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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Attorney-Client Privilege [with attachment] [7 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/11/2025 JLS] - To: Condoleezza Rice, et al. - From: Brad Wiegmann	7	02/19/2002	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Memo on Privilege - NSC (National Security Council)

FRC ID:

9693

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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SUPERSEDED

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1326

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

February 19, 2002

INFORMATIONMEMORANDUM FOR CONDOLEEZZA RICE
STEVE HADLEYTHROUGH: JOHN BELLINGER FROM: BRAD WIEGMANN SUBJECT: Attorney-Client Privilege/Work-Product Doctrine
and Executive Privilege

This note addresses the extent to which the attorney-client privilege, work-product doctrine, and executive privilege apply to protect communications between government attorneys and other government officials. As discussed in greater detail in the attached memorandum, the extent to which the attorney-client privilege and work-product doctrine shield government information from disclosure depends on the context in which the demand for the information is made.

If the demand is made in civil litigation, these privileges apply to government attorneys much as they do in the private sector. If the demand is made by Congress or a federal prosecutor, the attorney-client and work-product privileges do not apply as such. However, executive privilege would still apply in these contexts and can be invoked to protect governmental attorney-client communications from disclosure, particularly where legal advice for the President and his senior advisors is concerned. If disclosure of the information would jeopardize national security, the executive privilege would be absolute; otherwise, the privilege would be qualified and could be overcome by a showing of essential need.

Bottom line: We believe that, in response to a subpoena directed to the NSC or NSC officials, we could assert a claim of executive privilege with respect to many of the documents generated by NSC Legal (and other NSC directorates). As a practical matter, if we were confronted with a Congressional (or GAO) demand for NSC legal memoranda, e-mails, or working papers, the issue would generally be resolved by good faith negotiations

between the branches. If push came to shove, however, there is ample precedent for withholding such documents from the Congress where the interest in confidentiality is deemed sufficient to do so. If we were confronted with a federal criminal subpoena, it would likely be more difficult, politically and legally, to withhold NSC legal documents on privilege grounds, provided the prosecutor could show that the requested documents were important to a grand jury investigation and could not be obtained from another source. Finally, if the NSC were involved in civil litigation, we could invoke both attorney-client and other governmental privileges in an effort to protect documents from disclosure.

Of course, whether any particular document would be subject to a claim of privilege would require an analysis of the document and the pertinent facts and circumstances.

Attachment

Tab I Attorney-Client Privilege/Workd Product Doctrine

I. Attorney-Client Privilege/Work Product Doctrine

A. Civil Litigation/FOIA Requests. The courts have long recognized a government attorney-client privilege that protects confidential communications between government attorneys and client agencies or departments from disclosure in civil litigation, provided the communications involve requests for legal advice. See In Re Lindsay, 158 F.3d 1263, 1267 (D.C. Cir. 1998). The work product doctrine also applies to shield materials prepared by or for government attorneys in anticipation of litigation.

Exemption 5 of the Freedom of Information Act (FOIA) also shields from mandatory disclosure under that law "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This exemption encompasses documents subject to the attorney-client privilege or the work product doctrine, as well as other governmental privileges. (Note that the courts have ruled that FOIA does not apply at all to the National Security Council because the NSC is an exclusively Presidential entity. See Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996).)

In the context of civil litigation or a FOIA request, the attorney-client and work product privileges function for the government in much the same way as they do for private parties, with the "client" being the agency and the attorney being the agency lawyer. It is worth noting, however, that many cases take the view that where the communications are made by attorneys, those communications are shielded from disclosure only "if they rest on confidential information obtained from the client." See, e.g., In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984); Alexander v. FBI, 193 F.R.D. 1, 4 (D.D.C. 2000). Particularly in the government context, legal advice rendered to a client is often not based on any confidential facts. If so, a claim of attorney-client privilege may not be upheld if challenged in civil litigation. The qualified "deliberative process" privilege may still apply, however, to the extent that the documents in question reflect pre-decisional advice.

In sum, in the event of civil litigation involving the NSC, the attorney-client and work-product privileges (as well as the deliberative process privilege) would provide some protection for NSC documents reflecting confidential legal advice. FOIA litigation would not be a problem because the NSC is exempt from FOIA.

B. Federal Criminal Investigations

In In Re Lindsay, supra, the U.S. Court of Appeals for the D.C. Circuit held that the governmental attorney-client privilege does not apply to shield documents or information from a federal grand jury subpoena. The court explained that

"[w]ith respect to investigations of federal criminal offenses . . . government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to 'take care that the laws be faithfully executed.' . . . Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." Id. at 1272-73.

Therefore, in the event of a federal criminal investigation in which a prosecutor issued a subpoena for documents or information from the NSC, no attorney-client privilege (and no work-product protection) would apply.

