of this form must be sent to petitioner's counsel or to petitioner if *pro se*. Please indicate below the name(s) of the recipient(s) of a copy of this form:

CC:

CLER-0080-9-95

Supreme Court Rule 9

APPEARANCE OF COUNSEL

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. **The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed.** If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified.

2. **An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented.** A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

Office of the Independent Counsel

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

May 8, 1997

William K. Suter, Esq.
Clerk
Supreme Court of the United States
One First St., N.E.
Washington, D.C. 20543

Dear Mr. Suter:

We write to state our views regarding the caption of the anticipated case involving this Office and the White House.

Pursuant to the Ethics in Government Act, the Independent Counsel was appointed at the request of Attorney General Reno by the United States Court of Appeals for the District of Columbia Circuit. Under 28 U.S.C. § 594(a), the Independent Counsel is authorized to "exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." This includes the authority to "conduct[] proceedings before grand juries and other investigations"; to "participat[e] in court proceedings"; "to contest the assertion of any testimonial privilege"; and to "initiat[e] and conduct[] prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States." 28 U.S.C. § 594(a) (emphasis added).

In Supreme Court cases arising out of federal grand jury proceedings, the caption refers to the federal government prosecutors as the "United States." See, e.g., Hill v. United States, 117 S. Ct. 432 (1996); The Corporation v. United States, 117 S. Ct. 333 (1996); Doe v. United States, 510 U.S. 1091 (1994); Scarce v. United States, 510 U.S. 1041 (1994); Lewis v. United States, 510 U.S. 918 (1993); Union Bank of Switzerland v. United States, 502 U.S. 1092 (1992); DeGeurin v. United States, 499 U.S. 959 (1991); United States v. R. Enterprises, Inc., 498 U.S. 292 (1991); Backiel v. United States, 498 U.S. 980 (1990); Model Magazine Distributors, Inc. v. United States, 496 U.S. 925 (1990). In addition, the caption of Supreme Court cases in which the United States has been represented by an independent counsel appointed under the Ethics in Government Act (or a special prosecutor appointed by the Attorney General) refers to the "United States." See Tucker v. United States, 117 S. Ct. 76 (1996); Marks v. United States, 117 S. Ct. 76 (1996); Haley v. United States, 117 S. Ct.

76 (1996); Fitzhugh v. United States, 117 S. Ct. 256 (1996); United States v. Poindexter, 506 U.S. 1021 (1992); North v. United States, 500 U.S. 941 (1991); United States v. Nofziger, 493 U.S. 1003 (1989); Poindexter, North, and Hakim v. United States, 490 U.S. 1004 (1989); Deaver v. United States, 484 U.S. 829 (1987); Deaver v. United States, 483 U.S. 1301 (1987) (stay application); Mitchell and Haldeman v. United States, 431 U.S. 933 (1977); Ehrlichman v. United States, 431 U.S. 933 (1977); Barker v. United States, 421 U.S. 1013 (1975); United States v. Nixon, 418 U.S. 683 (1974).[1]

The reference in the caption to the party represented by this Office as the "United States" is proper despite the fact that a federal government agency or official is the opposing party. In United States v. Nixon, 418 U.S. 683 (1974), for example, the caption referred to the "United States" notwithstanding the fact that another entity within the Federal Government was the subpoena recipient and opposing party.

In short, both the law of Section 594(a) and the consistent practice of the Supreme Court require that the caption in this case refer to the "United States" as the party represented by this Office.[2]

The other question, of course, is how the White House should be referenced. There seem to be three possibilities: "Executive Office of the President"; "White House Office"; or "William Jefferson Clinton, President of the United States." We offer a few observations. First, the grand jury subpoena was directed to "The White House." Second, the White House Office is an official entity within the Executive Office of the President.[3] (There is no official

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[1] The exception of which we are aware, Morrison v. Olson, 487 U.S. 654 (1988), was extraordinary on several levels. First, the statute under which Ms. Morrison was appointed as independent counsel had been declared unconstitutional by the Court of Appeals. Ms. Morrison's status as a federal officer thus was somewhat uncertain, and it might have been thought inappropriate to refer to her Office as the "United States." In any event, the Department of Justice, instead of the Independent Counsel, represented the "United States" in both the Court of Appeals and the Supreme Court. Those extraordinary facts are not present in this case; moreover, the caption in that case has not been the guide for the caption in subsequent cases involving independent counsels.

[2] We therefore intend to file our brief in opposition using the traditional gray cover, consistent with the practice of the United States (including when an independent counsel represents the United States) in criminal matters. See S.Ct.R. 33.1(e).

[3] There are 14 executive departments and numerous agencies. The Executive Office of the President (EOP) is an agency established in 1939 by Executive Order 8248, September 8,

entity entitled the "Office of the President," at least so far as we are aware.) Third, the caption in the District Court was "In re: Grand Jury Subpoena Duces Tecum to the White House."

We appreciate very much your assistance in this matter.

Sincerely,

Kenneth W. Starr
Independent Counsel

Copy: Kenneth S. Geller, Esq.

1939, pursuant to the Reorganization Act of 1939, and comprised over the ensuing years of numerous units, including the White House Office and the Office of Administration, among others. See generally The United States Government Manual 1996-97 90 (various agencies transferred to EOP in 1939); 3 C.F.R. § 100.735-2(a) ("Agency means the followings agencies in the Executive Office of the President: The White House Office . . . .").

MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

WRITER'S DIRECT DIAL:
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202-463-2000
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May 14, 1997

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Office of the President* v. *Office of Independent Counsel*, No. 96-1783

Dear Mr. Suter:

We are writing in response to Independent Counsel Starr's letter of May 8, 1997, concerning the caption of this case. Mr. Starr objects to our denominating the respondent as "Office of Independent Counsel" rather than "United States."

We preface our response by observing that *each* of the parties to this somewhat unusual proceeding is unquestionably presenting its best understanding of the institutional interests of *the United States*. The Office of the President, like the Independent Counsel, is a governmental entity that appears in these proceedings solely to espouse official, not private or personal, interests. But, as we discuss below, each of these federal governmental entities has a somewhat limited perspective; and the Department of Justice too may appear to offer its view of the matter, and has a better claim to speak for the United States in these singular circumstances than either of the parties.

We believe that the current caption is correct for several reasons:

1. First and foremost, the closest relevant precedent is *Morrison* v. *Olson*, 487 U.S. 654 (1988). That case, like this one, involved a pre-indictment dispute between an independent counsel and a subpoena recipient. The independent counsel was called, not "United States," but "Alexia Morrison, Independent Counsel," in the caption – a decision we understand to have been deliberate. After consulting with your Office, we concluded that it was appropriate simply to follow that precedent in the present case.

Indeed, *Morrison* suggests that the respondent in this case could have been identified

as "*Kenneth W. Starr, Independent Counsel*". However, when your Office notified us that Mr. Starr had expressed concern about such a format, we readily agreed, as an accommodation to Mr. Starr and in an effort to avoid needless squabbling about nomenclature, to adopt the modification reflected in the present caption. We understood our discussion with your Office to have resolved the matter and are frankly mystified that Mr. Starr continues to insist on such a complete break from the most relevant precedent of this Court.

2. We were fortified in our view that we had selected the most appropriate caption because we adopted precisely the same nomenclature as used by the court of appeals – without any objection from Mr. Starr. In its opinion, the Eighth Circuit consistently referred to the appellant as "Office of Independent Counsel" or "OIC," not "the United States." It is the usual practice to style a case in the Supreme Court by employing the same party names used by the court below.[1]

3. We also believe that the caption we selected not only is technically correct but best reflects the institutional interests at stake in this litigation. *Both* parties, as noted above, speak on behalf of the United States, as each perceives its interests to demand. Moreover, the Department of Justice – which we expect to file as *amicus curiae* in this case – speaks for the United States as well, and in our view has the superior claim to be denominated "the United States" in this setting. In fact, when Attorney General Reno authorized the White House to retain counsel in this proceeding (see Letter of August 26, 1996, from Attorney General Janet Reno to Counsel to the President John M. Quinn, a copy of which is attached hereto), and again when she authorized the undersigned to file the certiorari petition in this matter (see Letter of May 9, 1997, from Attorney General Reno to Messrs. Frey, Geller and Robbins, a copy of which is also attached hereto), the Department of Justice expressly "retain[ed] the responsibility for representing the broad institutional interests of the United States in regard to this matter, and therefore retain[ed] the prerogative of appearing in court on behalf of *the United States*" (emphasis added).

Indeed, Independent Counsel Starr himself makes that point in attempting to distinguish *Morrison* v. *Olson*. As he observes (at 2 n.1), the Department of Justice spoke for the "United States" in *Morrison* – a fact that, in his view, explains why it was appropriate

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[1] We might add, in this connection, that we were fully prepared to adopt the identical caption that had appeared in the two lower courts – *i.e.*, *In re Grand Jury Subpoena Duces Tecum (Office of the President, Petitioner)*. We were advised by your Office, however, that the Court would prefer a caption that also identifies the respondent.

to denominate the prosecutor in *Morrison* by name. So, too, here: as Mr. Starr well knows, it is quite possible that the Department of Justice will elect to file an *amicus* brief in this case, just as it did in *Morrison*. See 28 U.S.C. § 597(b). Both Mr. Starr and the Office of the President have met with the Office of the Solicitor General regarding that possibility. If the Department of Justice chooses to present its views to the Court, it will speak (while not necessarily conclusively) for the institutional interests of the United States on the questions presented.

4. Independent Counsel Starr cannot seriously contest any of the foregoing. Instead, he principally relies on 28 U.S.C. § 594(a)(9), which authorizes an independent counsel, in pertinent part, to "initiat[e] and conduct[] prosecutions in any court of competent jurisdiction, fram[e] and sign[] indictments, fil[e] informations, and handl[e] all aspects of any case, in the name of the United States." But until the Independent Counsel "initiates the prosecution," or "frames and signs an indictment," or "files an information," there simply is no "case" in which to proceed "in the name of the United States." Mr. Starr's citation (at 1-2) to cases involving *post*-indictment proceedings is therefore beside the point.[2]

In sum, we submit that the caption we have used should be accepted, because it is supported by the most directly relevant precedent, is consistent with the way the parties were designated in the lower courts, best reflects the institutional interests at stake in this intra-governmental dispute, and was discussed with your Office in advance. The Independent Counsel's insistence that he alone be referred to as the "United States" takes account of none of these factors.

Sincerely,

Andrew L. Frey

Andrew L. Frey

Enclosures

cc: Kenneth W. Starr, Esq.
David E. Kendall, Esq.

---

[2] Even less germane is the litany of cases cited by Mr. Starr (at 1) that arise out of federal grand jury proceedings unconnected to any independent counsel. In those cases, of course, the Department of Justice is both the prosecutor and the representative of the non-prosecutive interests of the federal government, and there is thus no question that the caption should refer to the "United States."

Office of the Attorney General
Washington, D. C. 20530

May 9, 1997

Mr. Andrew L. Frey
Mr. Kenneth S. Geller
Mr. Lawrence S. Robbins
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006

Re: In Re: Grand Jury Subpoena Duces Tecum,
No. 96-4108 (8th Cir. Apr. 9, 1997)

Dear Messrs. Frey, Geller, and Robbins:

Because of the nature of this proceeding, you previously were appointed as Special Assistant United States Attorneys to furnish representation in connection with the motion to compel the production of documents served on the Office of the White House Counsel by Independent Counsel Kenneth Starr. Under that arrangement, although you are subject to the ultimate control of the Attorney General, you are detailed to the White House and subject to the day-to-day control of the White House Counsel. To the extent that separate, more specific authorization now is required by 28 U.S.C. 518(a) for Supreme Court proceedings, see, e.g., FEC v. NRA Political Victory Fund, 115 S. Ct. 537, 539-543 (1994), you are hereby authorized to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, and to continue with your representation in the Supreme Court.

As I stated at the time the representation arrangement was approved, the Department of Justice retains the responsibility for representing broad institutional interests of the United States in regard to this matter, and therefore retains the prerogative of appearing in court on behalf of the United States.

Sincerely,

Janet Reno

Janet Reno

Office of the Independent Counsel

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

May 14, 1997

William K. Suter, Esq.
Clerk
Supreme Court of the United States
One First St., N.E.
Washington, D.C. 20543

Dear Mr. Suter:

At approximately 3:15 p.m. today, we received a letter from counsel for the White House regarding the caption. We contacted Frank Lorson at approximately 4:00 p.m. to let him know that we intended to file a brief letter in response this afternoon. A few minutes later, you notified us that you had made a decision on the issue. We nonetheless send this letter so that the historical record is complete and reflects our considered judgment. Because the White House relied in its letter on the Department of Justice's supposed views on the captioning of this case, we also respectfully suggest that the Department itself should be notified and provided an opportunity to comment.

As to the substance of the White House's letter, we make the following points.

First, under the independent counsel statute, this Office was provided "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." 28 U.S.C. § 594(a). The statute specifically states that the Independent Counsel exercises authority in "all aspects of any case in the name of the United States." Id. (emphasis added). There is no basis in law or policy for the White House's newly minted distinction between pre-indictment and post-indictment cases. If the Department of Justice or a United States Attorney's Office authorizes issuance of a grand jury subpoena and subsequently files a motion to compel production, and the matter then proceeds to the Supreme Court, the party represented by the Department or the U.S. Attorney's Office is the "United States" -- and by law and custom is so denominated in the caption in the Supreme Court. The relevant statutory provisions demonstrate that the same must be true here.

Second, under the statute, "the Attorney General or the Solicitor General" is authorized

to "mak[e] a presentation as amicus curiae." 28 U.S.C. § 597(b). But in such cases the Independent Counsel still exercises his authority "in the name of the United States." 28 U.S.C. § 594(a). Section 597(b) of Title 28 in no way suggests that the Attorney General or Solicitor General can displace the Independent Counsel as the party representing the "United States" in a criminal investigation or prosecution (at least without removing the Independent Counsel for good cause pursuant to 28 U.S.C § 596(a)). In fact, by their careful wording, Sections 594(a), 597(a), and 597(b), in conjunction, appear designed to preserve the authority of the Independent Counsel to represent the United States. For example, then, in the case of United States v. Tucker, 78 F.3d 1313 (8th Cir.), cert. denied, Tucker v. United States, 117 S. Ct. 76 (1996), this Office represented the "United States." In the Court of Appeals, the Attorney General filed an amicus brief styled "Amicus Curiae Brief for the United States, as Represented by the Attorney General, Addressing Motions to Dismiss Indictment." We assume that the Attorney General or the Solicitor General, if either appears in this case in the Supreme Court, will use some similar appellation. But that possibility is simply not a basis for suggesting that the Independent Counsel does not properly represent the United States.

Third, in Morrison v. Olson, 487 U.S. 654 (1988), the very question raised by the case was whether the Independent Counsel in fact was an officer of the United States and could exercise the prosecutorial and investigative authority of the United States. There is no such question at issue here. Morrison is thus completely inapposite.

Fourth, the White House does not attempt to explain United States v. Nixon, 418 U.S. 683 (1974). Importantly, in that case, President Nixon was not the defendant. Rather, the White House had received a trial subpoena. The litigation concerned a privilege issue raised in response to a third-party subpoena in criminal proceedings -- as is the case here. The arguments made by the White House would suggest that in Nixon the caption should have referred to the "Office of the Special Prosecutor." The case was not so captioned, and there is no plausible basis for a different conclusion in this case.

Finally, in our initial letter, we noted that the "Office of the President" is not an entity within the Executive Branch, at least so far as we are aware, although the Executive Office of the President and the White House Office are. The White House did not respond to that point in its letter.

Sincerely,

Kenneth W Starr/dlb

Kenneth W. Starr
Independent Counsel

Copy: Kenneth S. Geller, Esq.

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

William K. Suter
Clerk of the Court

202-479-3014
Fax 202-479-3959

May 12, 1997

Kenneth S. Geller, Esquire
Mayer Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

RE: Petition No. 96-1783

Dear Mr. Geller:

I received by hand on May 8, 1997, a letter from Independent Counsel, Kenneth W. Starr, in which he presents his views regarding the caption of the petition you presented for filing today that will bear the number 96-1783.

Before this petition can be placed on the docket, I request that you file a response to Mr. Starr's letter in which you present your views regarding the caption, and that such response be filed in my office by 2 p.m., Wednesday, May 14, 1997.

Your prompt attention to this matter is appreciated.

Sincerely yours,

William K. Suter
Clerk

cc: Kenneth W. Starr, Esquire
David E. Kendall, Esquire

Office of the Independent Counsel

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

May 14, 1997

William K. Suter, Esq.
Clerk
Supreme Court of the United States
One First St., N.E.
Washington, D.C. 20543

Dear Mr. Suter:

At approximately 3:15 p.m. today, we received a letter from counsel for the White House regarding the caption. We contacted Frank Lorson at approximately 4:00 p.m. to let him know that we intended to file a brief letter in response this afternoon. A few minutes later, you notified us that you had made a decision on the issue. We nonetheless send this letter so that the historical record is complete and reflects our considered judgment. Because the White House relied in its letter on the Department of Justice's supposed views on the captioning of this case, we also respectfully suggest that the Department itself should be notified and provided an opportunity to comment.

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Finally, in our initial letter, we noted that the "Office of the President" is not an entity within the Executive Branch, at least so far as we are aware, although the Executive Office of the President and the White House Office are. The White House did not respond to that point in its letter.

Sincerely,

Kenneth W Starr /dlb

Kenneth W. Starr
Independent Counsel

Copy: Kenneth S. Geller, Esq.

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	4987
CONNECTION TEL	94793021
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/14 17:23
USAGE T	01'09
PGS.	3
RESULT	OK

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

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

Date: 5-14-97

TO: William K. Suter

Company Name: _____

Fax Number: 479-3021 Telephone Number: _____

FROM: Kenneth W. Starr

Number of Pages: 3 (including this cover sheet)

Message: _____

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	4988
CONNECTION TEL	94793021
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/14 17:24
USAGE T	01'09
PGS.	3
RESULT	OK

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D. C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: 5-14-97

TO: Frank Lorson

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Kenneth W. Starr

Number of Pages: 3 (including this cover sheet)

Message: _____

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	4989
CONNECTION TEL	98610473
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/14 17:26
USAGE T	01'07
PGS.	3
RESULT	OK

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

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

Date: 5/14/97

TO: Gary Winters / Ken Geller

Company Name: _____

Fax Number: 861-0473 Telephone Number: _____

FROM: John Bates

Number of Pages: 3 (including this cover sheet)

Message: _____

SUPREME COURT OF THE UNITED STATES

Office of the President
Petitioner

vs.

Office of Independent Counsel, et al.
Respondent

No. 96-1783

To Kenneth Starr & John D. Bates Counsel for Respondent:

YOU ARE HEREBY NOTIFIED pursuant to Rule 12.3 that a petition for a writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on May 12, 1997, and placed on the docket _____.

Agreement Pursuant to ~~Rule 15.3~~, the due date for a brief in opposition is May 29, 1997. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday, or federal legal holiday.

An appearance form is enclosed and should be sent to the Clerk only in the event you **do not** intend to file a response to the petition for a writ of certiorari. No appearance form is enclosed if the Solicitor General of the United States represents the respondent.

Your attention is directed to Rule 9 of the Rules of the Supreme Court reproduced on back of the appearance form. Only counsel of record will receive notification of the Court's action in this case.

Andrew L. Frey
Counsel for Petitioner

2000 Pennsylvania Avenue, N.W.
Number and Street

Washington, D.C. 20036
City, State, and Zip Code

(202) 778-0602
Telephone Number

NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.

CO-90

CLER-0032-9-95

MAYER, BROWN & PLATT

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

MAIN TELEPHONE
202-463-2000
MAIN FAX
202-861-0473

FACSIMILE COVER SHEET

Time: 3:09 pm	Date: May 12, 1997
MESSAGE TO:	FROM:
Brett Kavanaugh	Gary A. Winters
FIRM: Independent Counsel	NO. OF PAGES 1+cover (ALL PAGES MUST BE NUMBERED)
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William K. Suter
Clerk of the Court

202-479-3014
Fax 202-479-3329

May 12, 1997

Kenneth S. Geller, Esquire
Mayer Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

RE: Petition No. 96-1783

Dear Mr. Geller:

I received by hand on May 8, 1997, a letter from Independent Counsel, Kenneth W. Starr, in which he presents his views regarding the caption of the petition you presented for filing today that will bear the number 96-1783.

Before this petition can be placed on the docket, I request that you file a response to Mr. Starr's letter in which you present your views regarding the caption, and that such response be filed in my office by 2 p.m., Wednesday, May 14, 1997.

Your prompt attention to this matter is appreciated.

Sincerely yours,

William K. Suter
Clerk

cc: Kenneth W. Starr, Esquire
David E. Kendall, Esquire

FAX COVER SHEET

Clerk of Court
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

To: Kenneth Starr

Fax Number: (202) 514-8802

From: William K. Suter
Fax: (202) 479-2959

Description: Request re: caption of petition

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Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004
(202) 514-8688
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May 8, 1997

William K. Suter, Esq.
Clerk
Supreme Court of the United States
One First St., N.E.
Washington, D.C. 20543

Dear Mr. Suter:

We write to state our views regarding the caption of the anticipated case involving this Office and the White House.

Pursuant to the Ethics in Government Act, the Independent Counsel was appointed at the request of Attorney General Reno by the United States Court of Appeals for the District of Columbia Circuit. Under 28 U.S.C. § 594(a), the Independent Counsel is authorized to "exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." This includes the authority to "conduct[] proceedings before grand juries and other investigations"; to "participat[e] in court proceedings"; "to contest the assertion of any testimonial privilege"; and to "initiat[e] and conduct[] prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States." 28 U.S.C. § 594(a) (emphasis added).

In Supreme Court cases arising out of federal grand jury proceedings, the caption refers to the federal government prosecutors as the "United States." See, e.g., Hill v. United States, 117 S. Ct. 432 (1996); The Corporation v. United States, 117 S. Ct. 333 (1996); Doe v. United States, 510 U.S. 1091 (1994); Scarce v. United States, 510 U.S. 1041 (1994); Lewis v. United States, 510 U.S. 918 (1993); Union Bank of Switzerland v. United States, 502 U.S. 1092 (1992); DeGeurin v. United States, 499 U.S. 959 (1991); United States v. R. Enterprises, Inc., 498 U.S. 292 (1991); Backiel v. United States, 498 U.S. 980 (1990); Model Magazine Distributors, Inc. v. United States, 496 U.S. 925 (1990). In addition, the caption of Supreme Court cases in which the United States has been represented by an independent counsel appointed under the Ethics in Government Act (or a special prosecutor appointed by the Attorney General) refers to the "United States." See Tucker v. United States, 117 S. Ct. 76 (1996); Marks v. United States, 117 S. Ct. 76 (1996); Haley v. United States, 117 S. Ct.

76 (1996); Fitzhugh v. United States, 117 S. Ct. 256 (1996); United States v. Poindexter, 506 U.S. 1021 (1992); North v. United States, 500 U.S. 941 (1991); United States v. Nofziger, 493 U.S. 1003 (1989); Poindexter, North, and Hakim v. United States, 490 U.S. 1004 (1989); Deaver v. United States, 484 U.S. 829 (1987); Deaver v. United States, 483 U.S. 1301 (1987) (stay application); Mitchell and Haldeman v. United States, 431 U.S. 933 (1977); Ehrlichman v. United States, 431 U.S. 933 (1977); Barker v. United States, 421 U.S. 1013 (1975); United States v. Nixon, 418 U.S. 683 (1974).[1]

The reference in the caption to the party represented by this Office as the "United States" is proper despite the fact that a federal government agency or official is the opposing party. In United States v. Nixon, 418 U.S. 683 (1974), for example, the caption referred to the "United States" notwithstanding the fact that another entity within the Federal Government was the subpoena recipient and opposing party.

In short, both the law of Section 594(a) and the consistent practice of the Supreme Court require that the caption in this case refer to the "United States" as the party represented by this Office.[2]

The other question, of course, is how the White House should be referenced. There seem to be three possibilities: "Executive Office of the President"; "White House Office"; or "William Jefferson Clinton, President of the United States." We offer a few observations. First, the grand jury subpoena was directed to "The White House." Second, the White House Office is an official entity within the Executive Office of the President.[3] (There is no official

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[2] We therefore intend to file our brief in opposition using the traditional gray cover, consistent with the practice of the United States (including when an independent counsel represents the United States) in criminal matters. See S.Ct.R. 33.1(e).

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entity entitled the "Office of the President," at least so far as we are aware.) Third, the caption in the District Court was "In re: Grand Jury Subpoena Duces Tecum to the White House."

We appreciate very much your assistance in this matter.

Sincerely,

Kenneth W. Starr
Independent Counsel

Copy: Kenneth S. Geller, Esq.

1939, pursuant to the Reorganization Act of 1939, and comprised over the ensuing years of numerous units, including the White House Office and the Office of Administration, among others. See generally The United States Government Manual 1996-97 90 (various agencies transferred to EOP in 1939); 3 C.F.R. § 100.735-2(a) ("Agency means the followings agencies in the Executive Office of the President: The White House Office . . . .").

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

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

Date: May 8, 1997

TO: Lawrence Robbins, Esq.
Kenneth S. Geller, Esq.

Company Name: Mayer, Brown & Platt

Fax Number: 202-861-0473 Telephone Number: 202-463-2000

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 4 (including this cover sheet)

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No. 96-1783

In The

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF LAW PROFESSORS PAUL F. ROTHSTEIN, RONALD J. ALLEN, MARGARET A. BERGER, WILLIAM J. BRIDGE, PAUL C. GIANNELLI, STEPHEN GILLERS, LAIRD C. KIRKPATRICK, DAVID P. LEONARD, MIGUEL A. MÉNDEZ, ROGER C. PARK, MYRNA S. RAEDER, JOHN W. REED, MARK REUTLINGER, LEO M. ROMERO, STEPHEN A. SALTZBURG, AND PETER TILLERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Professor Paul F. Rothstein
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Counsel for Amici Curiae

* Counsel of Record

June 2, 1997

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Statutes and Rules

Miscellaneous

INTEREST OF *AMICI CURIAE*

Amici are law professors who regularly conduct scholarly research in, publish on, and teach the subjects of evidence or professional responsibility in law schools throughout the Nation. *Amici* law professors have written extensively on issues relating to the attorney-client privilege, and several have written or edited leading textbooks and treatises on the law of evidence or professional responsibility. In addition, many *amici* have had practical experience on both sides of civil and criminal cases; experience working as attorneys in government offices or agencies; and experience teaching evidence to the bench and bar.

Amici have a professional interest in and concern for the effective workings of the courts, government, and the legal profession. In particular, *amici* have an interest in the integrity and soundness of rules of evidence and privilege as they may affect the processes by which public policy, law, and regulations are made. As teachers of law, *amici* are also students of the legal profession and the contribution it makes to our system of government. These interests are heightened when the subject is, as in this case, the application of the attorney-client privilege in the context of government agencies and attorneys.

Brief biographical statements of individual *amici* are included in an Appendix to this brief. All parties have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

This Court should grant review not only because this is a case of national importance and prominence, but also because the decision below is a conspicuous departure from settled principles of evidence law. The panel majority concluded that communications between government lawyers and government officials are not protected by the attorney-client privilege, at least when those communications are sought by a federal grand jury. That conclusion conflicts with the predominant common-law understanding that the attorney-client privilege applies to government entities and that where the privilege applies, it is absolute (*i.e.*, it protects against disclosure in all types of legal and investigative

proceedings). In particular, the Court of Appeals' decision rests on a fundamental misunderstanding of this Court's decisions in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *United States v. Nixon*, 418 U.S. 683 (1974).

Moreover, this case warrants further review because the decision below has profound implications beyond the parties to this dispute. The Court of Appeals' ruling, if allowed to stand, will create widespread uncertainty among federal, state, and local officials concerning the extent to which their communications with their agency lawyers, for the purpose of seeking legal advice in the conduct of governmental affairs, are protected by the attorney-client privilege. Unless this Court grants review and resolves this uncertainty, the decision below will likely have an adverse effect on the current and future operation of not only the Office of the President of the United States, but also government at all levels. At the very least, a decision of such vast implications (as in the present case) should be made by the highest court in the land. We accordingly urge the Court to grant the petition for review.[1]

I. THE DECISION BELOW CREATES AN EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE THAT IS NOT IN ACCORD WITH ACCEPTED LEGAL PRINCIPLES AND HAS IMPORTANT ADVERSE CONSEQUENCES FOR GOVERNMENT

A. It Is Well-Settled That The Attorney-Client Privilege Applies To Government Entities

Rule 501 of the Federal Rules of Evidence provides, with limited exceptions, that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed

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[1] Because this brief urges the Court merely to grant further review, *amici* do not address in this brief the question whether, assuming the attorney-client privilege applies to government entities and is absolute, the requirements for asserting the privilege have been satisfied in this case. Those questions are more appropriately addressed if and when this Court elects to grant certiorari. *Amici* also do not address in this brief the attorney work-product issue raised by petitioner.

by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." As the court below recognized (Pet. App. 5a), the starting point of analysis is therefore the common law, "interpreted . . . in the light of reason and experience." Fed. R. Evid. 501.

At common law, it has long been understood that the attorney-client privilege applies to communications between government entities and government lawyers for the purpose of seeking and providing legal advice. *See, e.g.*, Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* ¶ 18.03[02][a], at 18-18 (1996) ("Artificial entities, public or private, are . . . considered clients for purposes of the attorney-client privilege."); Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:28, at 4-98 (1993) ("When government agencies consult with legal counsel for the purpose of obtaining legal advice or assistance . . . the attorney-client privilege protects [their] communications to those attorneys."); 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.18, at 1-47 (2d ed. 1995) ("Courts agree that the client may be an . . . organization or entity, either public or private.") (footnotes omitted); Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 693 (2d ed. 1982) ("The proposed federal rule and most of the rules that have been enacted by states which used it as a guideline assume that a client can be a government agency as well as a corporation.").[2]

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[2] In *SEC v. World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981), for example, the court applied the principles of this Court's *Upjohn* decision to communications between SEC staff and SEC counsel. And in *Deuterium Corp. v. United States*, 19 Cl. Ct. 697, 699 (1990), the court concluded that the "same reasoning" that this Court employed in *Upjohn* applies to "Government employees at all levels." In addition to the cases cited by petitioner in its Petition for Certiorari ("Pet."), *see* Pet. 18 n.5, other cases that recognize a governmental attorney-client privilege include *Connecticut Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955) (communications between bridge commission and its attorneys held to be privileged), *State v. Today's Bookstore, Inc.*, 621 N.E.2d 1283, 1288 (Ohio Ct. App. 1993) ("The city is like a corporation, and the same attorney-client privilege enjoyed by

Although the issue has typically arisen in the context of civil litigation, we are aware of no reported decision (prior to this one) that suggests a different rule applies in criminal or grand jury proceedings. Any such distinction would be a departure from a fundamental feature of the attorney-client privilege; namely, that the privilege protects against compelled disclosure regardless of the forum in which the privileged communication is sought. *See infra* pp. 6-9. Indeed, the few decisions that have confronted the issue in a criminal setting have recognized the existence of the privilege. *See In re Grand Jury Subpoena*, 886 F.2d 135, 138-39 (6th Cir. 1989) (vacating district court's order to enforce a federal grand jury subpoena and remanding to determine whether minutes of a city council meeting were confidential); *In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury*, 574 A.2d 449, 454-56 (N.J. Super. Ct. App. Div. 1989) (attorney employed by a county board of freeholders cannot be required to reveal client communications to a grand jury investigating the county).[3]

Apart from judicial decisions, the Freedom of Information Act ("FOIA") expressly recognizes that an attorney-client privilege exists between government agencies and their lawyers. *See* 5 U.S.C. § 552 (1994); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Although the panel majority below dismissed FOIA jurisprudence as "sui

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corporations is enjoyed by the city."), and *Rowley v. Ferguson*, 48 N.E.2d 243, 248 (Ohio Ct. App. 1942) (communications between attorney and client, both of whom were public officials, held to be privileged).

[3] It should not be surprising that there are few reported judicial decisions in the criminal or grand jury context, because the decision whether to waive attorney-client privilege in the context of a criminal or grand jury proceeding is often made within the Executive Branch. *See* Pet. 20 n.6. In addition, *amici* surmise that one reason this issue is not litigated more frequently is that, in the past, lawyers, judges, and scholars had no reason not to assume — or reasonably took for granted — that government agencies, no less than other entities, could assert the attorney-client privilege in the face of a criminal or grand jury investigation.

generis," Pet. App. 10a, it would have been singularly odd for Congress, which is presumed to be well-versed in this area of the law, to recognize an attorney-client privilege in the FOIA context if the general rule were that no such privilege exists.

Furthermore, Proposed Federal Rule of Evidence 503 provides that any "organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him," is entitled to the protection of the attorney-client privilege. Proposed Fed. R. Evid. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972).[4] The Advisory Committee Notes to Proposed Rule 503 confirm that "[t]he definition of 'client' includes governmental bodies." *Id.* at 237 (citations omitted). Although the panel majority's analysis began with Proposed Rule 503, it abandoned further consideration on the curious ground that the Proposed Rule announces a "broad proposition" without specifically addressing "the particular situation before us in this case." Pet. App. 6a-7a. Courts usually do not disregard plain language in a statute or rule on the basis that the text speaks in general terms.

More importantly, Proposed Rule 503 has been recognized as "a powerful and complete summary of black-letter principles of lawyer-client privilege. Perhaps more than any other privilege proposal that was contained in the draft rules presented to Congress, Standard 503 represents a convenient and logical summary of core principles in privilege doctrine." 3 *Weinstein's Federal Evidence* § 503.02, at 503-8 (McLaughlin ed., 2d ed. 1997). Because Proposed Rule 503 "is useful as a restatement of the traditional

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[4] Although Rule 503 is a proposed rule, and therefore not binding on the courts, its pedigree makes it a persuasive authority. *See, e.g.*, Weinstein's Evidence Manual ¶ 18.03[01], at 18-17 ("Standard 503 remains a useful starting point in examining the use of the attorney-client privilege in the federal courts today. It is an accurate restatement of actual practice and is cited to frequently") (footnote omitted); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (Proposed Rule 503 is "a useful starting place" for examination of the federal common law of attorney-client privilege).

common law lawyer-client privilege that had been applied in the federal courts prior to the adoption of the federal rules," *Weinstein's Federal Evidence*, *supra*, § 503.02, at 503-8 (footnote omitted), the court below should have viewed Proposed Rule 503 as persuasive (though not dispositive) authority that federal common law, interpreted "in the light of reason and experience," Fed. R. Evid. 501, includes a governmental attorney-client privilege.[5]

B. The Purposes Served By The Attorney-Client Privilege Apply With Full Force To Communications Between Government Entities And Government Lawyers

The attorney-client privilege is a long-recognized exception to the general rule that the public has a right "to every man's evidence," *United States v. Bryan*, 339 U.S. 323, 331 (1950) (internal quotation and citation omitted). Indeed, it "is the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389 (citing 8 John H. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)). The purpose of the privilege is to

> encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves

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[5] Other authorities also recognize a government attorney-client privilege. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996) ("The attorney-client privilege extends to a communication of a governmental organization."); Uniform Rule of Evidence 502 (defining "client" to include governmental bodies and public officers; subsection (d)(6), which restricts the scope of the privilege, has been rejected by most States, *see infra* note 10); Model Rules of Professional Conduct 1.6 comment ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers . . ."); *cf.* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 Geo. L.J. 1781, 1841 (1994) (proposing a new Federal Rule of Evidence 501 that includes a governmental attorney-client privilege).

> public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. The attorney-client privilege "'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.'" *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Its purpose is "to encourage clients to make full disclosure to their attorneys." *Id.* at 389 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).

In *Upjohn*, the Court rejected a narrow application of the attorney-client privilege to corporations, concluding that the narrow "control group" test "overlook[ed] the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390 (citations omitted). The *Upjohn* Court recognized that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. . . . 'It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.'" *Id.* at 390-91 (quoting ABA Code of Professional Responsibility, Ethical Consideration 4-1).

This Court in *Upjohn* also recognized that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. *Upjohn* thus affirmed the central principle that the attorney-client privilege, where it exists, is absolute and cannot be overcome by a showing of need. *See, e.g.*, Rice, *supra*, § 2.2, at 2-50 ("If the protection were not absolute, it would not be predictable, and the client could not rely on it. Absent a waiver of the protection, therefore, the privilege precludes disclosure of the communications

regardless of the need that might be demonstrated for the information in them") (footnotes omitted).[6]

The purposes served by the attorney-client privilege in the corporate setting apply with equal force in the government setting. *See* Rice, *supra*, § 4:45, at 4-175 (government agencies "need legal advice and assistance, and the privilege's rationale of encouraging more open communications from the client to the attorney is no less applicable, even though these entities can only speak and act through the individuals who represent them"). Government lawyers, no less than lawyers serving private clients, need to know all relevant facts before providing legal advice. The need to promote full and frank disclosure between clients and their lawyers is no less pressing in the government context than in the private context.[7]

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[6] The focus on encouraging the communication *ex ante* means that the privilege derives its justification independently of the context in which the information is sought *ex post*. In other words, given the rationales supporting the attorney-client privilege, there is no principled basis on which to distinguish between privileged information sought later in a criminal investigation or in civil litigation. Moreover, because the focus is on encouraging communication *ex ante*, the essence of the privilege goes to the need for candor and full access to information at the time the communication is made, not to the need for the information after the communication is made. In creating an exception to the attorney-client privilege for communications sought by a federal grand jury, the court below appears to have ignored this bedrock principle of privilege law.

[7] "The United States government employs more than 22,000 lawyers to handle its legal problems (two to three percent of all U.S. lawyers). . . . The variety of legal work performed by government lawyers is nearly as broad as the breadth of legal activity generally. Lawyers for the federal government are advisors, counselors and litigators; and they deal virtually in every legal specialty, ..." Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyers*, 5 Geo. J. Legal Ethics 291, 292 (1991). "Recognition of the attorney-client privilege for governmental entities is said to encourage more open communication between governmental officials and their lawyers, thereby enhancing the quality of governmental decisionmaking. Denial of the privilege would put

This Court in *Upjohn* recognized that a corporation's lawyers cannot function effectively for a corporation without the information provided by employees of the corporation, and that in the absence of privilege such information might be withheld from the lawyers to the detriment of the corporation, the legal system, and the public generally. *See Upjohn*, 449 U.S. at 390-95. The same is true of lawyers for government agencies. Legal advice is just as essential to a government agency's proper functioning as it is to a corporation's. Legal advice can be key to the agency's understanding of and obedience to the law, and key to the agency's formulation of sound public policy and sound legal regulations. Legal advice for a government agency is particularly necessary in the modern world's increasingly complex and sometimes counterintuitive laws governing agencies and their officials. As this Court observed in *Upjohn*, "[i]n light of the vast and complicated array of regulatory legislation," efforts to comply with the law will require "'constantly go[ing] to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (citations omitted). There can be little dispute that this observation applies with at least equal force to government agencies. At bottom, just as this Court recognized in the context of corporate attorney-client communications in *Upjohn*, application of the attorney-client privilege in a governmental context promotes, rather than impedes, the fair and accurate administration of justice.

C. The "Grand Jury Exception" Created Below To The Governmental Attorney-Client Privilege Erodes The Benefits Of The Privilege So Severely That Only The Nation's Highest Court Should Make That Decision

The panel majority below rejected the proposition that "an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena [issued] by a federal grand jury." Pet. App. 5a. But just as limiting the privilege to

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public entities at an unfair disadvantage in both criminal prosecutions and civil litigation." 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence Second* § 191, at 352 (1994).

members of a corporation's "control group" would "frustrate[] the very purpose of the privilege," *Upjohn*, 449 U.S. at 392, so too would the decision of the court below to remove communications from the governmental attorney-client privilege when they are sought in a grand jury proceeding deny the essence of the privilege for the governmental entity.

The panel majority assumed that "confidentiality will suffer only in those situations that a grand jury may later see fit to investigate." Pet. App. 19a.[8] But grand jury investigations of governmental decisionmaking and decisionmakers are (unfortunately) no longer uncommon, and there can thus be considerable uncertainty whether a future grand jury may someday be interested in otherwise privileged communications. As this Court recognized in *Upjohn*, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393; *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996) ("We reject the balancing component of the privilege . . . . Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the . . . evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); *cf.* Paul F. Rothstein, *A Re-Evaluation of the Privilege Against Adverse Spousal Testimony in the Light of Its Purpose*, 12 Int'l & Comp. L.Q. 1189, 1194 (1963) (contrasting communications privileges, which require certainty of applicability, with other privileges, which do not). Given the broad

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[8] The court below also asserted that it did not

> foresee any likely effect of our decision on the ability of a government lawyer to advise an official who is contemplating a future course of conduct. If the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice. . . . [W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

Pet. App. 19a-20a (citation omitted).

investigative mandate of federal grand juries, the uncertainty as to whether otherwise protected communications may lose that protection will frustrate the very purpose of the privilege.

Indeed, denial of the attorney-client privilege in the grand jury context would be an unprecedented exception to the privilege. There is no "grand jury exception" to the attorney-client privilege for individuals or corporations. A grand jury exception to the attorney-client privilege in the government context would cut a gaping hole in the privilege and would have a significant chilling effect on communications. Federal grand juries can investigate a wide range of conduct or suspected conduct and are not limited by relevancy rules applicable at trial. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Thus, a government employee speaking with agency counsel about matters necessary to the daily effective functioning of the agency would not necessarily know if the matter could possibly be of interest one day to a federal grand jury. The fear that it *might*, however, would undoubtedly chill communications with agency attorneys. In addition, if the attorney-client privilege did not apply to government agencies in the context of federal grand jury investigations, every agency lawyer could become a potential prosecution witness against agency officials who have sought legal advice from that lawyer or against government employees who have provided information necessary for that lawyer to offer such advice.

As a result of both these implications, government officials and employees would likely be deterred from seeking legal advice regarding the legality of their conduct, which would have several undesirable effects. First, it might encourage agency officials and employees to remain deliberately ignorant of the law. Second, it might deter some officials or employees from engaging in proper and desirable conduct for fear that it might be illegal. Also, it might cause government agencies to establish policies they might not establish had officials obtained confidential legal advice, or to engage in conduct they might have eschewed had officials consulted government counsel about their proposed course of conduct. Those government officials who do actually seek legal advice might decide to withhold crucial information or otherwise refrain from free and

frank exploratory discussions, thus undermining the quality and effectiveness of any legal advice that is ultimately given.

This uncertainty over the prospect of a future grand jury investigation that would require disclosure of otherwise privileged communications is compounded by other uncertainties raised by the decision below. For example, unless this Court grants review and announces a uniform rule, there will be uncertainty over whether other courts will follow the court below and, if so, whether a future grand jury will seek such communications in those jurisdictions. There will be uncertainty over whether the rule announced by the court below might also apply to other types of proceedings, such as criminal trials or civil proceedings. The decision below also raises substantial uncertainty as to whether the same exception would apply to state or local government agencies and officials and, if so, whether a future grand jury will seek such communications in a jurisdiction that applies the "grand jury exception" created below to state and local government agencies and officials. *Cf.* Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L.J. 125, 130-35 (1973) (urging general conformity of privileges with state law to avoid uncertainty). These uncertainties, each of which tends to undermine the very existence of the privilege, *see Upjohn*, 449 U.S. at 393, present an independent, compelling basis on which this Court should grant review.

D. A "Grand Jury Exception" To The Governmental Attorney-Client Privilege Pays Far Fewer Dividends to Grand Jury Investigations Than The Court Below Assumed

The decision below sought to distinguish application of the privilege in a civil setting from application of the privilege in a criminal setting by advancing "the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a (discussing *United States v. Nixon*, 418 U.S. 683 (1974)). The panel majority also cited *Nixon* to support its conclusion that "[e]ven if . . . the governmental attorney-client privilege ordinarily

applies in civil litigation," a different rule is warranted in criminal proceedings. Pet. App. 11a.

At the outset, the panel majority's conclusion rests on a fundamental misreading of *Nixon*. This Court's opinion in *Nixon* expressly distinguished the *qualified* privilege at issue in that case from *absolute* privileges, such as those that apply to military or diplomatic secrets. 418 U.S. at 706-07. *Nixon* did not suggest that the attorney-client privilege, which has long been regarded as an absolute privilege, is subject to a balancing analysis. To the contrary, the Court expressly acknowledged the existence of "common-law . . . privileges," including the privilege of "an attorney" who "may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709. Furthermore, there was a much stronger showing of need for the evidence in *Nixon*. In *Nixon*, the information at issue was not available from any other source, because the relevant individuals could not be called as witnesses in a criminal trial. In this case, by contrast, the Independent Counsel has other sources for the information he seeks. Because Mrs. Clinton has already testified before the grand jury, for example, the Independent Counsel's need for counsel's debriefing notes related to that testimony is far less pressing than the Special Prosecutor's need for the tapes in *Nixon*.

More importantly, even apart from the panel majority's misreading of *Nixon*, the decision below overestimates the potential benefits to law enforcement from denial of a governmental attorney-client privilege in the context of grand jury proceedings. First, it is well-established that "[t]he privilege only protects disclosure of *communications*; it does not protect disclosure of the underlying *facts* by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395 (emphasis added). As such, recognition of the privilege in the context of a grand jury subpoena does not and would not prevent the Independent Counsel (or some future party seeking grand jury evidence) from obtaining the underlying information from sources other than attorney-client communications. *See id.* at 396 ("While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience

do not overcome the policies served by the attorney-client privilege."). In this case, for example, because Mrs. Clinton has already testified before a grand jury, the Independent Counsel presumably has had ample opportunity to question her about underlying facts relevant to his investigation. What the attorney-client privilege protects — in this as in any other context — are confidential communications where there is an overarching public benefit in "encourag[ing] full and frank communication between attorneys and their clients [to] promote broader public interests in the observance of the law and administration of justice." *Upjohn*, 449 U.S. at 389.

Second, as this Court and others have recognized, the privilege does not serve to suppress evidence; rather, the privilege serves to encourage communications from the client to the attorney that otherwise might not have been uttered. *Cf. Jaffee*, 116 S. Ct. at 1929 ("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 greater truth-seeking function than if it had been spoken and privileged").[9] Thus, even apart from the significant adverse effect on governmental operations that is likely to occur, denial of the governmental attorney-client privilege for grand jury investigations provides no commensurate benefits for the administration of justice.

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[9] The privilege "keeps from the court only sources of information that would not exist without the privilege." Rice, *supra*, § 2:3, at 56-57 (quoting *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1501, 1508 (1985)). As such, "when the attorney-client privilege is properly understood, it reaches communications that are presumed to have been made precisely because the privilege exists. . . . It is not accurate, therefore, to say that the privilege operates in derogation of the truth. . . . [I]t is important, in understanding the privilege, to focus on the time period before the communications are made." Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 Hofstra L. Rev. 817, 823-24 (1984); *see also* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 600 n.9 (1980) (courts should recognize the information-generating effect of a privilege).

II. THE COURT OF APPEALS' DECISION RAISES A SERIOUS ISSUE OF FEDERALISM

The panel majority's decision also raises significant federalism concerns. Federal Rule of Evidence 501 provides that state law governing attorney-client privilege does not apply in the federal courts, except in civil actions and proceedings "with respect to an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 501. Accordingly, if state law provides that communications between state government officials and state government lawyers are protected by the attorney-client privilege, that *state* law will not be applied in federal criminal or grand jury proceedings or in federal civil actions that arise under federal law. Any protection in those proceedings is entirely dependent on the shape of *federal* privilege law. *See generally* Paul F. Rothstein, *Rules of Evidence for United States Courts and Magistrates* 139-40 (2d ed. 1996).[10]

This case concerns the federal government rather than a state government, and the panel majority itself recognized that "a standoff between a federal grand jury and a city government[] implicates potentially serious federalism concerns." Pet. App. 9a. But the Court of Appeals' reasoning denying privilege to the federal government applies as well to state and local governments. Having concluded (Pet. App. 18a) as a matter of federal common law that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition

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[10] This Court has considered "the policy decisions of the States" in determining the scope of privileges under federal law. *Jaffee*, 116 S. Ct. at 1929. Many States recognize that the attorney-client privilege applies to government agencies. *See, e.g.*, Cal. Evid. Code § 951 comment (West 1995) ("public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned"). *See generally* 1 Gregory P. Joseph & Stephen A. Saltzberg, *Evidence in America: The Federal Rules in the States*, ch. 24 (1987 & Supp. 1994); Paul R. Rice, *Attorney-Client Privilege: State Law* § 4.28 (1996). Of the States that have adopted Uniform Rule of Evidence 502, most have declined to adopt subsection (d)(6) of that Rule, which restricts somewhat the government's attorney-client privilege. *Id.*

of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials," it is difficult to see how the court could reach a different result for state and local officials.

As a result of the Court of Appeals' decision, a state lawyer who serves as counsel to a Governor (or, for that matter, any other state or municipal lawyer) could find herself having to testify as to otherwise privileged communications as an adverse witness in either a federal criminal or federal grand jury proceeding. Despite the State's own determination that the benefits of the governmental attorney-client privilege outweigh its costs, state and local officials will thus be deterred from seeking legal advice, and their communications with counsel will be constrained. *Cf. Jaffee*, 116 S. Ct. at 1930 ("Denial of the federal [psychotherapist-patient] privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications."). This could well result in significant damage to the effective functioning of State governments.

CONCLUSION

For the reasons stated in this brief and in the Petition, the Petition for a Writ of Certiorari should be granted.

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ROUND VERSION

No. ____

In the Supreme Court of the United States

October Term, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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