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BWN [Bernard W. Nussbaum] - Crime Bill, 1993 [1]

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## Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel

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### INTRODUCTION

On March 5, 1994, White House Counsel Bernard Nussbaum submitted his letter of resignation to President Clinton:

As I know you know, from the day I became Counsel, my sole objective was to serve you well and as effectively as I could, consistent with the rules of law, standards of ethics, and the highest traditions of the Bar. At all times I have conducted the Office of the White House Counsel and performed the duties of Counsel to the President in an absolutely legal and ethical manner. Unfortunately, as a result of controversy generated by those who do not understand, nor wish to understand the role and obligations of a lawyer, even one active as White House Counsel, I now believe I can best serve you by returning to private life.<sup>1</sup>

In the letter, Nussbaum unveiled the heart of a controversy which had plagued his job as the President's lawyer for fifteen months and which eventually forced his resignation.<sup>2</sup>

The former counsel first sparked notable controversy in July 1993 during the investigation of the apparent suicide of Vincent Foster, a Deputy White House Counsel.<sup>3</sup> Nussbaum was widely criticized for unethical behavior in the investigation that followed when he removed certain Whitewater development files from Foster's office before an official investigation was con-

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1. Excerpt from Bernard Nussbaum's letter of resignation from White House Counsel to President Clinton, reprinted in *The Whitewater Inquiry: Test of Resignation and Clinton Reply*, N.Y. TIMES, Mar. 6, 1994, at A23.

2. The White House Counsel is often described as "the President's lawyer." Eric Effron, *Baker's Confidant; Culvahouse Assumes Key White House Legal Post*, LEGAL TIMES, Mar. 9, 1987, at 1.

3. See Michael Isikoff, *Conspiracy Theorists Find Foster Case Hard to Resist: Rumors Abound Despite Lack of Supporting Evidence*, WASH. POST, Mar. 13, 1994, at A10 (discussing theories on the death of Vincent Foster).

ducted.<sup>4</sup> Nussbaum was later accused of impeding the Foster investigation by insisting that lawyers from the White House Counsel's office be present during police interviews with White House staff members.<sup>5</sup> Nevertheless, Nussbaum has vehemently defended his actions, arguing that had he done anything differently, he would have breached his ethical duties.<sup>6</sup>

The appropriateness of Nussbaum's actions was again called into question when Deputy Treasury Secretary Roger C. Altman disclosed that he had briefed Nussbaum, along with other White House aides, about a Resolution Trust Corporation (RTC) investigation into the collapse of Madison Guaranty Savings & Loan, its connections with Whitewater, and the possible involvement of the President and First Lady.<sup>7</sup> Many people, some with political motivations, criticized this exchange, because it is considered standard practice for federal officials not to reveal pending investigations.<sup>8</sup> Nevertheless, Nussbaum has argued that he only did for his client what any other lawyer would have done, even if his client happened to be the President.<sup>9</sup>

As a result of these actions, Nussbaum has been accused of a number of failures. Some have said he has a "tin ear" for the heightened ethical standards that govern operations inside the White House.<sup>10</sup> He is also viewed by many as "lacking the kind of political judgment required of a lawyer in the counsel's post."<sup>11</sup> Moreover, Nussbaum has been accused of overstepping the bounds of his job by involving himself with the private affairs of the President.<sup>12</sup> Others, however, have defended the former White House Counsel's actions, declaring that "[t]he duty that a lawyer [must] represent a client zealously within the bounds of the law applies just

4. *Id.* After removing the Whitewater files from Foster's office, Nussbaum transferred them to the Clintons' private lawyer. *Id.*

5. Neil A. Lewis, *The Whitewater Inquiry: Nussbaum's New York Tactics Falter in Washington*, N.Y. TIMES, Mar. 6, 1994, at A24.

6. Sharon LaFraniere & Ruth Marcus, *Nussbaum Staff Monitored Foster Probe Interviews*, WASH. POST, Feb. 5, 1994, at A4.

7. Lewis, *supra* note 5, at A24.

8. Edmund L. Andrews, *Inquiry Briefing May Have Violated Two Rules on Ethics*, WASH. POST, Mar. 6, 1994, at A22.

9. See LaFraniere & Marcus, *supra* note 6, at A4.

10. Ruth Marcus & Ann Devroy, *Nussbaum Quits White House Post*, WASH. POST, Mar. 6, 1994, at A1.

11. Ruth Marcus & Dan Balz, *President Picks Capital Insider as Counsel*, WASH. POST, Mar. 8, 1994, at A1. Nussbaum has been accused of "not appreciating how actions are viewed in a political as well as legal light . . . [and] lack[ing] the understanding of how politics and the law intersect in the White House." Marcus and Devroy, *supra* note 10, at A1.

12. Gwen Ifill, *President Chooses Another Counsel; Openness is Vowed*, N.Y. TIMES, Mar. 9, 1994, at A1. New White House Counsel Lloyd N. Cutler has repeatedly stated that his job is to represent the office of the Presidency, not the President's private affairs. *Id.*; Marcus and Balz, *supra* note 11, at A1; David Rosenbaum, *Clinton Partner Denies One Allegation*, N.Y. TIMES, Mar. 14, 1994, at B6.

as much to a lawyer whose client is the President of the United States as it does to a private lawyer."<sup>13</sup>

In a related situation, when Peter Wallison served as President Reagan's counsel during the Iran-contra affair, the central issue facing Wallison was whether the arms-for-hostages deals with Iran and the provision of lethal aid to the Nicaraguan contra rebels were legally within the President's authority.<sup>14</sup> The problem was that Wallison had never been consulted in this matter.<sup>15</sup> Nevertheless, when the controversy erupted, Wallison was caught in the midst of it as much as anyone else involved, so that when President Reagan appointed a new White House chief of staff, Wallison was replaced as well.<sup>16</sup>

The problems faced by Nussbaum and Wallison when they served as the President's lawyers illustrate the difficulty of handling the White House Counsel's office. As one observer put it, the counsel is "always buffeted by the powerful crosswinds of politics, ethics, loyalty and the law — winds that often push him in opposing directions."<sup>17</sup> This difficulty has been compounded by the fact that there is no formal position description that lay out clear guidelines on the duties and responsibilities of the White House

13. Marcus & Devroy, *supra* note 10, at A1.

14. See generally *Report of the Congressional Committees Investigating the Iran-Contra Affair*, 100th Cong., 1st Sess. (1987) [hereinafter *Iran-Contra Report*].

15. A.B. Culvahouse stated: "One of the real problems with the entire Iran-contra episode was that not only was it not well-lawyered, but it was not lawyered in most respects. White House lawyers were not consulted about the reach or the extent of the Boland amendment." Vicki Quade, *The President is His Only Client*, BARRISTER, Winter-Spring 1988, at 4,7 (interview with A.B. Culvahouse, Jr., Counsel to the President).

An additional example is provided by excerpts from testimony by former White House Chief of Staff Donald T. Regan to the House and Senate committees investigating the Iran-Contra affair that revealed the following:

Questioner: Did Peter Wallison express to you his feeling that he was being frozen out?

Regan : Yes, he did, on several occasions.

Questioner: And after he expressed this to you, [the President's own lawyer] . . . [w]hat did you do to try to get him involved so that the President would have the benefit of his own legal counsel . . . at a very crucial time?

Regan : I asked Poindexter to include him in whatever meetings he was having. He refused to do it. He said that he had plenty of counsel . . . [a]nd that their problem was not with . . . whether or not they were doing things legally or illegally.

*The Iran-Contra Hearings: The Eleventh Week of Testimony: Excerpts from Testimony of Donald T. Regan*, WASH. POST, Aug. 1, 1987, at A11 (quoting from the testimony of Donald T. Regan).

16. Effron writes: "The picture of outgoing counsel Wallison that emerges in the Tower Commission Report and in other accounts of the Iran-Contra affair is of a lawyer not in the White House inner circle. Far-reaching legal and ethical questions seemed to have been handled elsewhere, if at all." Effron, *supra* note 2, at 1.

17. Naftali Bendavid, *White House Counsel: The Job That Pits Ethics Against Reality*, THE RECORDER, Mar. 14, 1994, at 1. Bendavid states: "You represent the President, but also the Presidency. Your advice must be legally sound, but also politically astute. Your job is to provide ethical guidance, but also to keep your boss happy." *Id.*

Counsel.<sup>18</sup> Had Nussbaum and Wallison been equipped with a clear set of guidelines to follow during their tenures, they would have been able to avoid the compromising circumstances in which they found themselves. Indeed, clear guidelines are exactly what future White House Counsels will need in order to best carry out the duties of the office. Such guidelines would allow them to avoid the unfortunate circumstances in which their predecessors have found themselves.

Essentially, the question that must be answered is: What are the legal and ethical duties of the White House Counsel? To answer this question, the client of the White House Counsel must be identified against the political backdrop in which the counsel will find himself. Moreover, the prudence of evaluating the counsel's performance from a political perspective should be thoroughly reconsidered in light of the White House Counsel's unique position as the president's lawyer.

Accordingly, Part I of this Note discusses the consequences of an absence of clear guidelines. It will review the various types of duties that previous White House Counsels have performed and some of the problems they have encountered. Part II proposes that although the White House Counsel ultimately serves the public interest, the doctrine of separation of powers dictates that it is the President who is the counsel's immediate client. Part III examines the vital national interests represented by the President and discusses the imperative legal and ethical duties concomitant with the counsel's protection of such interests. Finally, section IV discusses the implications of imposing political accountability upon legal advice given by the president's lawyer in order to demonstrate that the White House Counsel cannot truly serve both a political and a legal function concurrently. The Note concludes that because the White House Counsel serves the President in a purely legal manner, the legal and ethical duties owed to the office of White House Counsel are clear.

## I. THE DUTIES OF THE WHITE HOUSE COUNSEL

Ever since the staff position of White House Counsel was created by President Franklin D. Roosevelt in the early 1940's, the duties assumed by

the counsels have varied greatly under different presidencies.<sup>19</sup> In fact, the counsel's duties have changed from administration to administration, sometimes "depending upon the personal relationship between the President and his three lawyers — the attorney general, the White House Counsel and his private lawyer."<sup>20</sup> For instance, the President's counsel has generally been in charge of reviewing legislation and Presidential statements, overseeing Presidential appointments, and handling pardons.<sup>21</sup> But White House Counsels have also been known to assume such varied roles as speech writer, drafter of legislation, program developer, and private adviser.<sup>22</sup>

The first White House Counsel was Samuel Rosenman, who was hired by President Roosevelt to be a Presidential assistant, write speeches and handle various internal legal issues and advisory assignments.<sup>23</sup> Later, under President Truman, Clark M. Clifford filled the position by acting as the President's political counselor as well as advisor on significant foreign policy matters.<sup>24</sup> Under President Nixon, John W. Dean III's tenure as White House Counsel involved working with the Justice Department, advising the President on technical legal problems, preparing legal opinions, and gathering information on political matters of interest to the White House.<sup>25</sup> When Dean was fired and replaced by Leonard Garment during the Watergate scandal, Garment dealt with such issues as: When should a President facing possible impeachment claim executive privilege? Should secret tapes of Oval Office meetings be destroyed?<sup>26</sup>

During President Carter's administration, Lloyd Cutler helped to plan the boycott of the 1980 Olympics and was deeply involved in foreign policy, such as negotiating the SALT treaty.<sup>27</sup> Cutler also managed some of the personal affairs of the President by handling an investigation of the President's brother.<sup>28</sup> Later, during President Reagan's administration, White House Counsel Peter Wallison handled such duties as attending key policy meetings and reviewing ethical matters and questions of propriety within

18. Ronald Goldfarb, *Counsel of Confusion*, N.Y. TIMES, Mar. 9, 1994, at A15. When Harry McPherson was asked what guidelines he followed when he served as White House Counsel for Lyndon B. Johnson, he replied, "Not many." *Id.* Likewise, Richard M. Nixon's counsel Leonard Garment replied: "Next to none. It was an existential nightmare — fuzzy, obscure, intuitive." *Id.* "There is no handbook anyplace," noted A.B. Culvahouse Jr., White House Counsel under President Reagan. "In some respects, each [P]resident and each White House redefines the job." Bendavid, *supra* note 17, at 1. "[It] is a very unstructured job . . . . It depends very largely on what the [P]resident wants and what the interests of the particular incumbent are." Jonathan Groner, *Clinton's Counsel Finds First Days Are No Picnic*, THE RECORDER, Feb. 5, 1993, at 3.

19. See Goldfarb, *supra* note 18, at A15 (discussing the varied duties of the White House Counsel during different administrations); Effron, *supra* note 2, at 1 (detailing different administrations' approaches to the position of the White House Counsel).

20. Bendavid, *supra* note 17, at 1.

21. *Id.*

22. Goldfarb, *supra* note 18, at A15.

23. *Id.*; Bendavid, *supra* note 17, at 1.

24. Neil A. Lewis, *Man in the News: A Rescuer Steeped in Washington's Ways: Lloyd Norton Cutler*, N.Y. TIMES, Mar. 9, 1994, at B7.

25. *White House Staff and President Nixon's Campaign Organizations. Statement of Information: Background Memorandum, Hearings Before the Comm. on the Judiciary*, House of Representatives, 93rd Cong., 2nd Sess. 2 (1974).

26. Bendavid, *supra* note 17, at 1.

27. *Id.*

28. *Id.*

the White House.<sup>29</sup> As events of the Iran-contra scandal slowly unfolded, however, it became apparent that Wallison had never been consulted about the legality of the crucial secret operations that plagued the remainder of Reagan's presidency.<sup>30</sup>

Unlike Wallison, his successor, A.B. Culvahouse Jr., found himself in charge of reviewing all the papers and documents to be seen by the President, as well as handling numerous nominations by the President and dealing with separation of powers and other constitutional issues.<sup>31</sup> However, Culvahouse maintained that most of the work handled by the White House Counsel's office involved pure legal work.<sup>32</sup> More recently, White House Counsel for President Bush, C. Boyden Gray, played a crucial role not only in judicial nominations and cabinet-level appointments, but also in successfully reshaping policy during the Bush administration, an activity that had traditionally not been handled by the President's lawyer.<sup>33</sup>

As the former White House Counsel of the Clinton administration, Nussbaum not only dealt with the Vincent Foster investigation and the Whitewater developments, but also he also played a key role in the selection of many Presidential nominees, including the Supreme Court Justices, the Attorney General, other federal judges, and the FBI Director.<sup>34</sup>

As President Clinton's new White House Counsel, Lloyd Cutler will assume the overall responsibility for many of the same duties performed by previous counsels.<sup>35</sup> Although Cutler has insisted that the Whitewater affair and other personal matters of the president would be handled by the President's private lawyer, David Kendall, he has acknowledged that with regard to the Whitewater affair, the mistake was "more the appearance of those meetings [between Nussbaum and Treasury and RTC officials] than anything else."<sup>36</sup>

29. Bernard Weinraub, *The White House: A Demanding Season for the Counsel*, N.Y. TIMES, June 23, 1986, at A12.

30. *Iran-Contra Report*, *supra* note 14.

31. Quade, *supra* note 15, at 4, 7. She stated that during the Iran-Contra matter, much of the White House Counsel's time was spent on the war powers debate, executive privilege issues, and interpretation of the Boland Amendment. *Id.* A.B. Culvahouse stated: "All of the paper that the President sees, be it executive orders, veto messages, signing statements, legislative bills, form letters, Presidential speeches, proclamations, and radio talks, are cleared through my office." *Id.*

32. *Id.* (claiming that eighty to eighty-five percent of the work is purely legal work, and that they generally are not policy-makers).

33. John E. Yang & Sharon LaFraniere, *Gray's Role Differs From Predecessors; Counsel at Forefront on Domestic Policy*, WASH. POST, Nov. 22, 1991, at A14. Gray was considered to be one of Bush's most important advisers. *Id.* Gray had a very good personal relationship with Bush, because he served as Bush's official lawyer during Bush's vice presidency. *Id.*

34. Marcus & Devroy, *supra* note 10, at A1.

35. Lewis, *supra* note 24, at B7.

36. Rosenbaum, *supra* note 12, at B6.

## II. IDENTIFYING THE CLIENT OF THE WHITE HOUSE COUNSEL

### A. THE PUBLIC INTEREST

The Constitution provides that the ultimate source of authority from which our federal government derives its power is the people.<sup>37</sup> Ultimately, then, all government employees must answer to the people, for it is for their benefit the constitutional form of government was created. Accordingly, "some sense of obligation to the public interest, however abstract that concept may be," is demanded of all government employees.<sup>38</sup>

Government lawyers also have a fundamental duty of assuming the public trust. The Federal Bar Association Ethics Committee states: "The lawyer assumes a public trust, for the government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. . . . In contrast, the private practitioner represents the client's personal or private interest."<sup>39</sup> In fact, some have claimed that the government lawyer's client is the people as a whole.<sup>40</sup> Because the lawyer's duty is to serve his client's interest above all others, some feel that the government lawyer must look beyond his individual superiors and the agency he serves and, instead, "address the interest of his ultimate client — the public."<sup>41</sup> A student commentator agrees, explaining that the ultimate client of government attorneys is the public interest.<sup>42</sup> Indeed, this commentator notes that any other view would undermine the purpose for which the *Model Rules of Professional Conduct* were written.<sup>43</sup> It is therefore only appropriate that lawyers employed by the government perform their duties in such a manner so as to ultimately serve the public interest. Correspondingly, since the White House Counsel serves the President, a public official elected by a democratic process, the ultimate client whose interests are served by the White House Counsel must also be the American people.<sup>44</sup>

37. See *Report by the District of Columbia Bar Special Comm. on Government Lawyers and The Model Rules of Professional Conduct*, reprinted in WASH. LAW, Sept.-Oct., 1988, at 54 [hereinafter *D.C. Report*]; THE FEDERALIST NO. 39, (James Madison) (stating that the government "derives all its powers, indirectly or directly, from the great body of the people, and is administered by persons holding their office during pleasure for a limited period, or during good behavior").

38. *D.C. Report*, *supra* note 37, at 54.

39. Fed. Bar Ass'n Ethics Comm., *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973) [hereinafter *Opinion 73-1*].

40. Charles Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. B.J. 331 (1974).

41. *D.C. Report*, *supra* note 37, at 54.

42. Keith W. Donahoe, Note, *The Model Rules and the Government Lawyer. A Sword or Shield? A Response to the D.C. Bar Special Committee On Government Lawyers and The Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987, 988 (1989).

43. *Id.* at 994.

44. Bruce E. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. NEWS & J. 406 (Sept.-Oct. 1983).

Unfortunately, this student commentator and others, who advocate that the public interest should be the client of government attorneys, stop short of providing a practical means by which government attorneys, including the President's lawyer, can actually serve this public interest. These advocates fail to address the unavoidable difficulties of taking on the nebulous public interest as a client. After all, in order to serve the public interest, one must first know what the public interest is in any given situation. Indeed, Professor Geoffrey Miller recognized this problem when he said that: "[I]t is commonplace that there are as many ideas of the 'public interest' as there are people who think about the subject."<sup>45</sup>

In 1988, the Special Committee on Government Lawyers and the Model Rules of Professional Conduct appointed by the District of Columbia Bar Association determined that the public interest was "an unworkable ethical guideline . . . inconsistent with the underlying rationale of many significant ethical concepts."<sup>46</sup> The committee explained that in order for a lawyer to function effectively as counselor and adviser to elected and appointed officials, "those officials must not view the lawyer as some independent actor, liable at any time to arrive at some individualistic perception of the 'public interest' and act accordingly."<sup>47</sup> Recognizing the likelihood of government attorneys becoming "influenced by some unique and personal vision of the 'public interest,'" the committee concluded that the "'public interest' was too amorphous a standard to have practical utility in regulating lawyer conduct or in providing ethical guidance."<sup>48</sup>

Many scholars who advocate the notion that government attorneys serve the public interest also fail to properly address the fact that there are different types of positions for which lawyers are employed by the federal government.<sup>49</sup> For instance, falling under the general description of "govern-

45. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294-95 (1987). In fact, because of the "transcendental" nature of what the public interest may be, Professor Miller believes that government attorneys' representation of the public interest is "incoherent." *Id.* at 1294.

46. D.C. Report, *supra* note 37, at 54.

47. *Id.*

48. *Id.* The public interest is a "vague and meaningless abstraction." Douglas Sale, *The City Attorney's Relationship with Council and Staff: Determining Who is the Client in Day-to-Day Affairs*, 11 CURRENT MUN. PROBS. 10, 11 (1984). See also William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986) (holding that when a government lawyer uses the public interest approach to decide for herself which conflicting point of view to represent, she decides what the public interest is, and in such a case, she is not a lawyer representing a client but a lawyer representing herself).

49. See generally Donahoe, *supra* note 42, at 987-88 (discussing the importance of government attorneys serving the public interest). Several authors support this view. See Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966); Fahy, *supra* note 40, at 331; Josephson & Pearce, *supra* note 48, at 564.

ment lawyers" are the Attorney General, the Office of Legal Counsel, Department of Justice attorneys, which include, among others, both prosecutors and defense attorneys, legal advisors of different executive agencies, and of course, the White House Counsel. Although they are all government lawyers, the functions they serve vary greatly.<sup>50</sup> In order to determine the ultimate interests which a particular government lawyer serves, it is also necessary to take into account the duties performed by the lawyer.<sup>51</sup>

## B. SEPARATION OF POWERS AND CHECKS AND BALANCES

Long ago, the American people chose to be governed by a system of government that did not oppress its people. Rather, the American people sought a form of government that would promote the ideals of democracy through representation. In response, the framers of the Constitution created three branches of government so that "tyranny" from an accumulation of all governmental powers in the same hands would be avoided.<sup>52</sup> The constitutional doctrine of separation of powers, along with an elaborate system of checks and balances among the three governmental departments, provides a necessary dynamic tension of opposing forces; here, ambitions are made to counteract ambitions, thereby achieving desired stability and safeguards within the government.<sup>53</sup>

For these reasons, Professor Miller suggests that the proper identification of the interest served by a government attorney depends on an analysis of the role of the attorney within the framework of separation of powers and checks and balances.<sup>54</sup> Professor Miller reasons that if attorneys could independently substitute for the views of their agencies a personal and

50. For discussion of how lawyers serve in varied capacities, see Donahoe, *supra* note 42; Weinstein, *supra* note 49; Fahy, *supra* note 40; and Josephson & Pearce, *supra* note 48.

51. *Opinion* 73-1, *supra* note 39, at 72. The Federal Bar Committee stated: "The client problem also divides according to the duties involved. There is the government lawyer who is designated to represent another in government service against whom proceedings are brought of a disciplinary, administrative or personnel character. . . . The more usual situation . . . is that of the lawyer who is a principal legal officer of a department, agency or other legal entity of the government, or a member of the legal staff of the department, agency, or entity." *Id.*

52. Miller, *supra* note 45, at 1296 (citing *Federalist* 47).

53. Miller, *supra* note 45, at 1296. "To prevent the gradual concentration of powers in a single department, therefore, it was necessary to give to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *Id.* (quoting *Federalist* 51). See also Abraham D. Sofaer, *Separation of Powers and the Use of Force in THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* 16 (L. Gordon Crovitz & Jeremy A. Rabkin ed., 1989) [hereinafter *FETTERED PRESIDENCY*] ("Actually, the Constitution is more than an invitation to struggle. It is a license to do so, which the framers expected and intended to be used, even at the cost of efficiency and effectiveness. The framers had a higher priority — the prevention of tyranny").

54. Miller, *supra* note 45, at 1294.

subjective sense of the public interest, a disorganized and inefficient government would result.<sup>55</sup> It is imperative, therefore, that government attorneys recognize the public interest sought to be served by "the governmental organization of which he is a part."<sup>56</sup> Simply advocating that government attorneys serve a nebulous notion of the public interest fails to place the attorneys within the structure of our democratic government.<sup>57</sup>

As a result, it is not the responsibility of a federal agency attorney to represent the interests of Congress or the judiciary, because those departments have their own means of protection.<sup>58</sup> Indeed, Congress has its own opportunities to check the powers of the President, so it does not need "the allegiance of agency attorneys to fulfill its constitutional functions."<sup>59</sup> The powers of Congress over the President include the powers of the purse, oversight investigation, and impeachment.<sup>60</sup> Likewise, the judiciary has the power to decide controversies presented to it and, in some cases, to order the executive branch to take or refrain from taking specific actions.<sup>61</sup>

In light of the powers possessed by the legislative and judicial branches of government, the President clearly has a substantial interest in maintaining the powers of the executive branch.<sup>62</sup> Justifiably, the President is entitled to

55. *Id.* at 1295 ("If attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its own government").

56. *Opinion 73-1*, *supra* note 39 at 72. The government lawyer must observe "in the performance of his professional responsibilities the public interest sought to be served by the governmental organization of which he is a part." *Id.* Another commentator states:

[T]he priorities that a lawyer should attach to each of his responsibilities to various government entities depends, not on some vague and misleading notion about the identity of his "real" client, but rather on how his performance of these responsibilities will affect the obligation of the government to serve the public interest.

*Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1414 (1981) [hereinafter *Developments*].

57. Miller, *supra* note 45, at 1295. See also Josephson & Pearce, *supra* note 48, at 565 (holding that the "requirement inherent in the public interest approach that the government lawyer determine the public interest is counter to representative democracy").

58. Miller, *supra* note 45, at 1296. "Agency attorney" refers to attorneys employed by the executive branch of the federal government, as opposed to the legislative and judicial branches.

59. *Id.*

60. *Id.*

61. *Id.* Since Supreme Court opinions are backed by substantial institutional prestige, the executive branch may suffer political costs and lose credibility by not complying with the Court's decisions. *Id.* at 1297.

62. The confrontations among the three branches of government have been described as "largely a jockeying over positions. . . ." Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 464 (1987). "Each branch has repeatedly pressed its powers as far as the other allowed or was unable to prevent. Competition for authority — the struggle for control — has been a persistent characteristic of American government." FETTERED PRESIDENCY, *supra* note 53, at 17.

the best legal advocacy of his lawyers in order to protect the powers of the executive branch from encroachment by Congress or the judiciary. The "constitutional system presumes — indeed, depends upon — the institutional loyalty of its lawyers."<sup>63</sup>

Accordingly, the agency attorney serves the interests of the officer who has the decision-making authority.<sup>64</sup> Professor Miller states that the attorney's obligation runs to the executive branch as a whole and to the President as its head.<sup>65</sup> As such, it seems only appropriate to consider the White House Counsel's client to be the President in his official capacity. Not only is the President the head of the executive department, but the White House Counsel is also generally regarded as one of the President's three lawyers, along with the Attorney General and the President's private lawyer.<sup>66</sup>

In view of the considerations raised by the separation of powers doctrine and the federal government's system of checks and balances, it is evident that the Constitution requires the White House Counsel, an agency attorney, to serve the interests of his immediate client, the President.<sup>67</sup> In order for the White House Counsel to ultimately and faithfully serve the public interest, from which all governmental powers are derived, the counsel must recognize, within the context of separation of powers and checks and balances, his role as the President's lawyer.<sup>68</sup> Certainly, if a policy of the President's is not properly represented by his counsel, the President's constitutional powers will be "blunted," thereby undermining the very purpose for which the doctrines of separation of powers and checks and balances were created.<sup>69</sup>

In consideration of the long term welfare of the executive branch's

63. Miller, *supra* note 45, at 1296.

64. *Id.* at 1298. See also *id.* at 1297 n.7 (holding that the responsibility of an agency attorney is to represent the interests of the officer who has the legitimate power to decide upon the course of action); *Opinion 73-1*, *supra* note 39 (holding that the client of the federally employed lawyer is the agency where he is employed); *D.C. Report*, *supra* note 37, at 54 (concluding that the employing agency should in normal circumstances be considered the client of the government lawyer).

65. Miller, *supra* note 45, at 1298.

66. Bendavid, *supra* note 17, at 1.

67. Fein, *supra* note 44, at 406.

68. See *id.* Fein contends that "ethical imperatives derived from our constitutional system of representative government and separation of powers obligate the government attorney to devote virtually unreservedly his legal talents and insights towards advancing the policies of the President through legal advocacy." *Id.* at 408. He states further that "[w]ithin the Executive Branch, the government attorney is emphatically a servant of the President." *Id.* at 408.

69. *Id.* at 408. Fein contends that: "If the ethical obligation of the [President] is not faithfully discharged, then the electoral system is mocked, the President's ability to implement his policies could be stymied, and unelected lawyers in the Executive will be censurable for disdaining the will of the people." *Id.* at 406.

As President Franklin Roosevelt declared:

The essential democracy of our Nation and the safety of our people depends upon . . . lodg-

powers, the President's need for the White House Counsel's representation becomes decisively more compelling. Commentators such as Robert H. Bork have argued that the power of the Presidency has been significantly weakened in recent years, mainly because of Congress.<sup>70</sup> The concern is that, since recent Presidents have failed to defend their office's prerogatives, Congressional encroachments upon the executive's powers may become permanent.<sup>71</sup> Furthermore, it has also been maintained that there is a trend towards increased controversy and litigation over separation of powers issues.<sup>72</sup> In light of these recent significant concerns affecting the executive branch, it is even more important for the President to have the benefit of a lawyer who serves, not the government as a whole, but rather the particular interests of the President, as mandated by the separation of powers doctrine.<sup>73</sup>

Hence the view advanced by some commentators that the client of the government attorney is the government as a whole is clearly incorrect, for it fails to recognize the balance of forces constitutionally established among the three branches of the government.<sup>74</sup> The government attorney cannot successfully perform his duties in the government without first determining the role he serves within a system of government delineated by separation of powers and checks and balances.<sup>75</sup> The most logical conclusion, therefore, is that the White House Counsel should serve the interests of the President.

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ing [power] with those whom the people can change or continue at stated intervals through an honest and free system of election.

President Franklin Delano Roosevelt, Second Inaugural Address, January 20, 1937 in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989* 275 (U.S. Gov't Printing Office, 1989).

70. *FETTERED PRESIDENCY*, *supra* note 53, at ix.

71. *Id.* (alleging that Presidential failures to defend the office's prerogatives may allow Congress to "establish easements across the constitutional powers of the Presidency that time and use may make permanent"). See also *Id.* at 211 (maintaining that in order for the United States to compete internationally in the future, the executive must be able to "reassert its constitutional role").

72. Geoffrey P. Miller, *Symposium: Separation of Powers and the Executive Branch: The Reagan Era in Retrospect: From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 *GEO. WASH. L. REV.* 401, 402 (1989) (observing that there had been significant tension between the political branches during the Reagan era).

73. See Miller, *supra* note 45, at 1296 (stating that the notion that an agency attorney serves the government as a whole is misplaced, because it fails to situate the attorney within a system of separation of powers and checks and balances).

74. See *id.* at 1295-96 (arguing against the view that an agency attorney serves the government as a whole); *D.C. Report*, *supra* note 37, at 55 (holding that the identification of the government attorney's client as the entire government would raise serious questions regarding client control and confidentiality). The D.C. Bar Special Committee concluded that defining the client of a government lawyer as the government, or even a particular branch thereof, suffered from the same essential deficiencies as the public interest approach. *Id.*

75. *Id.*

### III. SERVING PRESIDENTIAL INTERESTS

#### A. PRESIDENTIAL INTERESTS

Agency attorneys serve the agency where they are employed.<sup>76</sup> This is not in contradiction with the basic notion that the government and its attorneys derive their power from the people, their ultimate clients.<sup>77</sup> In other words, government attorneys serve the public interest.<sup>78</sup> Any other behavior on the part of the agency attorney would in fact violate the public confidence in the political processes of the federal government. It is through political processes generally accepted as legitimate that the federal government succeeds in analyzing and defining the public interest.<sup>79</sup> These generally accepted political processes by which the public interest may be determined are constitutionally established and include elections, appointments and legislation.<sup>80</sup>

In particular, the executive branch is headed by the President, a public servant elected by the people. From the people, he has been constitutionally entrusted with the power to advance the public policies and reforms he has envisioned for, and shared with, the nation.<sup>81</sup> The public interest is defined when the people express their opinion of the President's ideas by participating in the electoral process. The "constitutional right of the people to self-government, and to control the course of public policy" is preserved through "the exercise of the franchise."<sup>82</sup>

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76. Josephson & Pearce, *supra* note 48, at 565.

77. *Id.*

78. *Id.* See also Miller, *supra* note 45, at 1295. Miller explains that:

[a]lthough the public interest as a reified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation and legislation. Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.

*Id.* at 1295.

79. See *Developments*, *supra* note 56, at 1414 (noting that "one of the principal purposes of [our] government is to provide a set of institutions that analyzes and defines the public interest").

80. Miller, *supra* note 45, at 1295; *Developments*, *supra*, note 56, at 1414.

81. See Fein, *supra* note 44, at 408 (noting that the President is "constitutionally endowed with authority to seek to advance his public policy preferences"). The President's policies may be advanced through proposed legislation, issuance of rules or regulations, law enforcement strategies, or unilateral actions regarding foreign policy or national defense. *Id.*

82. *Id.* at 408. See also Catherine Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 *S. CAL. L. REV.* 951, 1015 (1991) Lanctot contends that:

Ultimately . . . in the American political system, the decision as to which governmental action will benefit 'the people' or 'the public interest' is vested in elected officials or those to whom they have delegated their decision-making authority. Once that policy decision has



Stemming from this reality is the imperative that the White House Counsel must faithfully strive to support the policies and programs espoused by the President in order to preserve the public interest.<sup>83</sup> After all, a President must be able to successfully defend his actions if he is to have any significant role in shaping and implementing public policy.<sup>84</sup> As one commentator has observed, the agency attorney is a servant of the President through the agency in which he serves, and "[n]either the Constitution nor the electorate has entrusted the government attorney with an independence to determine what policies are enlightened or advance the cause of justice, and to dedicate his legal talents to furthering his personal public policy desires."<sup>85</sup>

Consequently, if the White House Counsel fails to faithfully support the President's policies, "the President's constitutional powers will be blunted, and the will of the electorate [will be] thwarted."<sup>86</sup>

Not only does the loyalty of the White House Counsel preserve the President's abilities to serve the people, and consequently maintain the public trust, the White House Counsel's legal advice also enables the President to successfully safeguard the country's vital interest in national security. Protecting this national interest within an international arena of strong and numerous potentially aggressive forces requires a President through whom steps taken in the interest of national security can be effectively carried out.<sup>87</sup> According to David Sadofsky, the Founding Fathers felt that "the executive would provide the virtues of secrecy, strength, and dispatch in government. These virtues [are] considered necessary to secure the safety of the union."<sup>88</sup>

In the areas of international affairs and defense, the President has a "particularly strong role," and secrecy is often necessary when the success of certain governmental steps taken to secure the nation may be precluded

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been made, the government lawyer may ethically defend it, even if the lawyer believes that the public interest will not be served by that decision. The government lawyer, after all, is not employed by the federal government to represent personal interests, and it is virtually impossible for anyone to determine where a neutral view of the 'public interest' ends and one's own personal opinions begin.

*Id.* at 1015.

83. For discussions supporting the view that government attorneys most effectively serve the public interest by supporting the President's agenda, see *id.*; Fein, *supra*, note 44, at 406; Miller, *supra*, note 45, at 1295; and *Developments, supra*, note 56, at 1414.

84. Fein, *supra*, note 44, at 406.

85. *Id.* at 408.

86. *See id.*

87. FETTERED PRESIDENCY, *supra*, note 53, at 38 (quoting J. William Fulbright in 1961).

88. DAVID SADOFSKY, KNOWLEDGE AS POWER: POLITICAL AND LEGAL CONTROL OF INFORMATION 70 (1990).

or severely hampered by disclosure.<sup>89</sup> In these situations, the President "has traditionally been permitted to invoke executive privilege against [disclosure to Congress] under the theory that secrecy is incompatible with knowledge by so numerous . . . a body."<sup>90</sup>

As legitimate as the President's reasons are for secrecy in certain executive affairs, there is the potential for abuse when it becomes clear that secrecy and invocation of the executive privilege remove the particular executive activities from review by the other two branches of government. By removing such executive actions from the constitutionally established system of checks and balances, the potential for Presidential abuse of powers cannot be checked.<sup>91</sup>

For instance, one type of secrecy employed by the executive is classification: a legitimately recognized process of removing sensitive government materials from open access in the interest of national security.<sup>92</sup> The potential for abuse of the classification system, however, was demonstrated by the exposure of the Pentagon Papers.<sup>93</sup> In violation of classification restrictions and possibly criminal espionage laws, Daniel Ellsberg and Anthony Russo delivered copies of a Department of Defense study to the New York Times, the Washington Post, and Arkansas Senator William Fulbright. This study revealed that the "government had deliberately misled the public for several years about the nature and extent of [U.S.] involvement in Southeast Asia."<sup>94</sup>

The disclosure generated controversy over whether the study was appropriately classified, and thus shielded from the public. Moreover, the disclosure also undermined the credibility of the government as well as public confidence, because many believed that the study did not contain any matters of national security and was classified for purely political reasons.<sup>95</sup> In the case that arose from these facts, Justice Stewart, in his concurring opinion wrote: "When everything is classified then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and

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89. *Id.* at 76.

90. *Id.*

91. *Id.* at 89 ("Limited secrecy is a means to defense and security. Pervasive secrecy is a means toward bureaucratic-executive rule in sharp disharmony with the separation of powers and popular sovereignty").

92. *Id.* at 82.

93. See *New York Times v. United States*, 403 U.S. 713, 729 (1971) (addressing the controversy over unauthorized disclosure of classified documents).

94. STEPHEN DYCUS, ET AL., NATIONAL SECURITY LAW 634 (1990).

95. *Id.* at 635 (noting that the Pentagon Papers and Watergate possibly "irreversibly changed the relationship between citizens and government — from one of trust to one of skepticism, if not distrust"); SADOFSKY, *supra*, note 88, at 85.

to be manipulated by those intent on self-protection or self-promotion."<sup>96</sup>

Likewise, the potential for abuse is also present in the President's claim of executive privilege. The concept of executive privilege is based on several legitimate justifications for resisting disclosure of information either to the public or to the other two branches of government.<sup>97</sup> One justification is that disclosure would endanger national security.<sup>98</sup> A second justification is that the information consists of names of informants or the status of investigations so that disclosure would hinder law enforcement.<sup>99</sup> A third justification for invoking the executive privilege is that the information consists of "intra-branch deliberative communications, disclosure of which would chill the candor and usefulness of such communications."<sup>100</sup>

The claim of executive privilege invoked by President Nixon during the Watergate scandal illustrates the potential for abuse of this privilege. In response to a subpoena duces tecum for certain Oval Office tapes of President Nixon's conversations, the President refused to turn over the tapes, claiming that the conversations were confidential and were thus protected by a claim of executive privilege.<sup>101</sup> Senator Fulbright criticized use of the executive privilege to achieve presidential suppression of information, labelling it a "repudiation of the very concept of government of checks and balances."<sup>102</sup>

In the legal case that arose from the scandal, the Supreme Court held that when the privilege is dependant solely upon a broad claim of public interest in the confidentiality of the conversations, the privilege is not absolute, and that an in camera inspection of the conversations would be permissible.<sup>103</sup> The Court, however, did not suggest that in camera inspections would be appropriate when a President's claim of executive privilege rested on

96. *New York Times*, 403 U.S. at 729.

97. *DYCUS*, *supra* note 94, at 84.

98. See *United States v. Reynolds*, 345 U.S. 1, 10 (1952) (holding that a claim of privilege should be honored when the government has satisfied the court that disclosure would jeopardize national security).

99. See generally Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1246 (1983).

100. *DYCUS*, *supra* note 94, at 84.

101. *United States v. Nixon*, 418 U.S. 683, 688 (1974).

102. *SADOFSKY*, *supra* note 88, at 89.

103. *Nixon*, 418 U.S. at 706. The court opined that:

However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

*Id.* at 706.

national security interests.<sup>104</sup> Thus the potential for abuse by the President of the executive privilege powers remains, raising the concern that a President might incorrectly invoke a claim of executive privilege on national security grounds.

As a result of these risks, the President has a critical need for competent legal advice and representation by his lawyers in the area of national security. Although the President has a number of legal advisors in various agencies dealing with national security matters, the need for competent legal advice from the White House Counsel is not diminished. With the exception of the President's private lawyer, the White House Counsel, and the Attorney General, each of the President's legal advisors serves the interests of their respective agency. Thus, it is not unlikely that the legal advisors from these various agencies may often differ in opinion as to the right course of action a particular situation mandates.

Furthermore, the President's private lawyer handles his private affairs, and the Attorney General heads the Department of Justice and manages a multitude of litigation matters in addition to advising the President. Since the White House Counsel is not partial to any agencies in particular, the President can be more confident that the advice of his counsel would not be motivated by any agency's undue influences.

Moreover, since the President is entrusted with the vital interests of the United States and its people, the fact that the President may be equipped with more than a single opinion on the legality of certain courses of action does not seem to be onerous. In fact, such a process would seem to be preferable, since executive actions, especially secret ones, that have received the approval of several legal advisors would more likely be legitimate in the eyes of the public.

Correspondingly, the White House Counsel must loyally support the policies of his President. Such an arrangement places the counsel within the correct constitutional confines of balance of powers within the federal government. More importantly, the public interest, including the interest in national security, is ultimately protected when the White House Counsel fulfills his duty as a faithful legal advisor to the President.<sup>105</sup>

#### B. DEFINING THE WHITE HOUSE COUNSEL'S DUTIES

By faithfully serving the interests of the President, the White House Counsel is only abiding by legal and ethical duties required by the bar. Government lawyers are subject to the code of ethics of the state bar of which they are members; thus they usually are subject to some version of the

104. *Id.*

105. See *Fein*, *supra* note 44, at 408.

*Model Rules of Professional Conduct (Model Rules)* or *Model Code of Professional Responsibility (Model Code)* as adopted by that state.<sup>106</sup> Accordingly, government lawyers are under an ethical obligation to comply with their client's instructions.<sup>107</sup> As the comment to *Model Rule* 1.2 states, "The client has the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."<sup>108</sup>

Some commentators have remarked that by becoming a member of the bar, the government lawyer is not endowed "with a power of life and death over the agency he serves."<sup>109</sup> As the head of an agency, this individual takes his own oath of office, becoming accountable "to the inscrutable forces of public opinion."<sup>110</sup> Thus in carrying out his responsibility to decide policy, the President looks to the White House Counsel's legal advice as one of his strongest supports, but the lawyer's advice "can never usurp the decision which must be made by the responsible head of the agency."<sup>111</sup> As previously discussed, if the counsel does not comply with the President's decisions, the functioning of the electoral process is hampered.<sup>112</sup>

Furthermore, as the President's lawyer, the White House Counsel has the duty to zealously advocate the interests of his client, the President.<sup>113</sup> It has been suggested that the constitutional framework requires the government attorney to devote "virtually unreservedly his legal talents and insights" towards promoting the policies of the President through legal advocacy.<sup>114</sup> Indeed, the agency attorney has a responsibility to provide "unremitting assistance" through legitimate legal arguments to the President "in further-

106. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter MODEL CODE]. The *Model Rules* Preamble states that "[e]very lawyer is responsible for observance of the Rules of Professional Conduct." MODEL RULES pmbl. See Miller, *supra* note 45, at 1294 n.1 (noting that government lawyers are subject to their respective state codes of ethics).

107. Josephson & Pearce, *supra* note 48, at 563.

108. MODEL RULES Rule 1.2 cmt. Likewise, Ethical Consideration 7-7 of the *Model Code* states that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." MODEL CODE EC 7-7.

109. Josephson & Pearce, *supra* note 48, at 569.

110. *Id.*

111. *Id.* (citing Corlock, THE LAWYER IN GOVERNMENT LISTEN TO LEADERS IN LAW 255, 268-69 (A. Love & J.S. Childers ed., 1963)).

112. See also Lancot, *supra* note 82, at 1015 (holding that a government lawyer may ethically defend the policies of elected officials even if the lawyer believes that the public interest will not be served by that policy).

113. *Id.* at 955; Fein, *supra* note 44, at 408. The *Model Rules* preamble provides: "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." MODEL RULES pmbl.

114. Fein, *supra* note 44, at 406.

ance of the policies championed by the President."<sup>115</sup> In light of the fact that the White House Counsel's advocacy of the President ultimately serves the public interest, the zealotry with which he is to carry out these responsibilities would seem to correspond very well with his ethical duties.<sup>116</sup>

Moreover, the White House Counsel's faithful representation of the President requires the same degree of protection, in the form of confidentiality and attorney-client privilege, as that in private representations.<sup>117</sup> The comment to *Model Rule* 1.6 states explicitly that "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."<sup>118</sup>

The rationale for preserving client confidences is to encourage open communications between the client and his attorney so that the attorney may most effectively represent his client. Like the private client, the government client must have a reasonable belief in the confidentiality of his communications to his lawyer in order to encourage "free and full communications."<sup>119</sup> The President has an even greater need for confidentiality in his communications with the White House Counsel, as evidenced by the general power of the President to invoke a claim of executive privilege. In addition to the national security interests discussed earlier, the President must be able to explore all the options available in the process of shaping policies, including those that "many would be unwilling to express except privately."<sup>120</sup> In weighing the merits of President Nixon's claim of executive privilege, the Supreme Court observed:

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.<sup>121</sup>

115. *Id.*

116. See Lancot, *supra* note 82, at 958 (noting that "if one believes in the preeminent role of zeal in the adversary system, one should also believe in zealous advocacy by all participants, including government lawyers").

117. *Model Rule* 1.6 states that "A lawyer shall not reveal information relating to representation of a client unless the client consents . . ." MODEL RULES Rule 1.6. See also MODEL RULES pmbl. (noting that "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private").

118. MODEL RULES Rule 1.6 cmt.

119. D.C. Report, *supra* note 37, at 54.

120. United States v. Nixon, 418 U.S. 683, 708 (1974).

121. *Id.* at 708.

Thus it is evident that the White House Counsel complies with his ethical duties as long as he provides the essential confidentiality for his communications with the President. Moreover, the White House Counsel's faithful adherence to the policies of the President and his zealous advocacy of those policies are imperative when, in light of the public interests involved, any other behavior would be improper.

#### IV. POLITICAL ACCOUNTABILITY

Although the White House Counsel is a legal advisor of the President, many people have associated the position with a substantial degree of political responsibility.<sup>122</sup> Nevertheless, when Lloyd Cutler was appointed as White House Counsel by President Clinton, Cutler pledged that he would do everything he could to "assure that trust is maintained."<sup>123</sup> It would seem that this level of trust is only possible when the President and the public he represents are assured that the White House Counsel's legal advice will not be influenced by the often ambiguous political consequences of giving such advice in difficult circumstances.

After all, when the White House Counsel must be both a legal advisor and a "political operator," his loyalties become divided. On the one hand, he is called to faithfully serve the President by informing him of all the legal possibilities available. On the other hand, the White House Counsel is concerned with the political ramifications that he himself — not to mention the President — would suffer if certain legal avenues are chosen by the President. In other words, the counsel may be legitimately concerned that his job is on the line. Clearly, the White House Counsel struggles between two loyalties: his duty as a lawyer, with the requisite legal and ethical duties demanded by the bar, and his duties as a political appointee in a highly politicized environment. The President as well as the public interest may suffer the consequences of such conflict as the lines between politically astute and legally sound advice blur.

This reality is enhanced by the fact that the President has a multitude of political advisors whose main objectives are to direct the President's actions towards the most politically acceptable. In this light, it becomes quite clear that the President cannot afford to have the White House Counsel influenced by political motives at the cost of losing much needed impartial legal advice. This idea is best expressed by legal ethics expert Professor Stephen Gillers when, in discussing the events that led to Nussbaum's resignation, he

122. See Marcus & Devroy, *supra* note 10, at A1 (suggesting that Nussbaum did not appreciate how actions are viewed in a political as well as legal light inside the White House); Marcus & Balz, *supra* note 11, at A1 (noting criticism that Nussbaum lacked the kind of political judgment required of a lawyer in the counsel's post).

123. *Id.*, *supra* note 12, at A1.

said, "While the [P]resident needs a lawyer, the [P]resident does not need a lawyer who is also a pol[itician]." <sup>124</sup> As Nussbaum has revealed, requiring the White House Counsel to fulfill both legal and political functions diminishes his ability to do either. <sup>125</sup>

#### CONCLUSION

All governmental powers are derived from the American people, who have decided that they are to be governed by a federal government conceived by the Constitution. Hence, all government employees, including the President and his lawyer, must ultimately answer to the people. This public interest is defined by the Constitution in the form of three branches of government, their separation of powers, and the checks and balances existing among the branches.

The White House Counsel must serve the public interest by accepting his role within the delicate framework established by the Constitution. He achieves this trust by faithfully advancing the policies of the President, whose very election is an expression of the public interest. The legal advocacy provided by the White House Counsel is especially important in the area of national security, where the President is often compelled to protect the national interest by decisions and actions necessitating secrecy.

Such loyalty to the President's policies does not violate the White House Counsel's legal and ethical duties as a lawyer. Indeed, allegiance to the President's policies requires adherence to those same duties. Imposing political accountability directly on the White House Counsel, however, impedes his ability to faithfully advocate the President's interests.

This discussion will hopefully aid future White House Counsels to faithfully perform the duties of their office without placing themselves in the unfortunate circumstances many previous counsels have experienced.

124. Stephen Gillers, *Divided by Duality: Requiring the White House Counsel to Be Both Legal Adviser and Political Operator Diminishes the Ability to Be Either, as Bernard Nussbaum Discovered the Hard Way*, THE RECORDER, Mar. 22, 1994, at 7.

125. *Id.*

For Lloyd  
Cutler

Free  
Crime  
Bill

- B.  
(Brooke  
Shearer)

# MU Marquette University

34 SEP 2 P7: 11

Milwaukee, WI 53233  
414-224-7089  
August 27, 1994

Dear Brooke:

I am glad the President was so pleased over his "victory" on the crime bill. It is well that he savor it now as the problems have not surfaced fully as yet--even though they are beginning. There is a tremendous difference between enacting a bill and administering the law that is created by the bill. The administration of the bill is much more important to his political future than the rhetoric we have been suffering for the past few weeks.

One of the greatest problems is that the bill was not really debated by the public. The media presented the struggle in terms of its impact upon the President's political fortunes. Therefore, the news stories took on the coloration of a forensic horse race. This is extremely important. One of the values of public debate on a fundamental piece of legislation is that it affords clues on how the American people will react should the bill become law. There are no such clues now.

Some of the real subjects that should have been debated are surfacing now that the measure has been passed. This morning's MILWAUKEE SENTINEL has a front page story quoting the Executive Director of the Wisconsin Counties Association as claiming that the law will lead to an increase in property taxes. I do not know enough about the bill to pass judgment on his assertion but property taxes are a major political factor in this state and something should have been said about that issue before the bill was passed.

The SENTINEL also carries a story quoting Jesse Jackson who attacks the President for selling "a Draconian crime bill as a wolf in sheep's clothing". He also describes it as "a combination of Kool-Aid and cyanide, more jails, more sentences, and 60 more ways to electrocute". Jesse does not say so directly but he is obviously hooking on to a fear of many Blacks that the crime issue is merely a disguised form of racism and that the penalties in the bill will be directed against them. He is getting set to run for President again and while his chances of succeeding cannot be taken seriously, it would be foolish to underestimate the damage he can do to the President and the Democratic Party.

The mandatory sentencing and the death penalties disturb many people, including me. It is inevitable that they will result in some horrors where men and women can be sent to jail for comparative minor offense and possibly even executed. It is a mistake to withhold discretionary powers from judges when it comes to sentencing. By the way, will the President throw the switch on the first person to be killed legally in the execution of the 60 new capital offenses? Many people would consider that to be appropriate.

I hope that the President will set up a blue ribbon group--composed half of political experts and half of both experienced administrators and lawyers--to study the practical problems of converting the measure into real law. It would be a mistake to make any moves until the group has completed its studies. I also hope he will stop bragging about how "tough" the bill is and, by inference, bragging about how "tough" he is.

"Tough" is a synonym for brutality employed by people who have never lived where toughness is a part of everyday life. I wish some of them had grown up where I did. They would not find the word "tough" so attractive.

Sincerely

A handwritten signature in cursive script, appearing to read "George".

Brooke Shearer, Director  
THE PRESIDENT'S COMMISSION on  
WHITE HOUSE FELLOWSHIPS  
712 Jackson Place, N.W.  
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EXECUTIVE OFFICE OF THE PRESIDENT  
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(THIS IS A COPY OF MESSAGE SENT TO PRESIDENT CLINTON)  
DEAR PRESIDENT CLINTON  
THANK YOU FOR YOUR LEADERSHIP IN GETTING THE CRIME BILL PASSED. IT  
IS OF PARTICULAR IMPORTANCE TO ALL OF US WHO ARE INTERESTED IN  
HELPING TO PREVENT THE NATION'S CHILDREN FROM USING DRUGS.  
JIM BURKE  
PARTNERSHIP FOR A DRUG-FREE AMERICA (212) 973-3514  
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FAX SHEET

*Crime*

TO: The Honorable LLOYD CUTLER

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**FINAL EDITION**

# The Miami Herald

Friday, August 19, 1994

## Approve the crime bill

**A**fter more than a little horse-trading, the Clinton administration now believes that it will have enough votes to pass a patched-up version of its \$33 billion anti-crime bill. No amount of quick fixing could have turned this jumble of initiatives into an ideal law. But for all the amended bill's rough edges, killing it would do far more harm than enacting it. The House — including South Florida's three Republican members — has good cause to focus on the bill's strengths, tolerate its flaws, and vote Yes.

Killing the bill would, among other things, hand a revivifying victory to those in the national gun lobby who believe that there is some absolute constitutional right to own assault-type weapons. By that tortured reasoning, there ought to be an inalienable right to own grenade launchers, too. Naturally, no court has ever recognized such a right, nor should it. The assault-weapons ban is as needed as it is despised by the gun-owners' radical fringe.

Besides banning the most murderous weapons, the bill would provide between 80,000 and 100,000 police officers for high-crime areas. By White House estimates, 5,400 of those would be in Florida. It would supply cells for more than 12,000 new prisoners here, plus another 13,000 beds for undocumented immigrants.

The most short-sighted objections to the bill have come from those opposed to its crime-prevention efforts. While a few wasteful projects sneaked in among those, and now reportedly have been removed, the majority are reasonable and necessary. They range from education and training to social and athletic programs. The latter, such as midnight basketball leagues, have been wrongly derided as feel-good amusements. In fact, they have shown a promising knack

### DESPITE ITS FLAWS

**The bill's enemies seek to kill it, not fix it. If they win, its best features will be doomed.**

for luring unsupervised and antisocial teens into circles of positive influence.

Yes, the bill goes wild in turning dozens of state crimes into federal ones (it will now be a federal crime, for instance, to harass

anyone hunting on federal property). That's a great way to clog the federal courts further without curtailing crime much. It heroically imposes death penalties on crimes, such as causing a train wreck, that are unlikely to threaten many people. That's a fine way to talk tough while doing almost nothing.

And it imposes a catchy-sounding "three strikes and you're out" rule, mandating an automatic life sentence when a third serious felony is federal. That's sure to clog federal prisons while turning some of them into elder-care facilities.

One could lament all these provisions and wish for a thorough rewrite of this bill — as we have done several times in this space. But it is clear now that no rewrite will be forthcoming. In fact, its enemies offer no improvements, and probably would make it far worse. Some of them — including South Florida Reps. Ileana Ros-Lehtinen and E. Clay Shaw — actually supported the bill the first time it came to a House vote. They then took part in a parliamentary antic designed to keep it from facing a final vote. That hypocrisy, all too typical of Washington, squanders any credibility that they may have had on this issue.

As debate nears an end, the only provisions under serious assault are two of the bill's strengths: the ban on assault-style weapons and the support for crime prevention. If the bill is defeated, those provisions aren't likely to be resuscitated. Nor would help for police or prisons resurface any time soon. Those advantages, urgently needed and responsibly provided for in this bill, are reason enough to support it despite its flaws.

# Crime Bill Foes Take Shots At Midnight Basketball

By Joe Donnelly  
Washington Post Staff Writer

BASKETBALL, From A1

The 10th-seeded Laurel Bridge Club clawed through the playoffs and was set to battle the regular-season champs for the league championship. The competition and camaraderie, not to mention the good-natured trash talk, had the nearly 200 in attendance buzzing.

Only for a moment, as a woman recited a prayer through a microphone, did the crowd grow silent. "Lord, will you also remember those who are not in attendance, those who were cut down in the prime of their lives," she prayed, her voice reverberating around Bowie State University's gym Tuesday night.

This is Midnight Basketball, a national program started in Glenarden to give young men an alternative to late nights on the streets, to keep them from getting killed and other perils.

In the final seconds, the underdog Laurel Bridge Club lost to the Richmond American Raiders, 84-80. But in the words of a supporter, "The last thing Midnight Basketball is about is basketball."

"It's about providing opportunity for young adults to escape drugs and the streets and get on with their lives," President George Bush said in 1991, when he named it his 124th Point of Light.

In recent days, Midnight Basketball has become the buzzword used to criticize the \$7 billion in crime prevention programs that are part of President Clinton's \$30 billion crime bill. Final action on the bill was stalled last week after Republicans attacked the funds for prevention programs as excessive.

In House debate, several called the bill's \$40 million dollar commitment to nighttime sports leagues (funding would begin with \$5 million in fiscal 1996 and grow to \$10 million in fiscal 2000) the essence of political pork.

The Republican attacks appear to have been successful in winning a concession from Clinton to reduce social programs by 5 percent and to transfer that money into law enforcement. The move apparently would save most funding for nighttime sports leagues and allow the bill

See BASKETBALL, A16, Col. 1

to be put to both the House and Senate, perhaps by Saturday.

But for the "at-risk" youths the program is designed to help, Midnight Basketball embodies its slogan.

"The Alternative—this says it all," said Anthony Cowan, 24, Laurel Bridge Club's coach and a former player, referring to the league's slogan. "It gives us a choice. When I played, it taught me leadership and discipline."

"At the same time that I was playing midnight league," said Cowan moments before his team took the floor, "I had three of my friends get locked up. Who's to say that I wouldn't have been with them?"

This summer, Cowan, who works for Cellular One in Greenbelt and plans to begin work in the spring on a master's degree in business administration, coached until 2 a.m. three nights a week for token pay. "It's not really a money thing," Cowan said. "It's a love of the game and a love for the guys."

While "the guys" swear by the program, many Republican legislators are practically swearing at it.

"Our children do not need midnight basketball . . . our children need law enforcement, good jurisdiction, imprisonment for criminals and safety on their streets," Richard K. Armey (Tex.), chairman of the House Republican Conference, said last week.

Just miles from the political wrangling on Capitol Hill, however, midnight basketball began in 1986 as one worried town manager's response to escalating crime. By studying crime reports, G. Van Standifer learned that trouble in Glenarden increased during the summer months and that most of the crimes were committed between 10 p.m.

**Midnight basketball began in 1986 as one worried town manager's response to escalating crime.**

and 2 a.m. He devised the league as a way of getting young people off the streets and into something productive during those dangerous hours.

Standifer died in 1992, but his idea grew. Now, there are Midnight Basketball leagues in 50 cities across the country and in Puerto Rico. About 900,000 youths participate, according to Karen Standifer, his daughter-in-law. A national association based in Oakland was formed six months ago.

Stan Hebert, national director of Midnight Basketball Inc., said money in the crime bill would go toward establishing nighttime basketball leagues in more cities, fund expansion

of existing leagues—many of which have more people interested in playing than funds can support—and pay for uniforms, security, gym rental and educational program costs.

Although the program has gone national, it still bears the Standifer stamp. His son, Eric Standifer, is president of the national organization. Another son, Nelson, and Nelson's wife, Karen, are the eastern regional coordinators, as well as league commissioner and executive director, respectively. The league has become a full-time job they do in addition to their regular jobs. Nelson is paid \$3,000. Karen works for free.

Anyone who wants to start a midnight basketball league can get from the Standifers a free license to use the name and logo as long as "high-risk" youths are targeted and the program includes educational components that prepare players for life off, and out, of the courts.

Throughout the summer, the local league attracted 144 players and as many as 100 spectators three nights a week at facilities in Glenarden and Marlow Heights.

"The big question is, if they weren't here, where would they be? They are in a controlled, constructive environment," Karen Standifer said.

Prince George's Police Chief David B. Mitchell, who attended Tuesday night's finals along with Rep. Steny H. Hoyer (D-Md.), defends the program's capacity to reduce crime more directly.

"The first year it was implemented in Glenarden, in 1986, it reduced crime," said Mitchell, who has lobbied for the crime bill. "I can tell you this much. If it were not for Midnight Basketball, we would have greater violence in the communities where there is Midnight Basketball."

The program is designed to do more than sweep young people off the streets. It sneaks a little guidance in with its dose of diversion. Players are required to attend weekly workshops on everything from goal planning to sexually transmitted diseases.

Darnell Morrison, 19, whose team got knocked out of the playoffs, is vying for a scholarship donated by Lincoln Technical Institute in Landover. He hopes to learn auto mechanics and heating and air-conditioning maintenance. The scholarship is valued at \$10,000. Tesst Electronics also gives the program scholarships.

"I think I'm going to get it," said Morrison at halftime Tuesday night. "It's all on yourself. What you set your goals to be, you will be. . . . The Midnight League helps. . . . If they weren't in the Midnight League, they'd be in the streets," he said, referring to many of the players.

The local Midnight Basketball program gets by on a \$40,000 grant from Prince George's County and what the Standifers can scrape up in corporate sponsorships.

The Standifers say they have enough interest, but not enough funds, to double the local program.

Karen Standifer, dwarfed by the young men to whom she handed trophies and certificates Tuesday night, said the league here will continue, with or without crime bill dollars.

"We have been successful," she said. "We may not be able to grow as quickly. With it, we could offer our young men so much more."

# Favorable stories offered for votes

By Rod Dreher  
THE WASHINGTON TIMES

Desperate to win a House procedural vote on President Clinton's crime bill, the White House last week offered its public relations services to at least two House Republicans.

In advance of the vote, which the president lost, Rep. Peter G. Torkildsen received a phone call from a White House staffer promising to ask Boston Globe columnist Tom Oliphant to praise the Massachusetts Republican in exchange for his vote for the bill.

A follow-up note on White House stationery didn't mention Mr. Oliphant but repeated the basic offer.

"Should you decide to support the [bill], I want to reiterate that I will make calls to Boston media on your behalf," wrote Susan Brophy, who works in the White House legislative affairs office. "I know you are getting a lot of pressure. It is my belief that this is a good vote for you politically and substantively."

Mr. Torkildsen was unmoved and voted with the majority against the procedural rule last Thursday.

In Sunday's editions of the Globe, Mr. Oliphant lauded the vote of bill supporter Rep. Peter Blute, Massachusetts Republican, and condemned "the smarmy move of his GOP colleague," Mr. Torkildsen.

"I don't want to make assumptions, but a reasonable person might wonder if there was a connection," the congressman said yesterday.

Mr. Blute, in an interview last night on a Boston radio station, said Ms. Brophy made the same offer to him. "She said we can help you with the regional press up there, like the Globe," he told WHDH-AM.

Regarding the White House's Ms. Brophy's lobbying tactic, Mr. Torkildsen said: "I've never had it happen before, and I don't think any objective media outlet would want to be used that way as part of a lobbying campaign."

Neither Ms. Brophy nor Mr. Oliphant were available for comment yesterday.

H.D.S. Greenway, the Globe's editorial page editor, said there was no funny business afoot. The paper supported the crime bill and could reasonably be expected to criticize those who voted against it, he said.

Mr. Greenway said he never heard from Ms. Brophy but is not surprised by her offer to Mr. Torkildsen. "This is what lobbyists do, isn't it?" he said.

The White House staffer was not the only administration employee working the media angle to

## CRIME PREVENTION

The Omnibus Crime Bill includes many prevention programs. Here is a comprehensive list of the bill's prevention programs and the amount each is expected to cost over six years. Figures are in millions.

| Program                                                            | Amount         |
|--------------------------------------------------------------------|----------------|
| Ounce of Prevention                                                | \$100          |
| Community schools                                                  | \$632          |
| Family and Community Endeavor Schools (FACES)                      | \$268          |
| Youth Employment and Skills (YES)                                  | \$540          |
| Local partnership Act                                              | \$1,800        |
| Model Intensive Grants                                             | \$895          |
| Community Economic Partnership                                     | \$300          |
| Hope in Youth                                                      | \$21           |
| Gang prevention services for boys and girls                        | \$20           |
| Midnight sports                                                    | \$40           |
| Olympic youth development centers                                  | \$49           |
| Boys and Girls Clubs in public housing                             | \$30           |
| Triad (partnership program)                                        | \$06           |
| Police Partnerships                                                | \$30           |
| Child Safety Act (visitation centers)                              | \$30           |
| Assistance for Delinquent and At-Risk Youth                        | \$30           |
| Anti-Crime Youth Councils                                          | \$4            |
| Urban Recreation and At-Risk Youth                                 | \$7            |
| Family Unity Demonstration Project                                 | \$22           |
| Substance abuse treatment in federal prisons                       | \$125          |
| Residential substance abuse for state prisoners                    | \$300          |
| Gang Resist, Education and Training Grants (GREAT)                 | \$50           |
| Grants to combat violence against women                            | \$1,000        |
| Sexual-assaults prevention grants                                  | \$220          |
| Training grants for counselors                                     | \$2            |
| Prevention of sexual abuse of runaway and homeless youth           | \$30           |
| Victims of child abuse programs                                    | \$50           |
| National Domestic Violence Hotline                                 | \$1            |
| Grants to encourage arrest policies in domestic violence           | \$120          |
| Grants for battered women's shelters                               | \$326          |
| Community programs on domestic violence                            | \$10           |
| Rural domestic violence and child abuse enforcement                | \$30           |
| Education/training on domestic/sex violence for state court judges | \$1            |
| Education/training on gender bias for state court judges           | \$1            |
| National stalker and domestic violence reduction                   | \$7            |
| Counselors for victims and witnesses                               | \$3            |
| Court-administered drug-rehabilitation programs                    | \$1,300        |
| Juvenile drug-trafficking and gang prevention grants               | \$125          |
| Grants for youth development centers                               | \$50           |
| <b>Total</b>                                                       | <b>\$8,575</b> |

The Washington Times

get the crime bill passed. Robert Gabordi, managing editor of the Marietta (Ohio) Times, which has a circulation of 13,000, received a call from Attorney General Janet Reno the day before the House vote.

"Why, I wondered, did the attorney general care what this newspaper in rural Ohio thought?" Mr. Gabordi wrote in his column on Saturday.

He made the connection: Rep. Ted Strickland, a Democrat whose district includes Marietta, was on record as opposing the bill.

"Maybe Reno was showing a great deal of understanding of the local politics. . . . But I suspect it was back-door arm-twisting," he wrote. "I suspect calls were made only to newspapers in areas like Marietta — where the local Democrat was preparing to vote against the president."

The Times had already criticized Mr. Strickland for his position to no avail. Mr. Strickland voted against the crime bill.

# Even if House passes, Senate ambles away's crime bill

By Major Garrett  
THE WASHINGTON TIMES

Even if the White House succeeds in pushing the crime bill through the House with only modest changes, the measure faces new challenges in the Senate.

Senate Republicans are planning to use an arcane parliamentary tactic to block passage unless the current \$33 billion price tag is reduced.

Senate Republicans will oppose any crime bill that passes the House without significant GOP support. To win GOP support in the House, the Clinton administration will have to trim the bill's cost.

GOP congressional aides who discussed this strategy conceded that some Republicans are concerned about being labeled as partisan obstructionists. However, the general consensus among aides is

that unless the bill is trimmed by at least \$1 billion, most Republicans will reject it.

If the White House ekes out victory in the House mainly on the strength of Democratic votes, Senate Republicans are planning to trip a parliamentary trap.

Sen. Orrin Hatch of Utah, senior Republican on the Judiciary Committee, unveiled the threat on the Senate floor yesterday.

"Should the administration refuse to work in a bipartisan manner but still manage, through arm-twisting and obfuscation, to squeeze the crime bill... through the House, we will then take up our concerns on the floor of the Senate," Mr. Hatch said.

"We will offer a budget point of order because of the wasteful spending in the bill, and I believe we will prevail with bipartisan support."

*"We will offer a budget point of order because of the wasteful spending in the bill, and I believe we will prevail with bipartisan support."*

If the crime bill arrives in the Senate costing roughly what it does now, Republicans will object that the bill violates the Congressional Budget Act of 1974. This law requires that the Budget Committee approve any legislation that changes existing budget rules.

The crime bill does. It establishes what is known as the Violent Crime Reduction Trust Fund. The fund is supposed to collect all the savings from a planned reduction in the federal work force of 250,000 full-time employees.

Trust funds are devices Congress uses to show voters that sav-

ings from one program — such as a federal work-force reduction — will actually pay for something they support — like crime prevention.

In 1993, Congress established a deficit-reduction trust fund to collect all revenue derived from higher taxes and use it to reduce the deficit.

All new trust funds are supposed to be approved by the Senate Budget Committee. The trust fund in the crime bill wasn't. That means Republicans can object on the grounds that the trust fund

violates the 1974 budget law. The formal method of protest is to make what is known as a "budget point of order."

The only way to dispose of this objection is to waive the budget act. Doing so requires a supermajority of 60 votes. If Democrats cannot muster the 60 votes to waive the budget act, the Senate cannot proceed to a vote on final passage.

There are 56 Democrats and 44 Republicans in the Senate. If the Republicans hold firm, Democrats will not be able to assemble the necessary 60 votes. That could doom the bill.

Republican aides who discussed this strategy on the condition of anonymity said most of the 44 Republicans are committed to upholding the budget challenge unless the cost of the crime bill is significantly reduced.

Judiciary Committee Chairman Joseph R. Biden Jr., Delaware Democrat, said Republicans are raising spending objections to disguise their opposition to the assault-weapons ban.

He said 65 House Republicans voted for the original House crime bill that contained nearly \$500 million more in social spending than is in the current bill.

"How could we go from [65] Republicans voting for a bill that had a half a billion dollars more than the bill they turned down, on the grounds that the bill they turned down had too much social spending in it?" Mr. Biden said.

"Just maybe I am right when I say it's politically inspired," he said.

Only 11 House Republicans voted for the procedural motion that would have brought the crime bill to the floor last week.

## Crime study center mysteriously slipped into 972-page bill

By Donald Lambro  
THE WASHINGTON TIMES

Justice Department officials said yesterday they did not seek the crime study center that has become a symbol of nonessential, pork-barrel spending.

The future of the center — for which \$10 million was added to the crime bill — is in doubt as House and Senate leaders try to work out a compromise that would cut social welfare funding.

House Judiciary Committee Chairman Jack Brooks, whose committee oversees all federal criminal justice programs, quietly inserted the funding for his hometown alma mater into the 972-page crime bill, setting off a storm of controversy.

The grant to create a National Criminal Justice Center at Lamar University in Beaumont, Texas, has been sought by university officials since 1991. And Mr. Brooks, an easy opportunity to get

the money through the Omnibus Crime Bill, which he helped to author, was happy to oblige.

The university had earlier received a small planning grant of \$370,000 to help develop the idea for the center. But a Justice Department spokesman confirmed that the department did not seek the \$10 million that Mr. Brooks authorized in the bill.

James A. Norton, the university's interim chancellor, said yesterday that he has been working closely with Mr. Brooks on the proposed project, which would turn one of the school's buildings into a law enforcement training and research center.

A former Brooks aide, William Maddox, is now on the university's staff and is in charge of securing the funding.

Despite Republican criticism of the money, university officials bristle at the charge that the project is less than vital to the fight against crime.

"Anybody who criticizes this grant and tries to call it pork is totally misinformed about it," Mr. Norton said. "This is aimed right at the heart of the problem of lowering violence in our society."

The grant is popular throughout the Beaumont community and Jefferson County, which has a number of correctional facilities and several more in the process of being developed.

Lamar, which runs a degree program in law enforcement, sees the center as a means of training the personnel for the nearly half-dozen state and federal prisons and substance-abuse facilities that will be built over the next several years in the county.

But that is not how Rep. Henry Hyde, Illinois Republican and the third-ranking member of Mr. Brooks' committee, sees it.

"This is pure pork. It was never considered by the conferees. This is another redundant program to study crime," Mr. Hyde said. "It is

another example of the arrogance of the Democrats."

"None of us had any idea that this was in the bill when we finished our work on the conference report on the crime bill," Mr. Hyde said. "I've never seen anything like it in the 20 years that I've been up here."

It is commonplace for powerful committee chairmen to insert provisions for their own pet projects into bills that are considered by the House or Senate and their committees. Senate Appropriations Committee Chairman Robert Byrd is legendary for getting special projects for West Virginia through his funding bills.

But it is unusual for special spending provisions to show up in a bill after it has been acted upon by lawmakers.

Precisely when Mr. Brooks added the \$10 million for Lamar to the conference report remains a mystery. But lawmakers on the committee and their staffs said

yesterday that the provision was not in the bill when the conferees finished their work on the evening of July 28.

"This was slipped in after the conference was over," said a senior Judiciary Committee Republican staff official who worked on the bill. "It wasn't anything the conferees agreed on."

As soon as Mr. Brooks had the grant folded into the bill, he informed university officials that the money would soon be on its way.

A news release issued by the school the next day, July 29, announced that Mr. Brooks had informed them "that Lamar is on the verge of being authorized to spend \$10 million on a research and education center."

The grant "would represent the largest single designation of federal funding in Lamar University's history," the release said.

convicted of three felonies.

While the three lawmakers provided some momentum for the bill, Democratic leaders expressed frustration in their efforts to find just the right changes to attract votes. Part of the problem, said House Speaker Thomas S. Foley, is that Republicans keep saying they want more items dropped from the bill.

"You have to judge how serious the Republicans are about compromise when they escalate their demands," Foley said. "Some of it is still motivated by politics."

Democrats lost the procedural vote last week by eight votes, with 58 Democrats defying their party's position. But now they are trying to win back more than the minimum of eight to ensure that they do not embarrass themselves and the president further by losing on the floor a second time.

By late afternoon, Foley and White House Chief of Staff Leon E. Panetta had suggested a number of changes that could be made in a second House-Senate conference. Those changes include:

Transferring about \$350 million from prevention programs to law enforcement or a Police Corps college scholarships program.

Allowing Congress to review any future additions to the 19 assault-style weapons the bill would ban.

Strengthening a provision to require convicted sexual offenders to report their addresses to authorities by requiring the police to notify neighborhoods that the so-called sexual predator had moved in.

Dropping a \$10 million grant for a crime research center at Lamar University in the district of House Judiciary Committee Chairman Jack Brooks, D-Texas.

Nevertheless, those changes might not be enough for the Democrats who voted no. Forty-eight Democrats voted against the crime bill because they oppose the assault weapons ban. Foley and Majority Leader Richard A. Gephardt met with those Democrats on Wednesday to try to persuade them to sign on.

That would be a crucial victory for Democratic leaders, and it would eliminate the need for negotiations with Republican leaders. House Minority Whip Newt Gingrich said \$3 billion to \$4 billion should be cut from the bill.

And Rep. Christopher Shays, R-Conn., who was one of 11 Republicans to vote for the rule, said at least \$1 billion should be cut to keep the moderates on board.

For the three black members who switched their votes Wednesday, presidential pressure and a promise to have Attorney General Janet Reno personally review all death-penalty cases made the difference. They said they would stick with Clinton on the procedural vote but then vote against the bill itself.

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## Opponent says White House and a newspaper are conspiring to win his vote

By John Aloysius Farrell  
Boston Globe

WASHINGTON Rep. Peter G. Torkildsen, the Republican freshman from Massachusetts who has come under fire from Democratic opponents for his vote last week to stall the crime bill, set off a national talk-show fuss Wednesday when he suggested that the White House and The Boston Globe were working in concert to corral his vote for the legislation.

On a C-Span talk show Wednesday morning, Torkildsen said that Susan Brophy, a White House lobbyist, promised last week to request a flattering column on him from Globe columnist Thomas Oliphant if he would side with President Clinton on a key procedural vote last Thursday. Both

Brophy and Oliphant denied the charges Wednesday.

Torkildsen turned Brophy and the White House down and voted to block consideration of the crime bill.

On Saturday, Torkildsen was criticized in a Globe editorial, and in a column on Sunday, Oliphant called Torkildsen a "shadow-seeker" whose vote was a "smarmy" political cave-in to the gun lobby and the Republican House leadership.

Brophy said Wednesday that Torkildsen had misinterpreted or distorted an offer she made to call members of the Boston media on his behalf and that she never used Oliphant's name in her conversations with Torkildsen.

Both Brophy and Oliphant said they did not discuss Torkildsen's vote before the columnist penned his negative critique or the paper wrote its critical editorial.

But Torkildsen wasn't swayed.

"I do remember very specifically that if I voted for the rule she would request that Thomas Oliphant write a favorable piece about me in his column. I was a little taken aback by it but also took it with a grain of salt because I didn't think a news organization would operate in that way," said Torkildsen. "I'm absolutely certain she mentioned him by name."

After the Globe blasted him twice over the weekend, "I think any reasonable person would at least question the connection between the two," said Torkildsen.

Torkildsen's remarks on C-Span were picked up by conservative talk radio host Rush Limbaugh, who urged his listeners to call the Globe and complain about liberal media bias. Scores did.

Torkildsen and Oliphant then squared off on a talk radio show in Boston on Wednesday afternoon. In a heated exchange, Oliphant accused Torkildsen of lying.

"The congressman is lying," said Oliphant. He told Torkildsen on the Boston radio show hosted by Howie Carr that "you left the implication of a connection. You wanted people to make it. And it's a lie."

"You're a liar. You got it? A liar. You got caught. You got caught lying, and you're trying to cover your trail. And you're not going to do it over my body," said Oliphant.

"Well, maybe you're afraid, because you're next on the line, Tom," said Torkildsen. "You may want to cover your tail. But everything I stated is the absolute truth."

"Brophy and I never talked about Torkildsen ... ever. And his direct suggestion to the contrary is a lie," Oliphant said afterward.

The White House and the Globe, meanwhile, each backed its employee.

"Was he promised a column? Absolutely not," said White House Press Secretary Dee Dee Myers. "Any journalist will tell you we can't produce columns one way or the other, and we didn't."

H.D.S. Greenway, editor of the Globe's editorial pages, said: "Neither the Globe nor its columnists take their marching orders from the White House, and any allegation to the contrary is not true."

"No one who looks at the news columns or our editorial pages can say we are in the tank for the Clinton administration," said Greenway.

But Rep. Peter I. Blute, a Republican from Shrewsbury, Mass., said on WHDH on Wednesday night that Brophy had made a somewhat similar offer to him as she lobbied for his crime bill vote.

According to Blute, Brophy told him that "we could help you with the regional press up there ... like the Globe" and Oliphant. Blute voted with the White House and was heralded in the Globe editorial on Saturday and was praised as a courageous "stand-up guy" by Oliphant on Sunday.

8/18/94

## Crime bill tragedies — and follies . . .

**A**fter Mr. Clinton's announcement Sunday that he had picked up God's backing for the crime bill, subsequent endorsements were bound to be anticlimactic. Still, the case of Janice Payne is remarkable.

It turns out that Janice Payne, the 29-year-old Louisiana woman who tearfully pushed the legislation from the Rose Garden in the wake of her 9-year-old son James' shooting death, was arrested later on charges in connection with a felony drug conviction. According to a news account by this newspaper's Michael Hedges, Ms. Payne had violated a probation agreement that stemmed from her possession of cocaine and synthetic narcotics. Apparently she had been on the lam since September, and Louisiana officials only managed to track her down when they saw her in a picture standing next to the president.

Not that the Rose Garden ceremony was his idea of some kind of sting operation. White House spokesman Dee Dee Myers declined to say whether the administration was aware that there had been an outstanding arrest warrant for Ms. Payne at the time she appeared.

What Mr. Clinton wanted the press to focus on instead was the tragic story of Ms. Payne's son. He reportedly wrote to the president as part of an anti-crime project directed by Louisiana State University researchers, asking him to do something about the violence around him. The youngster expressed concern that he might be its next victim—as within days he was.

"I can't tell you that our crime bill would have saved James' life," the president said in a radio broadcast. "But I can tell you with absolute certain-

ty that it will save other lives."

Maybe it will. Maybe it won't. In fact, the Payne family — single mother involved in the drug trade, broken home, absent father — exemplifies the kind of deadly social pathologies against which law-enforcement officials are often helpless. It is burden enough to grow up without a father in the home. It is all the worse to try to grow up in a home where drugs are present. Young James died in a shooting apparently resulting from an argument over a football game. *Over a football game!* Children deserve better than that, all right — but this crime bill won't give it to them.

Mr. Clinton can blast the National Rifle Association as much as he likes. He can work to deny its law-abiding members access to guns. He can push extravagant spending programs into key legislative districts and try to get the Jameses of the world signed up for arts and crafts projects and midnight basketball games. He can, in short, twist arms and try to get the crime bill passed.

But as written, the legislation would do less to protect the life of James Payne than the re-election efforts of lawmakers who want something, anything, to take home to their constituents. There's room for a crime bill to improve the quality of life in this country. But this crime bill won't. Nor will any tinkering with it around the edges. It's time for a congressional majority of Republicans and Democrats to tell the White House that its approach is wrong, that its rhetoric is overheated and — as in the humiliating case of Janice Payne — that it is time to stop mistaking the problem for the solutions.

## . . . and the White House protection racket

**M**assachusetts Republican Peter G. Torkildsen claims a White House staffer visited him last week with an offer he wasn't supposed to refuse: If Mr. Torkildsen would agree to support the rule bringing the crime bill to the floor for a vote, the aide would arrange some friendly commentary for the congressman from a Friend of Bill's in the media, Boston Globe columnist Thomas Oliphant.

Indeed the aide, Susan Brophy of the White House Office of Legislative Affairs, went so far as to put a variation of that promise in writing. "Mr. Torkildsen, Should you decide to support the rule," she wrote on White House paper, "I want to reiterate that I will make calls to Boston media on your behalf." The note is signed, "Susan Brophy."

Mr. Torkildsen, who voted for the original reduced-fat crime bill when it passed the House in April, opposed the rule for the porker version that subsequently emerged from the conference committee. That was last Thursday.

On Sunday, the aforementioned Mr. Oliphant unleashed a column entitled, in part, "Torkildsen's cave-in on crime." Among other things, the column accused the lawmaker of a "smarmy move" that would cost Massachusetts localities more police officers. The column concluded by noting "the crime bill isn't over yet, which means the question should be whether . . . shadow-seekers like Torkildsen speak for the Republicans of Massachusetts. A great deal is at stake."

One wonders exactly what kind of phone calls Ms. Brophy ultimately made. (Neither she nor Mr. Oliphant returned any from The Times' editorial page seeking comment yesterday.) Mr. Oliphant himself needs no administration prodding to attack Republicans, and the timing of the column might easily have been pure coincidence. But Ms. Brophy's promise — and implicit threat — both reinforce suspicions that for all the president's complaints about the unfair shake he gets from the press, there is still no shortage of Friends of Bill. Or is it Goons of Bill?



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**Congress of the United States**  
**House of Representatives**

**JIM BACCHUS**  
15TH DISTRICT, FLORIDA

MEMBER:  
BANKING, FINANCE AND  
URBAN AFFAIRS COMMITTEE

SCIENCE, SPACE, AND  
TECHNOLOGY COMMITTEE

EXECUTIVE COMMITTEE  
TOURISM

August 16, 1994

**BY TELEFAX**

The Honorable Janet Reno  
Attorney General  
United States Department of Justice  
Washington, D.C. 20530

Dear Janet:

I would like to help gather Congressional support for the crime bill. I believe that my law enforcement background can be of significant benefit in that effort.

For the past month, I have been on a leave of absence from Greenberg Traurig while I was working as Special Counsel to Representative Jim Bacchus for the "Whitewater" hearings.

Congressman Bacchus is eager to help. Please let me know how we can be of assistance.

Sincerely,

Mark P. Schnapp

THE WHITE HOUSE  
WASHINGTON

August 16, 1994

MEMORANDUM FOR LEON PANETTA  
CHIEF OF STAFF

FROM: LLOYD N. CUTLER *LNC*  
SPECIAL COUNSEL TO THE PRESIDENT

SUBJECT: CRIME -- HEALTH CARE

I realize I am in the minority on the need to win enough Republican leaders or members to avoid gridlock. However, you may want to look at the attached *Los Angeles Times* editorial and *U.S. Today* op-ed piece by Amo Houghton.

Attachments - 2

*File*  
*Crimes*

"breached his duty of loyalty to Holland" and "not only acted directly contrary to Holland's interest, but aligned himself with the state's position." (The court, it seems, knows what is in Holland's "interest" better than Holland himself.) The court did concede that "we are aware that Holland might prefer the death penalty .... Nevertheless, an attorney is not justified in asserting that his client deserves the death penalty, even if his client desires to have that penalty imposed."

Is the public perception of the criminal-justice system strengthened or weakened when, consistent with his client's knowing and intelligent choice, an attorney lets his guilty client speak the truth? "I am guilty of taking life, and I want to die for my crimes."

-----

## **Bill Clinton:**

### **You're the President, and No One Else Is =(c) 1994, Los Angeles Times=**

The following editorial appeared in Monday's Los Angeles Times:

You're William Jefferson Clinton, and you're the president of the United States heck, the leader of the Western World and you've been clobbered.

Yes, with last week's defeat of the crime bill you were handed a thumping by Congress. And, yes, you and your staff seem to have made many mistakes in your first 20 months. Including losing this one.

But you're still the president, and you were elected because more people thought you were better than anyone else running. So you've got to get up, dust yourself off and hold your head high.

Take comfort in the ups and downs of your predecessors hey, how would Lincoln have done in the polls if there had been polls? For you've still got more than half of your term left, and you can do a lot better than you have done so far. Because, among other things, you're basically more intelligent than many people in Washington.

Try thinking more presidentially. Consider Republicans Bob Dole, the minority leader in the Senate, and Robert H. Michel, the minority leader in the House. Yes, they are wily fellows, but they are not the president. Better for you to always deal with them as the president than as a Democrat. For you are president of all the people; they are leaders of the Republicans only.

You still can be a great president, and many patriotic people hope you will prove to be just that. (How many Americans really want to watch another presidency unravel?) You have tremendous energy, an enormous appetite for the big issues (no one can call a man who tackles a complex issue like health care reform a policy wimp) and an obvious desire to make this country better. You've got a foreign policy success in North Korea, putting some luster on your Western-leader credential (see editorial at right). It might even lend a domestic boost.

But all along the way you'll need Republicans, for as you've figured out by now, too many Democrats are Democrats mainly in name. Some are downright provincial, some are oh-so-easily intimidated by monied interest groups like the National Rifle Association and some on the left are willing to vote against a mostly useful measure like the crime bill and deprive constituents of needed programs in order to make a political point.

Therefore, every triumph, like the NAFTA victory, will be because of Republicans as well as Democrats. As a 43 percent-of-the-voters president, you will continually need to harvest consensus. This takes time, this takes patience, this takes some Republicans.

It's bipartisan government or no government. Maybe you will get some kind of crime bill repackaged this week, maybe you won't. A whole lot of people are still rooting for you, whatever the latest poll shows or doesn't show. For you are the president and no one else is. Don't lose heart.

-----

# Grammer back on the 'Frasier' set

Amid reports that he got a whopping raise to return to work, *Frasier* star Kelsey Grammer did just that Monday.

His agent says that after not showing up Wednesday or Thursday last week, he showed up on the set Friday. NBC's version had him as a no-show Friday.

Despite reports that Grammer, already getting \$77,000 an episode, wanted a big pay boost, agent Michael Livingston says that wasn't the case.

"Not as far as I know," Livingston said Monday. So, what kept Grammer away last week? A stomach bug, Livingston says, or "something that he ate."



Paramount

**GRAMMER:** Bug got to him, agent says.

jects usually put classic fairy tales into modern urban settings. But in tonight's *Whitewash* (HBO, 7:30 ET/PT), Sporn takes on a true event in New York some years back: a hate crime in which a young black girl was spray painted white by a gang of white thugs. The disturbing themes of violence and racism make the film "a little rough in a couple of places," Sporn says. But the award-winning animator wants kids to tune in "and hopefully ask some difficult questions of the adults."

**PERSONNEL FILE:** Discovery Networks President Ruth Ottie, one of the

leading women in cable, has left to become president of Knowledge Adventure Inc., an emerging developer of multimedia educational software. Greg Moyer, who has steadily moved up the Discovery ranks over the years and has helped Discovery expand worldwide, takes over.

**MEANWHILE:** Advertising Age says ABC "appears ready" to switch heavy hitter sitcoms *Roseanne* and *Home Improvement* to meet the expected competition when *Frasier* moves to Tuesdays at 9 p.m. ET/PT on NBC this fall. That would mean *Roseanne* would head to Wednesdays at 9, and it'd be *Improvement's* Tool Time against *Frasier's* Shrink Time. Age says ABC execs figure *Roseanne* and *Improvement* would make more money by switching time periods. ABC spokeswoman Janice Gretemeyer says that no decision has been made but that anything is possible. "We want to keep our options open."

**NEW 'DICE':** The Diceman himself, Andrew Dice Clay, doesn't want to be known as Mr. Trashmouth anymore. Just as Ralph Macchio, millions of dollars notwithstanding, is no doubt sick of being pegged the Karate Kid. Good thing, then, that the two will be paired this season in NBC's midseason show *The Ties That Bind*. Clay, who has dropped Dice, plays a kinda nerdy cousin of Macchio's character.

**HATE CRIME:** Michael Sporn's animation pro-

**BRIEFLY:** WETA, the PBS station in Washington, D.C., plans to produce a multipart documentary on the culture of American politics, part of PBS' planned coverage of the 1996 elections. . . . Martin Short is said to be enlisting friends, including Steve Martin and Aaron Spelling, for guest appearances on his NBC sitcom this fall. . . . Model-turned-actress Kathy Ireland will guest on at least four *Melrose Place* episodes this fall. . . . Finally, we report that Gennifer Flowers, who says she had an affair with President Clinton, will parody Marilyn Monroe's famous "Happy Birthday, Mr. President" greeting for a spot to air on Comedy Central Thursday at 9 p.m. ET/PT. Clinton's birthday is Friday.

Also reporting: Alan Bash

## Public loses in Stone Age political combat

**hen it comes to crime, politicians owe the public more than gamesmanship.**

Years ago, poet e.e. cummings suggested that one is not part of two, but two are parts of one. Too bad our political parties in Congress don't see life this way.

Instead, they act like two gladiators, circling slowly, each ready to tear the other's head off. Somewhat exciting for passersby, but hardly productive. The gladiators, Republican and Democrat, seek to annihilate one another. Nothing unusual here. Such competition has been a part of life since the earliest hominids appeared.

But that's not good enough. We're on this Earth a short period. If we want to make a difference, should our high-water mark be to end up as grown people playing king of the hill? That seems a bit degrading. And what about the people we represent? How do they benefit?

A perfectly good bill crafted to make a dent in crime bit the dust because of such internecine rivalry. Sure, there were lots of reasons to oppose it — abuse of the leg-



By Rep. Arno Houghton, R-N.Y.

islative process, costs too high, overemphasis on tough, macho laws, the prevention part riddled with pork. But there are issues that can bring any legislation to a screeching halt if you let them. And we did.

The Democrats prompted all this by sticking it to Republicans through an infuriating use of procedures orchestrated to bully the minority into silence. The Republicans, not to be outdone, then stonewalled the process, aided by unhappy Democrats. Seeking political advantage, both sides did a disservice to the country.

No bill is perfect. I gave the crime bill a C+. Yet if you can't take the first step, how do you take the second? If the programs are wrong, change them. The important thing is to start. And who cares who gets the credit? You win not by sticking your finger in the other person's eye. You win because you represent something better.

Great issues should not be trivialized in a political combat zone. But what happens:

Team A smells blood; Team B scratches to protect its base. Battle lines form for partisan advantage. The people this all was supposed to benefit are left behind.

Years ago, Michael Rockefeller filmed *Dead Birds*, the story of two New Guinea tribes whose occupation was combat. Each morning the two sides would face each other, pose, fight for most of the day, then retire. The next day and the next and the next, the same agenda. Time moved on, but not for them. Each day they engaged in their comic warfare — the last two Stone Age tribes.

Will this become our game? As we look into a new millenium, will this be our plight, our ultimate paralysis, our brave death throe as the world passes us by?

Free-swinging competition is the stuff of success. It stimulates. It produces. It is good — but only if geared to help the customers. The crime bill debate did not.

Now we have a chance to resurrect this battered legislation. Why not try something different, the almost-unheard-of approach of working together?

Who knows? It just might work.

► Crime bill, 1A

85

AMO HOUGHTON  
HOUSE OF REPRESENTATIVES  
WASHINGTON, D. C. 20315

LLOYD -

8/15/94

HOME IS THE "BILL"

PROBABLY WON'T SEE THE LIGHT

OF DAY - ALSO WE OTHER

THOUGHT: THE JACK BROOKS

MONEY FOR TEXAS. THAT SHOULD

GO. IT HURTS - ARMSIDE HIS

ARROGANCE!!

TAKE CARE,

Amo

## THE GLADIATORS

Many years ago, E. E. Cummings suggested that one is not part of two, rather two are parts of one. Too bad our political parties in Washington do not look out on life this way. They appear as two lumbering gladiators circling slowly, each ready to tear the other's head off. Somewhat exciting for the passerby, but hardly productive.

In the light of the Crime Bill defeat on Capitol Hill recently, it might be worthwhile to look at who these gladiators are and what they are about. The gladiators are called Republicans and Democrats. Their goal is to annihilate one another. Nothing unusual here. It has happened since the earliest Hominids appeared one million years ago. But you know what, that's not good enough.

We're on this earth a short period of time. If we want somehow to make a difference, I wonder whether our high water mark should be to end up as grown people playing King of the Hill. Seems a bit degrading, and what about our families and the people back home whom we represent. How do they benefit?

A perfectly good bill crafted to make a dent in crime bit the dust on Thursday because of internecine rivalry. Oh, sure, there were lots of reasons to oppose it - process abuse, costs too high, over emphasis on tough, macho laws, the prevention part riddled with pork ("Night Basketball" was a favorite). But there are always issues that can bring any legislation to a screeching halt if you let them. And let them we did.

The Democrats prompted all this by sticking it to Republicans through an infuriating use of procedures - ones which are orchestrated to bully the minority into silence. The Republicans, not to be outdone, then stonewalled the process, aided by more than a few unhappy Democrats.

## Page Two

So who loses? You got it - every American. In an effort to gain political advantage prior to November 8th, both sides did a disservice to the citizens of this country. No bill is perfect. I gave the Crime Bill a C+. Yet, if you can't take the first step, how do you gain the second? Crime will not be brought to its knees by a single act of Congress. This is a long process. It involves everyone - families, churches, schools, youth groups, doctors, everyone. But I happen to believe that we must get at it. If the programs are wrong, change them. The important thing is to start. And who cares who gets the credit. You win, not by sticking your finger in the other person's eye. You win because you represent something better.

Ours is a great country. It needs great leadership. The issues are great. They should not be trivialized in a political combat zone. I have always felt that there might be a special category of super national issues to be treated by Congress differently than any other, similar almost to an Act of War. But what happens: Team A smells blood; Team B scratches to protect its base. The battle lines form for partisan advantage. The people whom this all was supposed to benefit are left behind. In all seriousness, friends, can you imagine a fight against the nation's No. 1 problem being challenged along party lines?

Many years ago, Michael Rockefeller died while filming a movie called DEAD BIRDS. The story described two tribes of New Guinea. Their occupation was combat. Each morning the two sides would face each other, pose, fight for most of the day, then retire. The next day and the next and the next the same agenda. Time moved on but not for them, as each day they engaged in their comic warfare - the last two Stone Age tribes.

### Page Three

Will this become our game? As we look at the next 65 months into a new millennium, will this be our plight, our ultimate paralysis, our brave death throe as the world passes us by?

Free-swinging competition is the stuff of American success. It stimulates; it produces; it is good but only if geared to help the customers.

The Crime Bill debate did not. This week we have a chance to resurrect this battered legislation. Why not try something different, the almost unheard of approach of working together.

Who knows? It just might work.



## **...cans wage ongoing battle to block crime bill in Senate**

**By John Aloysius Farrell  
Boston Globe**

WASHINGTON In a show of political muscle, Senate Republicans spurned President Clinton's hopes for bipartisan help Tuesday by joining to block final passage of the \$30.2 billion crime bill and its ban on assault weapons.

Sen. Bob Dole of Kansas, the Republican leader, released a letter signed by 40 of the 44 GOP senators, directing him to re-open negotiations with the White House to make further changes in the legislation.

The Republicans said they hoped to cut the cost of the bill, but one of the amendments they demanded would kill the ban on assault weapons.

In addition, any change in the present version of the bill would send it back to the House, where it had to be revived from near death last week, thus potentially dooming the legislation.

White House aides conferred with Senate Democrats about how to deal with the Republican threat. Clinton, in public, continued to appeal for bipartisan cooperation.

"Every senator, without regard to party, ought to continue the bipartisan spirit that was established in the House, for an American approach to an American problem ... to make this an American crime bill and to do it without delay," the president said.

(EDITORS: NEXT GRAF OPTIONAL)

Four of the five Republican senators from New England signed the letter, including moderate Sen. John Chafee of Rhode Island, a supporter of the assault weapons ban, whom the White House had hoped to woo. Sen. James Jeffords, another GOP moderate, from Vermont, did not sign the letter.

(END OPTIONAL TRIM)

Democrats expressed outrage.

Majority Leader George Mitchell of Maine said the Republican move would commit the bill "to an indefinite future" that could "kill the crime bill by means of continuous and endless changes back and forth between the houses."

"Partisan politics and special interests returned like a bad dream," said Sen. Herb Kohl, D-Wis. "The American people are not stupid ... the people can smell cynical politics and opportunism."

Dole did not try to disguise the fact that his gambit had political overtones. He said the White House erred when it negotiated a deal with a block of some three dozen Republican congressmen to win passage of the crime bill in the House last weekend. That deal left too much political "pork" in the bill, Dole said, and ruffled the feathers of GOP senators.

"We were ignored. We were never contacted by anyone in the White House," Dole said. He later acknowledged, however, that Sen. Orrin Hatch, the Republican from Utah who is the ranking minority member on the Senate Judiciary Committee, participated in the House negotiations.

When asked if his own presidential ambitions prompted his opposition to the bill, Dole said it was the White House that was playing politics, and had a strategy to "demonize Dole, demonize Dole, demonize Dole."

"The White House hasn't learned yet there is a Republican Party up here," Dole said. "This is not Arkansas."

If Democratic leaders do not agree to open the bill to new amendments, Dole and his 40 GOP supporters say, they will support a parliamentary point of order crafted by the Republican leadership to forcibly re-open the legislation to change.

The Democrats, needing 60 votes in the 100-member

Senate to waive that point of order, were not prepared to say how they will deal with the Republican demands: by negotiating with the GOP, or by trying to break the Republican bloc by rallying public opinion.

Mitchell's initial response was to offer Dole an up or down vote on the Republican amendments on a separate piece of legislation at a later date. Dole quickly snubbed the Democratic offer, saying, "I don't think it will be acceptable."

Dole and other Republicans overwhelmingly supported the crime bill in its earlier forms, praising it when it first passed the Senate by a 95-4 margin last fall.

But the bill has risen in cost from \$22.8 billion to \$30 billion since it left the Senate, and the crime prevention funds that Dole and Hatch called "pork" have been hiked from \$3.6 billion to \$6.9 billion.

"We swallowed a little pork last fall, but this is the whole hog," said Dole.

Yet \$4.2 billion of the overall increase in the bill's pricetag was slated for more prisons and police hikes approved by House Republicans and the appropriations have been stretched from five to six years.

At a mid-afternoon press conference, the Republican leaders insisted that, in Hatch's words, "this is nothing about the gun ban."

But Dole then presented Mitchell with an amendment that would kill the ban on the sale of assault weapons, and threatened to mount a filibuster. The Democrats on the floor went ballistic.

"On this issue the Republicans are under the control of the National Rifle Association," said Mitchell. "What you have here is an effort to defeat the assault weapons ban without appearing to do so."

"This is the NRA in its most brazen, myopic, narrow special interest stand," said Sen. John F. Kerry, D-Mass., who played a leading role in crafting the crime bill.

(EDITORS: STORY CAN END HERE)

Clinton played a minor role in the day's debate, leaving most of the wrestling to Mitchell. But the president did take time out from a Rose Garden bill-signing ceremony to note that the point of order chosen by Sen. Phil Gramm of Texas and other GOP leaders as their procedural weapon challenges the legality of a crime-fighting trust fund they themselves had helped devise.

The cost of the bill is "not much bigger on an annual basis, and it's all paid for the same way," said Clinton. "This trust fund was sponsored by leaders from both parties, including ... Senators Dole, Gramm and Hatch."

The GOP senators "stumbled over each other to take credit for this trust fund," said Kerry. "And now they are somehow going to come to the floor and declare it violates the budget process."

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## **Clinton is a prisoner of his own history, not the nation's**

**By Martin F. Nolan  
Boston Globe**

It's not the crime bill. It's not health care. It's not Whitewater. The threat to Bill Clinton's presidency is that Americans vote for president on the basis of character, not six-point programs. The one-term consensus on Clinton now gathering rests on that belief and on doubts that all the president's new men can spin him out of the dilemma of his character.

Character is destiny, and destiny is biography. Clinton's character remains stuck in voters' first

mission of him, as he campaigned in New Hampshire in 1992 denying charges on a daily basis. But except for the foaming baptismal fonts of televangelists, accusations of marital infidelity have not stuck. Americans are a forgiving people, not unacquainted with sin.

No, the lingering toothache in Clinton's character remains his avoidance of military service. That slow-motion pursuit by his Arkansas draft board of the young Rhodes scholar still haunts Clinton, affecting his policy and performance on a daily basis.

Foreign policy, or the lack thereof, is the most important legacy of his draft status. Clinton's reluctance to send U.S. troops in harm's way may be rooted in a sophisticated Realpolitik, but few diplomats in Washington or anywhere else believe that. The president is handcuffed by his admission in 1969 that he sought to "protect myself from physical harm."

In domestic policy, a less dramatic, but pervasive effect, is Clinton's naivete about large bureaucracies. Had he served in the Army for even six months, he would have known that the government cannot deliver 100 percent of anything, never mind something as important and complicated as health care.

(EDITORS: NEXT 5 GRAFS OPTIONAL TRIM)

If his admirers could rewrite Clinton's resume on his path to the presidency, some would include a hitch in boot camp for practical, as well as patriotic reasons. He might have learned discipline, when to talk and when not to. If he had been forced to clean a latrine, peel some spuds or deliver 50 push-ups at some sergeant's whim, he might have gained perspective and learned how to ignore talk-show critics.

Clinton frustrates his friends more than his foes by an inability or unwillingness to learn. Nearly every day, boarding Air Force One, when Clinton returns a salute sloppily, he makes 27 million veterans cringe.

Many wonder if he is aware that protocol dictates that anyone out of uniform or "uncovered," that is hatless, need not return a salute. George Bush saluted probably because Ronald Reagan did. The Gipper may have thought he was back on the Culver City lot playing a lieutenant again.

Did anyone on the White House staff research the precedent of previous presidents? There is no evidence of it. Dwight Eisenhower commanded the world's largest invasion force and he never saluted as president, because he knew it was a civilian job. In this whiz-kid White House, how many know who Eisenhower was?

The Pentagon's military protocol office maintains that whether to return a salute or not is up to the commander in chief. Another (gulp!) decision. So he offers a Clintonian compromise: an inexperienced, unskilled flutter limp enough to ignite a ferocious chewing-out from any sergeant.

(END OPTIONAL TRIM)

Clinton's lack of respect or understanding of the military is rooted in another lurking problem: his demographic destiny. Born in 1945, Clinton belongs to the vanguard of baby boomers who matured, if that is the word, in the late 1960s. The popular culture told them they were the best-educated, best-motivated generation in memory. Many believed it.

Many of Clinton's generation avoided the draft not simply out of fear or prudence, but because they considered themselves too important to serve.

In Clinton's formative years, political issues were moral and therefore simple. In his 1969 letter to Col. Eugene Holmes in Arkansas, Clinton said he "opposed and despised" the war in Vietnam "with a depth of feeling I had reserved solely for racism in America before Vietnam."

Civil rights, Vietnam and Watergate were models of moral clarity. No discussion was needed and no discipline

required to resolve them, just teach-ins and other schmoozing sessions. For Clinton, the prospect of the presidency was a Renaissance Weekend lasting four years.

A lingering moralism has complicated life for Clinton. He has complained about the lack of civility in politics, but has rarely examined his own moral-high-ground preachiness. Sen. John McCain, R-Ariz., last week said Clintonites regard themselves as "a morally superior force of public servants determined to save the country." McCain, a decorated Vietnam veteran, probably does not like being lectured on courage.

(EDITORS: NEXT 2 GRAFS OPTIONAL TRIM)

The divide between the McCains and Clintons of America is something the president finds hard to address, but the calendar is a cruel instrument. The 25th anniversary of Woodstock, celebrating the continuing self-admiration of Clinton's peers, received bigger media play last weekend than the 49th anniversary of V-J Day, but next year the 50th anniversary of the end of World War II will force Clinton to ponder the courage of other men and women.

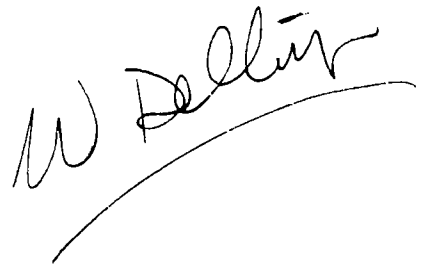
When Clinton discussed his 1969 dealings with the draft board, voters gave the benefit of the doubt to the 23-year-old idealist who wrote the letter, if not to the 46-year-old candidate talking about it. Campaigning in Arkansas as a draft-dodger was not a "politically viable" option so Clinton had to live with his dilemma quietly for a quarter-century until it burst upon him in that New Hampshire February.

(END OPTIONAL TRIM)

Ironically, many of his apologists now claim that historical forces would render any president ineffective. The end of the Cold War and new budgetary restrictions have reduced the power of the presidency.

He is a prisoner of the past, the victim of history, they say. But mostly he is a prisoner of his own history, pinned down by the demons of destiny, biography and character. Even if he wanted to, Clinton cannot become what most Americans want their president to be: tough, strong and decisive.

X X X



**DRAFT MEMORANDUM FROM WILLIAM J. CLINTON**

To: Janet Reno  
Attorney General

Lee Brown  
Director of National Drug Control Policy

[All Other National Drug Control Program Agency Heads]

Re: The National Narcotics Leadership Act Amendments

I am advised that the National Narcotics Leadership Act Amendments to the Crime Bill raise substantial constitutional doubts. The Amendments give the Director of National Drug Control Policy ("Director") new oversight and enforcement powers over National Drug Control Programs as well as the policy and operations of federal agencies, including cabinet departments, insofar as they relate to these programs. It is extraordinary in our nation's history to grant executive oversight powers over cabinet departments to an officer other than the President and current law does not grant such broad authority to the Director. I am informed that, consequently, a serious legal argument could be made that the Amendments enact a constitutionally significant change in office of Director, requiring the Director to be renominated and reconfirmed. See Shoemaker v. United States, 147 U.S. 282 (1893). I am informed that, furthermore, any attempt by the Director to exercise the authority conferred by the Amendments would be subject to significant litigation risk in an action brought by an aggrieved party. See Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1192 (D.D.C. 1990). This risk, however, can be avoided if the Director exercises his authority under the amendments only pursuant to the guidelines set forth in this memorandum.

Among the most significant powers that the Constitution vests in the President is the authority to supervise his subordinates in the executive branch. However, I am advised that there is no reasonable interpretation of the text or structure of the Amendments under which they would limit the supervisory authority of the President over the Director. In addition, were the Amendments construed to supplant the President's supervisory authority, they would be unconstitutional. See Myers v. United States, 272 U.S. 52 (1926). Furthermore, it is my judgment that the unsupervised exercise of the authority vested in the Director would detract from the effective administration of federal drug control efforts. Therefore, I instruct the Director and the heads of all National Drug Control Program agencies to adhere to the following guidelines when acting in relation to the Amendments.

Guidelines for Conduct under the  
National Narcotics Leadership Act Amendments

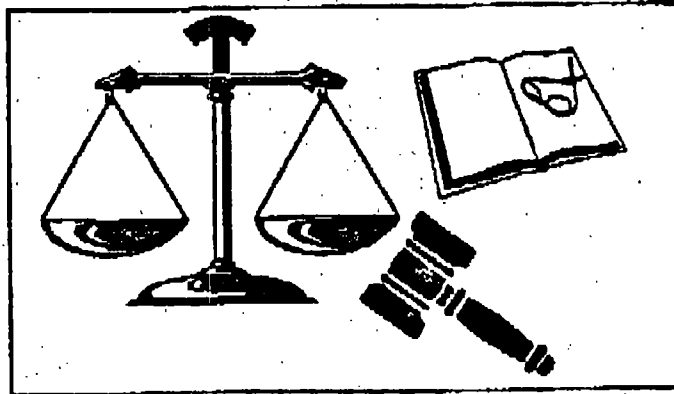
- The Director of National Drug Control Policy ("Director") shall not take any action that requires an agency head to include programs in the agency's budget proposal to the Office of Management and Budget without the concurrence of the affected agency head(s).
- The Director shall not take any action that requires the personnel of any agency be detailed to any other agency or within any agency without the concurrence of the affected agency head(s).
- The Director shall not order that funds be transferred to or from any drug control program account without the concurrence of the affected agency head(s).
- The Director shall not issue a Funds Control Notice without the concurrence of the head of the recipient agency as to the form and substance of the notice.
- The Director shall not disapprove any agency request for "reprogramming" of funds.
- The Director shall not disapprove any proposed agency change in policy relating a National Drug Control Program.

U.S. DEPARTMENT OF JUSTICE

OFFICE OF LEGISLATIVE AFFAIRS

file  
DO J

FACSIMILE COVER SHEET



Crime  
Bill

TO: Lloyd Cutler

White House Counsel's office

FAX NO.: 456-~~2222~~ 6279

FROM: Ron Klein

PHONE: 514-6909

DATE: 8/16/91

NO. OF PAGES: 4 (EXCLUDING COVER)

COMMENTS: Per Mr. Cutler's request by phone  
to Ron Klein. ASAP

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August X, 1994

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: THE PRESIDENT

SUBJECT: DIRECTIVE ON FAIRNESS IN THE IMPLEMENTATION  
OF THE FEDERAL DEATH PENALTY

As the branch of government charged with enforcing federal law, the Executive Branch has a responsibility to ensure that our pursuit of a safer society is not at odds with our pursuit of equal justice for all Americans. Historically, our criminal justice system has at times failed to treat all persons equally; in particular, racial discrimination in the application and enforcement of our laws has led to injustice and undermined many Americans confidence in that system.

As a State Attorney General, Governor, and now President, I have always believed that there is no tension between stiff enforcement of our criminal laws, and strong safeguards against discrimination. Freedom from crime is among the most important civil rights of all Americans -- and it can be achieved without sacrificing the civil rights of any American.

That some Americans retain legitimate doubts about the fairness of our criminal justice system is simply unacceptable -- an injustice in and of itself. Moreover, it is worth remembering that such doubts also undermine law enforcement's effectiveness: when people lack confidence in the criminal justice system, they are much less likely to aid that system, to work with police and prosecutors to apprehend and convict criminals.

Thus, all Americans share a common interest in enhancing public confidence in the fairness of our criminal justice system. And there is no aspect of our system where such guarantees of fairness are more important than in capital sentencing.

Because of the severity and finality of the death penalty, discrimination in the application of that penalty is particularly abhorrent. We must candidly admit, however, that there have been times and places in our country where the death penalty has not been administered in a fair, nondiscriminatory manner. We must insure that our federal system is free from this defect.

Fairness can be achieved without quotas, which I find repugnant. Fairness does not mean freedom from punishment, only freedom from discrimination. It means that defendants who commit similar acts, and who are similarly culpable, are equally likely to receive the death penalty -- not that anyone is excused from the sentence they deserve. And it means that victims from all background and all races will see their victimizers punished to the full extent proper under the law.

The need to insure fairness is particularly acute now that Congress has passed our Crime Bill, with its substantial expansion of the federal death penalty. The Department of Justice, which has already taken steps to insure that its existing prosecutions proceed without regard to improper factors, must redouble those efforts in light of the new weapons at its disposal.

To build upon the Department's efforts in this area and to increase the American people's confidence, I hereby direct you to take the necessary steps to assure that the Department of Justice seeks imposition of the death penalty in an impartial and non-discriminatory fashion. I direct that you take the following steps to achieve this goal:

- (1) Promulgation of additional internal procedures to insure that decisions to seek the death penalty are made in a non-discriminatory manner;
- (2) Adoption of internal review mechanisms to insure that capital defendants who commit similar acts and who have similar degrees of culpability are treated similarly by the Department;
- (3) Creation of an appropriate mechanism for post-trial release of the Department's capital prosecution decisions, so that the public can review and understand the basis for such decisions;
- (4) Development of improved training and support for prosecutors who seek the death penalty, to insure that their actions will be consistent with Departmental policies; and
- (5) Any other steps you believe appropriate to enforce this Directive, so long as those actions do not contradict the principle that each individual's case is to be judged on its own merits, without regard to any improper factors.

I further direct you to report to me concerning the steps you have taken within 30 days.

With our joint commitment to assuring fairness, I believe we can develop a process that will meet the needs of the criminal justice system while guaranteeing the equal protection of the laws to all people.



Washington, D.C. 20530

August 1, 1994

**MEMORANDUM FOR THE ATTORNEY GENERAL**

**THROUGH: THE DEPUTY ATTORNEY GENERAL**

**FROM: Jo Ann Harris**  
Assistant Attorney General  
Criminal Division

Ronald Klain  
Counselor to the Attorney General

**SUBJECT: Proposed Response to Anticipated Presidential Directive Regarding Racial Justice in Death Penalty Implementation**

In anticipation of a Presidential directive, the Department should consider the following actions to ensure that federal death penalty statutes are applied in a consistent and non-discriminatory manner.

- o Adopt a Department Death Penalty Protocol, which will be published in the United States Attorneys' Manual. The Protocol will:
  - Require the United States Attorneys to submit to the Attorney General a Death Penalty Evaluation Form for each prosecution under any statute that permits imposition of the death penalty, whether or not the United States Attorney recommends seeking the death penalty;
  - Supply guidance to the United States Attorneys on appropriate law enforcement and prosecutorial standards to be considered in deciding whether to seek the death penalty;
  - Provide for review and recommendation by a Departmental committee, appointed by the Attorney General, in all federal potential death penalty cases. Committee review will ensure compliance with departmental guidance and the absence of racial bias in recommending the death penalty; and



- Provide for the Attorney General to conduct an independent review of each case and make the final decision whether the death penalty will be sought.
- o Convene a special meeting of United States Attorneys during which the Attorney General and other senior Department officials will:
  - Review implementation of the Protocol and re-emphasize the Department's commitment to nondiscrimination in the criminal justice process.
- o Conduct special seminars for federal prosecutors focusing on potential death penalty cases. These seminars will:
  - Review the Department's Protocol, the responsibilities of prosecuting attorneys under the Protocol, and the nature of the Department's review process;
  - Address any factors that may weigh in favor of or against seeking the death penalty; and
  - Provide guidance on evaluating and prosecuting capital cases.
- o Establish a centralized unit within the Department to assist federal prosecutors in death penalty cases.
  - This unit will provide centralized expertise in the evaluation and prosecution of capital cases.
- o Make public after trial or guilty plea in each case submitted to the Attorney General a document reflecting the Attorney General's decision whether or not to seek the death penalty.
  - The public disclosure of the Attorney General's decisional document will demonstrate the Department's accountability for its decisions regarding the death penalty.
  - In addition, the decisional document will be distributed to the United States Attorneys as guidance for future cases.

N.G.

HHI - Bad feeling in Conf.  
Treated with disdain  
Contempt  
Sex Pred - HIV testing of  
Rape suspects

2 bil

Sex Pred.

Sex Pred Guns.

Block grants -  
less rest.

Brooks \$10 mm

\$3 b

Conf \$ higher than H or S bill

6.4

Rule went down bec.  
of "pork".  
Block Grants.

Block Gr.

Cut \$1 B of 1 prng

\$1 B Police.

AH - small changes  
how do w.o. <sup>second</sup> Conf.

\$ And that is understandable

Pork - jobs, training don't belong in crime bill

Support for full police \$

Cut 7.3 for other prev.

Points in Gunguch letter.

Grandy - Proper. downsize (exc. Brooks)

Dem behind closed doors  
of GATS

Brooks - July 29

R's more <sup>Aug 10</sup> unified  
bec. tired of wallowing

HH - 150 exist jobs pro  
30 new ones  
Consolidate?  
Rannibout

5.3 Pol

.6 v. ag. women  
5 Law Enf.

- 1.9  
- .4  
1.5