C. Congressional Demands

The Department of Justice's Office of Legal Counsel (OLC) has long held the view that the attorney-client privilege as such may not be invoked to shield government documents from disclosure pursuant to a Congressional subpoena. Rather, the attorney-client privilege is applicable only insofar as it is subsumed under executive privilege. The same analysis would apply to the work-product doctrine. This is not to say that the Executive Branch may not argue, in negotiations with Congress over the release of documents, that the attorney-client privileged status of documents strongly militates against their release. As a legal matter, however, executive privilege rather than attorney-client privilege would have to be invoked to shield government documents from a Congressional subpoena.

II. Executive Privilege

As a constitutional matter, the President enjoys a privilege to withhold confidential Executive Branch information demanded by Congress, the courts, or the public. See United States v. Nixon, 418 U.S. 683, 705-06 (1974); June 19, 1989 Opinion of William P. Barr, Assistant Attorney General for the Office of Legal Counsel, "Congressional Requests for Confidential

Executive Branch Information." Executive privilege is rooted in the constitutional separation of powers. Although it is not specifically aimed at communications between government attorneys and other government officials, it can be invoked in civil litigation or against a Congressional or federal criminal subpoena to shield information reflecting confidential legal advice provided by White House or NSC attorneys for the President.

There are several components to executive privilege. The President's privilege to withhold national security information -- the "state secrets" aspect of executive privilege -- is absolute. However, the President's privilege to withhold communications between him and his senior advisors -- the "presidential communications" aspect of executive privilege -- is qualified, and can be overcome by a showing of essential need by the entity seeking disclosure. See December 21, 1989 Opinion of J. Michael Luttig, Principal Deputy Assistant Attorney General for the Office of Legal Counsel, "Congressional Access to Presidential Communications." The more general privilege covering all confidential, pre-decisional deliberations in the executive branch -- the "deliberative process" aspect of executive privilege -- is similarly qualified.

A. State Secrets

OLC has opined that

"essentially all communications of the President with his national security advisors on national security matters, and virtually all other information related to national security, would fall within the state secrets component of executive privilege where the President determines that disclosure of the communications or information could jeopardize national security." Id.

Therefore, to the extent that the release of communications to or from NSC or other White House attorneys would threaten national security concerns, the state secrets privilege could be invoked to bar their release.

B. Presidential Communications

Absent an identifiable national security threat, the more qualified presidential communications privilege may still apply to documents prepared by, or reflecting the advice of, NSC Legal.

1. Federal Criminal Investigation/Civil Litigation

An entity seeking disclosure of government documents in a civil or criminal matter must make a special showing of need for the evidence in order to overcome an assertion of presidential communications privilege. See United States v. Nixon, 418 U.S. 683 (1974); In Re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997). The precise showing that is required depends on the context. In the context of a grand jury subpoena, the showing is not terribly hard to make: the prosecutor must demonstrate "why it is likely that evidence contained in presidential communications is important to the ongoing grand jury investigation and why this evidence is not available from another source."

Significantly, the Espy court also addressed the question of how far down into the President's circle of advisors the presidential communications privilege extends:

"communications made by presidential advisors in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President. Given the need to provide sufficient elbow room for advisors to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisors solicited and received from others as well as those they authored themselves. The privilege must also extend to those communications authored or received in response to a solicitation by members of a presidential advisor's staff, since in many instances advisors must rely on their staff to investigate and issue and formulate the advice to be given to the President. . . . The privilege should not extend to staff outside the White House in Executive Branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate."

Based on this analysis, much of NSC Legal's work (and the work of other NSC directorates) potentially is protected by the presidential communications privilege. Certainly, NSC material prepared for you by NSC staff for use with the President would be covered. This would also appear to be the case for agencies' views that you have requested for use with the President.

2. Congressional Demands

In the context of a Congressional demand for documents or testimony, there is a long history of incidents in which Presidents have refused to provide information to the Congress, dating to the founding of the Republic. See December 14, 1982 Opinion of Theodore B. Olson, Assistant Attorney General for the Office of Legal Counsel, "History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress." The grounds for such refusals have included both state secrets and presidential communications concerns. If Congress has a legitimate oversight or investigative interest in the information in question, however, the Executive must assess its interest in keeping the information confidential. As explained in the Barr opinion, supra,

"the Executive Branch's general practice has been to attempt to accommodate whatever legitimate interests Congress may have in obtaining the information, while, at the same time, preserving Executive Branch interests in maintaining essential confidentiality. Only when the accommodation process fails to resolve a dispute and a subpoena is issued does it become necessary for the President to consider asserting executive privilege."

Such disputes rarely end up in court. When an inter-branch dispute did result in a Congressional lawsuit during the Watergate scandal, the court held that Congress had not shown a "demonstrably critical" need for the information in question, and therefore upheld the President's claim of presidential communications privilege. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc).