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THE WHITE HOUSE
COUNSEL'S OFFICE

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REPORT #2009-29

THE WHITE HOUSE COUNSEL'S OFFICE

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EXECUTIVE SUMMARY

Given that the United States of America is governed under the rule of law, and that the President is its elected Chief Magistrate, the role of the White House Counsel's Office is to maintain the presidency in lawful tension with all other elements, in and out of government. As the burdens of the nation's highest office grow, so do the responsibilities of what is often called "the president's lawyer" but is more accurately described as the "presidency's lawyer." The myriad tasks of this complex office include: *monitor* ethics matters; *coordinate* the president's message and agenda within the executive branch units; *negotiate* on the president's behalf with Congress and other vectors; *recommend* actions to the president; and *translate* or interpret the law in its broadest context throughout the Executive branch. Often overlooked is its separate role as *protector* of the Office, in everything from scrutinizing the security of its workers to the legal boundaries all must maintain. So encompassing are the sweeping burdens of this office that no adequate job description exists. Suffice it that the White House Counsel's Office is a mirror held up to the highest office in the land. As such, it is forever the stuff of tomorrow's front page headlines.

LESSONS LEARNED

- a. Name the Counsel as early as possible.
- b. Prepare to enter an empty office
- c. Meet with the outgoing Counsel
- d. Expect a steep learning curve, the unpredictability of events, and deadlines dictated by the media
- e. Know where to go for information.
- f. Maintain good relations with the Office of Legal Counsel in the Department of Justice
- g. Divide the Counsel's Office when scandals arise.
- h. Monitor the president closely in the last year of the term
- i. Be aware of sharp public criticism of the White House Counsel's Office
- j. Understand the impact of the loss of government attorney-client privilege
- k. Note the continuing significance of issues of executive privilege and other presidential prerogatives
- l. Recognize the difficult political environment for the judicial appointment process

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INTRODUCTION

The White House Counsel's Office is at the hub of all presidential activity. Its mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts in which the president plays a role. To fulfill this responsibility, it monitors and coordinates the presidency's interactions with other players in and out of government. Often called "the president's lawyer," the Counsel's Office serves, more accurately, as the "presidency's lawyer," with tasks that extend well beyond exclusively legal ones. These have developed over time, depending on the needs of different presidents, on the relationship between a president and a Counsel, and on contemporary political conditions. The Office carries out many routine tasks, such as vetting all presidential appointments and advising on the application of ethics regulations to White House staff and executive branch officials, but it also operates as a "command center" when crises or scandals erupt. Thus, the more sharply polarized political atmosphere in recent years has led to greater responsibility and demands, as well as heightened political pressure and visibility, on the traditionally low-profile Counsel's Office. The high-stakes quality of its work has led to a common sentiment among Counsels and their staff that there is "zero tolerance" for error in this office.

In sum, the Counsel's Office might be characterized as a monitor, a coordinator, a negotiator, a recommender, and a translator: it *monitors* ethics matters, it *coordinates* the president's message and agenda with other executive branch units, it *negotiates* with a whole host of actors on the president's behalf (not the least of which is Congress), it *recommends* myriad actions to the president, and it *translates* or interprets the law (whether it is the Constitution, federal rules and regulations, treaties or legislation) for all executive branch officials. Past Counsels have lamented that there is no job description for this office, while the opening quote from Peter Wallison makes clear that even if there was, it would be all-consuming and all-inclusive of everything that goes in and out of the president's office.

OVERVIEW

The White House Counsel's Office sits at the intersection of law, politics, and policy. It is charged with reconciling these three, without sacrificing too much of any one.

- * The White House Counsel's Office advises on the exercise of presidential powers and actions; defends presidential prerogatives; oversees executive and judicial appointments and nominations; educates and monitors White House staff adherence to federal ethics and records management law; and handles White House, departmental, and agency contacts with the Department of Justice.
- * The work of the White House Counsel is as strategic as it is substantive. By participating in decision-making processes, the White House Counsel anticipates problems or provides more effective solutions.

The most important contribution of the White House Counsel may well be telling the President "No." To do this effectively, the Counsel must understand the limits of the advocacy provided by the office.

- * The White House Counsel protects presidential powers and constitutional prerogatives, providing legal counsel to the office of the presidency, not to the individual president.
- * As the presidential term advances, the interventions practiced by the White House Counsel will alter and may focus more on preventing than facilitating White House actions.
- * The loss of government attorney-client privilege has significantly altered practices and procedures within the Counsel's office, making it even more critical that incoming Counsels consult with their predecessors.
- * The Office of Legal Counsel in the Department of Justice is a critical and supportive resource for the White House Counsel.

The White House Counsel's Office must be prepared for close scrutiny and constant criticism, as it protects presidential prerogatives and contributes to presidential policy-making.

- * The breadth and number of the Counsel's responsibilities ensure that the forces at work on the White House Office – the quick start, the lack of records and institutional memory, the need to make decisions with limited information, the tight deadlines and goal displacement – will be felt with even greater force in the Counsel's Office.
- * Congressional and media oversight will be continuous and critical, because the Counsel's Office has responsibilities pertaining to decisions and processes that have become intensely polarized and partisan.
- * The Counsel must be prepared for scandal, both procedurally and substantively, or these events will overwhelm (and potentially sideline) the office.

ROLES AND RESPONSIBILITIES, THE PRESIDENTIAL TERM, AND SAYING "NO."

In simple terms, the Counsel's Office performs five basic categories of functions: (1) advising on the exercise of presidential powers and defending the president's constitutional prerogatives; (2) overseeing presidential nominations and appointments to the executive and judicial branches; (3) advising on presidential actions relating to the legislative process; (4) educating White House staffers about ethics rules and records management and monitoring adherence; and (5) handling department, agency and White House staff contacts with the Department of Justice (see Functions section). In undertaking these responsibilities, the Counsel's Office interacts regularly with, among others, the president, the Chief of Staff, the Vice President's office, the White House Office of Personnel, the

Press Secretary, the White House Office of Legislative Affairs, the Attorney General, the Office of Management and Budget (on the legislative process), the General Counsels of the departments and agencies, and most especially, the Office of Legal Counsel in the Department of Justice (see Relationships section). In addition to the Counsel, the Office usually consists of one or two Deputy Counsels, a varying number of Associate and Assistant Counsels, a Special Counsel when scandals arise, a Senior Counsel in some administrations, and support staff. Tasks are apportioned to these positions in various ways, depending on the Counsel's choices, though most Counsels expect all Office members to share the ongoing vetting for presidential appointments (see Organization and Operations section).

Certain responsibilities within the Office are central at the very start of an administration (e.g., vetting for initial nominations and shepherding the appointment process through the Senate), while others have a cyclical nature to them (e.g., the annual budget, the State of the Union message), and still others follow an electoral cycle (e.g., determining whether presidential travel and other activities are partisan/electoral/campaign or governmental ones) (see Organization and Operations). There is, of course, the always unpredictable (but almost inevitable) flurry of scandals and crises, in which all eyes turn to the Counsel's Office for guidance and answers. Watergate, Iran-contra, Whitewater, the Clinton impeachment, the FBI files and White House Travel Office matters and the response to congressional investigations after the 2006 Democratic take-over of Congress all were managed from the Counsel's Office, in settings that usually separated scandal management from the routine work of the Office, so as to permit ongoing operations to continue with minimal distraction. Among the more regular tasks that occur throughout an administration are such jobs as directing the judicial nomination process, reviewing legislative proposals (the president's, those from departments and agencies, and bills Congress has passed that need the Counsel's recommendation for presidential signature or veto), editing and clearing presidential statements and speeches, writing executive orders, and determining the application of executive privilege (see both Relationships and Organization and Operations sections).

Perhaps, the most challenging task for the Counsel is being the one who has the duty to tell the president "no," especially when it comes to defending the constitutional powers and prerogatives of the presidency. Lloyd Cutler, Counsel for both Presidents Carter and Clinton, noted that, in return for being "on the cutting edge of problems," the Counsel needs to be someone who has his own established reputation...someone who is willing to stand up to the President, to say, "No, Mr. President, you shouldn't do that for these reasons." There is a great tendency among all presidential staffs to be very sycophantic, very sycophantic. It's almost impossible to avoid, "This man is the President of the United States and you want to stay in his good graces," even when he is about to do something dumb; you don't tell him that. You find some way to put it in a very diplomatic manner. (Cutler interview, pp. 3-4)

LAW, POLITICS AND POLICY

A helpful way to understand the Counsel's Office is to see it as sitting at the intersection of law, politics and policy. Consequently, it confronts the difficult and delicate task of trying to reconcile all three of these without sacrificing too much of any one. It is the distinctive challenge of the Counsel's Office to advise the president to take actions that are both legally sound and politically astute. A 1994 article in *Legal Times* warned of the pitfalls:

Because a sound legal decision can be a political disaster, the presidential counsel constantly sacrifices legal ground for political advantage. (Bendavid, 1994, p. 13)

For example, A.B. Culvahouse recalled his experience upon arriving at the White House as counsel and having to implement President Reagan's earlier decision to turn over his personal diaries to investigators during the Iran-contra scandal.

Ronald Reagan's decision to turn over his diary - that sits at the core of the presidency. ...You're setting up precedents and ceding a little power. But politically, President Reagan wanted to get it behind him. (Bendavid, 1994, p. 13)

Nonetheless, Culvahouse added, the Counsel is "the last and in some cases the only protector of the President's constitutional privileges. Almost everyone else is willing to give those away in part inch by inch and bit by bit in order to win the issue of the day, to achieve compromise on today's thorny issue. So a lot of what I did was stand in the way of that process..." (Culvahouse interview, p. 28)

Because of this blend of legal, political and policy elements, the most essential function a Counsel can perform for a president is to act as an "early warning system" for potential legal trouble spots before (and, ultimately, after) they erupt. For this role, a Counsel must keep his or her "antennae" constantly attuned. Being at the right meetings at the right time and knowing which people have information and/or the necessary technical knowledge and expertise in specific policy or legal areas are the keys to insuring the best service in this part of the position. C. Boyden Gray, Counsel for President Bush, commented: "As Culvahouse said -- I used to say that the meetings I was invited to, I shouldn't go to. ...It's the meetings I wasn't invited to that I'd go to." (Gray interview, p. 26) Lloyd Cutler noted that

...the White House Counsel will learn by going to the staff meetings, et cetera, that something is about to be done that has buried within it a legal issue which the people who are advocating it either haven't recognized or push under the rug. He says, "Wait a minute. We've got to check this out," and goes to the Office of Legal Counsel and alerts them and gets their opinion. But for the existence of the White House Counsel, the Office of Legal Counsel would never have learned about the problem until it was too late. (Cutler interview, p. 4)

One other crucial part of the job where the legal overlaps with the policy and the political -- and which can spell disaster for Counsels who disregard this -- is knowing when to go to the Office of Legal Counsel for guidance on prevailing legal interpretations and opinions on the scope of presidential authority. It is then up to the White House Counsel to sift through these legal opinions, and to bring into play the operative policy and political considerations in order to offer the president his or her best recommendation on a course of presidential action. Lloyd Cutler described how this process works:

They [OLC staffers] are where the President has to go or the President's counsel has to go to get an opinion on whether something may properly be done or not. For example, if you wish to invoke an executive privilege not to produce documents or something, the routine now is you go to the Office of Legal Counsel and you get their opinion that there is a valid basis for asserting executive privilege in this case. ...You're able to say [to the judge who is going to examine these documents] the Office of Legal Counsel says we have a valid basis historically for asserting executive privilege here. (Cutler interview, p. 4)

C. Boyden Gray underscored the critical importance of OLC's relationship to the Counsel's Office:

They [OLC] were the memory...We paid attention to what they did. [Vincent] Foster never conferred with them. When they [the Clinton Counsel's Office] filed briefs on executive privilege, they had the criminal division, the civil division and some other division signing on the brief; OLC wasn't on the brief... In some ways they [OLC] told us not to do things but that was helpful. They said no to us... I can give you a million examples. They would have said to Vince Foster, "Don't go in and argue without thinking about it." They would have prevented the whole healthcare debacle [referring to the Clinton Counsel's Office's position that Hillary Rodham Clinton was a government official for FACA purposes] ...[T]he ripple effect of that one decision is hard to exaggerate: it's hard to calculate. (Gray interview, pp. 18-19)

In addition, Gray continued,

...OLC has this long institutional memory of how to deal with Congress in situations like this [referring to the Clinton Counsel's Office's agreement to permit the president to give grand jury testimony to Independent Counsel Ken Starr] and they would have said, "Hey, have you thought about [this]?" (Gray interview, p. 20)

Thus, the Counsel's Office is the channel through which most paper and people must pass on the way to the president, and, equally, through which all outputs from the Oval Office must be monitored and evaluated. The pace of the work is incessant, and the pressure to ensure against errors of substance or judgment, unrelenting. The Office exists in a fishbowl, is subject to searing public criticism when it makes the slightest misstep, and yet prompts intense loyalty among those who have been privileged to serve in it.

JUSTIFICATION FOR THE CONTINUED EXISTENCE OF THE COUNSEL'S OFFICE

If one dates the origins of the Counsel's office back to Sam Rosenman in the Roosevelt administration, it has existed in its present form for more than sixty years. It is an office that surfaces to the public only in times of controversy. Some have questioned its very existence, especially in light of its inherent tension between law and politics and the potential for an uneasy relationship with the Department of Justice. Presidential scholar Bradley Patterson, Jr. explains one line of criticism about the office, that its detractors think that it offers a way for presidents to "shop around" for the legal advice they prefer – resulting in inconsistencies in the administration's judgments.' (Patterson, 2008, p. 66.)

In a conference at Duke University Law School in September 1999, a distinguished panel of former White House Counsels and Attorneys General was asked by moderator Walter Dellinger to consider whether the White House Counsel's office should be abolished. Their answers were illuminating, based on reflections from their own experiences as government lawyers from each party who had served in recent administrations. Former Attorney General Benjamin Civiletti was the only panel member who was opposed to maintaining the Counsel's office, stating that "the White House Counsel's office is an abomination, structurally inefficient, lots of potential for conflict because of its political nature. If the president has a trusted person who can give him confidential advice, keep that person out of government." (Notes on file with Kassop.)

The discussion began with questions about when and why a president needs a White House Counsel, as contrasted with a president's need for an attorney general. Lloyd Cutler remarked, "A president needs two lawyers that he trusts implicitly: one as attorney general and one as White House Counsel. The AG is busy running a huge department, travels a lot, often is out of town. The White House Counsel is more like an inside general counsel of a major corporation that identifies legal issues that are about to develop, and discusses them with the AG, in advance." Later, he added, "The Justice Department is so big, *it* needs a good White House Counsel. DOJ needs someone at the White House. DOJ couldn't do without us." (Notes on file with Kassop.)

Another key topic addressed by this panel was whether it was proper for the Attorney General to inform the White House Counsel when a senior White House official or a major contributor to the president's campaign was under criminal investigation. All panel members agreed that it was necessary for the president to know when these circumstances arose, and that the Attorney General or Deputy Attorney General could tell the White House Counsel, who should then inform the president, to insure that the president would not associate further with the person under criminal inquiry.

Finally, when asked for advice to give to the next White House Counsel, A.B. Culvahouse, counsel to President Reagan, offered that a Counsel should "assume no policy responsibility (don't make the White House Counsel the "czar" of anything) – that would undermine his role as an honest broker and his relationship with the agencies." Cutler, on the other hand, responded that "there are many instances where the White House Counsel *should* have substantive policy positions, e.g., on

vetoed, on Supreme Court briefs from the Solicitor General's office, and on issues such as affirmative action." (Notes on file with Kassop.)

Thus, despite skepticism over how such an office can exist comfortably with one foot each in law and politics, those who have served in it and those who have worked in close association with it agree that the president requires someone who can sift through political and policy options with an understanding of the law and who can advise the president as to what the law will and will not permit. That is not a job for which the Attorney General has either the time or the statutory authority to perform, and therefore, the need for an official with legal expertise within the confines of the White House staff can be satisfied by the exercise of responsibilities performed by the Counsel's office.

The following sections will provide more detailed information on the functions of the Office, the relationships it maintains with other governmental units, and its organization and routine operations. A final section on Lessons Learned from prior Counsels will close with some practical advice and cautions for its future occupants.

FUNCTIONS OF THE WHITE HOUSE COUNSEL'S OFFICE

Although the White House Counsel's Office has assumed different tasks in different administrations, the broader contours of its responsibilities began to take shape under Counsel Fred Fielding in the Nixon administration, and have been remarkably consistent since the Ford years. These responsibilities generally fall into the following categories. (For a summary, see Appendix One.)

- Advising on the exercise of presidential powers and defending the president's constitutional prerogatives;
- Overseeing presidential nominations and appointments to the executive and judicial branches;
- Advising on presidential actions relating to the legislative process;
- Educating White House staffers about ethics rules and records management and monitoring adherence; and
- Handling department, agency, and White House staff contacts with the Department of Justice.

1. ADVISING ON THE EXERCISE OF PRESIDENTIAL POWERS & DEFENDING THE PRESIDENT'S CONSTITUTIONAL PREROGATIVES

Counsel tasks related to presidential powers include routine review of executive orders (and, in unusual cases, drafting them); reviewing all pardoning and commutation recommendations; reviewing requests for federal disaster relief; reviewing CIA-drafted intelligence findings and approving covert action proposals; interpreting treaties and executive agreements; examining all presidential statements for consistency and compliance with legal standards, and in anticipation of legal challenges; and participating in editing the State of the Union address. Tasks that have consistently related to the defense of a president's constitutional prerogatives are fewer in number. These have generally focused on issues related to executive privilege, war powers, and presidential disability or succession. [In this list, links are needed from the executive orders, pardoning, and war powers points to the Culvahouse interview.]

The responsibilities associated with presidential powers are highly volatile. The present Washington political environment is notable for partisanship, polarization, and confrontation. Presidential actions and decisions are subjected to extraordinary scrutiny, and a twenty-four hour

news cycle accelerates the pace of decision-making. For these reasons, any distinction between the “routine” and the more “crisis-laden” exercise of a president’s constitutional powers is essentially artificial. At any time, political events may transform an otherwise routine exercise of presidential powers into an extraordinary undertaking. As Clinton Counsel Bernard Nussbaum concluded, “Small (and not so small) policy and political problems grow into legal problems. It was my job to make sure that these political and policy brushfires didn’t become conflagrations.” (Nussbaum interview, p. 6) Consequently, a White House Counsel must be well informed about political developments throughout the White House and the executive branch.

Advising on Executive Privilege

Issues relating to the president’s constitutional prerogatives require both awareness of politics and attentiveness to precedents. Nowhere are these two requirements more critical than in the intensely sensitive clashes that can result when Congress, a court, or an independent counsel exercising prosecutorial functions demands information (documents or testimony) from a sitting president who refuses to accede to such demands.

Despite the primacy of high-stakes politics in these stand-offs between the branches, some degree of political accommodation, rather than a purely “legal” answer, is more often the outcome of such conflicts. Although presidents are fiercely protective of their prerogatives, they may also recognize the practical need to find some compromise to break the political logjam. White House Counsels often find themselves caught in the cross-hairs, where their best legal judgment about the appropriate presidential response is often overridden by more forceful political considerations from influential political advisors.

Once we began to understand it, we decided to negotiate when the problem came up. As a result, I don’t think we ever had a showdown on [executive privilege]. For instance, if a committee wanted certain documents and certain information we would try to figure out everything we could properly give to them and sit down with them – either I would, [Assistant to the President for Congressional Relations] Frank Moore would or someone else would – and try to negotiate on disclosing everything we possibly could. I don’t think we had any confrontations of any serious consequence on the whole executive privilege issue as a result of that. (Lipshutz interview, p. 27)

I think this President operated on the premise pretty much and I certainly did that whatever the legal consequences or legal parameters were of executive privilege, if Congress really wanted something, politically it almost was impossible to deny it. The more you stood on privilege, the more you pointed to precedents, the more you showed these are the things that the President didn’t turn over, the more they could make political hay out of it. As I say, we operated on the premise that you could resist and you could maybe negotiate but that, by and large, if Congress really wanted anything you have to give [it] to them, therefore, better act forthcoming.

I think the worst rap they put on this administration was that they have stonewalled on anything with the exception of Monica – obviously it was stonewalled. (Mikva interview, p. 5)

A more detailed discussion of executive privilege, specifically referencing recent decisions in this area, can be found in the Relationships and in the Lessons Learned sections.

Advising on War Powers

In relative terms, the Counsel’s role in regard to war powers has seemed less controversial. As chair of the War Powers Committee, the Counsel is responsible for notifications to Congress. In keeping with presidential views of the War Powers Resolution as unconstitutional, though, Counsels have provided Congress with a minimum of information “in the interest of comity.” In the words of

A.B. Culvahouse, “There is a real kabuki dance that was done. You sent a notice up to the Hill while protesting all the time that you’re not providing notice.” (Culvahouse interview, p. 5) Like a kabuki dance, the war powers dialogue is often quite ceremonial, lacks a clear beginning or ending, and reveals much about the competition for political power.

Typically, precedent is followed very closely, with past letters serving as models for correspondence.

War Powers is less of a problem because you can always rely on OLC to give you the tick-tock on that. That’s a shared responsibility; I never worried much about war powers... (Gray interview, p. 6)

... the War Powers Act discussions were very desultory. I think I saw my role and most of the lawyers involved in the process saw their role and the political people saw their role as trying to make sure that we did the minimum necessary to comply with the notice provisions and other provisions the act required of us so we didn’t give Congress a free hit. (Mikva interview, p. 13)

Advising on Presidential Disability and Succession

C. Boyden Gray observed that the Counsel’s Office is singularly responsible for designing decision-making procedures for presidential disability and succession.

There’s a Twenty-fifth Amendment, that’s all – we didn’t inherit much on that but we did develop a big decision tree thing which worked when [President Bush] had his thyroid problem and I think has worked since. That was a big contribution to the Counsel’s Office, the work that we did to put that all together.... I don’t think we involved anybody outside the White House but I sat down and did it with the Chief of Staff ... [and] the White House doctor.... What happens: If X then go to Y; if Z then go back to A. It’s just a decision tree on how to handle disability and it worked like a charm faultlessly, perfectly when he went into the hospital. (Gray interview, p. 6)

A.B. Culvahouse has commented on this recurring issue of temporary presidential medical incapacity:¹

This is an area where the lack of an institutional memory is atrocious. The White House should not have to re-invent a process each time the POTUS [President of the United States] has surgery. We did the same thing when President Reagan had surgery (I think for skin cancer) in ‘87/’88.

The Limits of Advocacy

Complicating the Counsel’s work as a protector of presidential powers and constitutional prerogatives is the lack of clarity associated with the Counsel’s responsibilities as an advocate. The White House Counsel provides legal counsel to the *office* of the presidency, not to the *individual* president. As such, the Counsel’s Office protects the powers of the office within the constitutional order of separated powers. Determining whether the office or the individual is under attack, however, may be difficult.

In fact, when I was first introduced to this job by Fred Fielding he said to me, “You are counsel to the office of the presidency. You are not counsel to the President.” I absorbed that and thought I understood what it all meant. However, in practice, it’s not a very useful guide, because you really don’t know -- when issues like Whitewater come up -- whether you’re representing the President or the presidency. For example, counsel can certainly with a lot of noise created by the President’s political opponents, even if they are allegations concerning the President’s own personal conduct. But as soon as it becomes clear -- and

¹ Personal communication A.B. Culvahouse to Martha Joynt Kumar, White House Interview Program, October 9, 2000.

there's no bright line here -- that this isn't just noise by political opponents, but in fact relates to the President's personal conduct, then the President should have his own lawyer. (Wallison interview, p. 25)

Identifying and drawing these distinctions, however, often has generated controversy. For instance, Clinton Counsel Bernard Nussbaum was widely viewed as failing to make this distinction between advocacy on behalf of the office and on behalf of an individual president. For his part, Nussbaum wrote in his resignation letter that he left "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 acting as White House Counsel." (As reported in Marcus and Devroy, 1994)

2. OVERSEEING PRESIDENTIAL NOMINATIONS & APPOINTMENTS TO THE EXECUTIVE AND JUDICIAL BRANCHES

Participating in the Selection of Presidential Nominees and Appointees to the Executive Branch

White House Counsel advising about presidential nominees and appointees to the executive branch has typically focused on nominations to the top Justice Department positions and to the General Counsel positions in the departments and agencies. Bernard Nussbaum bluntly stated that his office "appointed the Attorney General, head of the FBI, Justice Department officials (Dellinger - I sent him over to OLC from the White House Counsel's Office)." (Nussbaum interview, p. 5)

Within the White House, White House Counsels stressed their need to appoint a counsel to the National Security Council (NSC) staff. Lloyd Cutler argued for appointing the NSC Counsels to the White House Counsel's Office, rather than to the NSC staff; C. Boyden Gray emphasized the need for a low key NSC observer.

We worked out a deal that I could name [Scowcroft's] deputy legal advisor to the NSC, Steve Rademaker.... But that can be tricky. It was tricky and a huge problem in Iran-Contra.... Scowcroft agreed that I should never be in a situation like that. That's why he allowed me to have Rademaker in there. I don't know how the current administration has done this. I don't know whether the White House Counsel has his person in the NSC operation but that to me was very important, very, very important. (Gray interview, p. 23)

Participating in the Selection of Presidential Nominees to the Judicial Branch

The extent to which the Counsel's Office has been involved in the judicial appointment process has varied across administrations. (Goldman, Slotnick, Gryski, and Schiavoni 2005, 2007; Goldman, Slotnick, Gryski, Zuk, and Schiavoni, 2003) In several recent administrations, the White House Counsel oversaw the process from start to finish: the Counsel chaired the judicial selection committee, supervised the vetting and clearance process, and prepared the nominee for confirmation. In every administration, the judicial nomination process required the careful coordination of several White House offices, consultation with the Justice Department, and extended negotiations with U.S. Senators.

The selection process routinely varies for district, circuit, and Supreme Court nominations. Senators tend to be more involved in nominations to the U.S. District Courts than they are in nominations to the Courts of Appeal or, especially, to the U.S. Supreme Court. Partisanship, though, plays an important role in determining the amount of influence that each player will have in the process.

Unlike the Supreme Court, with courts of appeal and district courts you had to deal with the local Republican, in our case senators if there were senators. If there weren't senators, the governors, congressmen and congresswomen. District courts, I seldom got involved. The Justice Department had a lot of protracted negotiations ... about whether this was an

appropriate person and so forth or was this a person who shared the President's judicial philosophy. Courts of appeal I would more often get involved. There would be disputes between the senators and the Justice Department. There would be disputes between maybe two Republican senators from the same state, between the governor and the more senior congressman or congresswoman. (Culvahouse interview, pp. 20-21)

The selection process itself has shifted from being centered in the Justice Department to being firmly ensconced in the White House, albeit with the status of the Attorney General always a factor. Carter Counsel Robert Lipshutz recalled that the Department of Justice believed that judicial selection was its distinctive responsibility.

[White House involvement in judicial appointments] was a struggle within the Justice Department because, number one, the White House was stepping into what many, particularly career people, and even Griffin [Bell, the Attorney General] too, felt should be strictly their prerogative and that is helping the President pick the judges. (Lipshutz interview, p. 11)

During the Reagan administration, White House involvement in lower court nominations increased. By the Clinton years, such involvement had become routine, although the Justice Department continued to participate in the process. Members of the Clinton Counsel's Office were invited to the personal interviews with prospective lower federal court nominees, which were conducted by senior officials in the DOJ's Office of Policy Development. Counsel staff also contacted senators about possible nominees, working with senior members and staffers of the Senate Judiciary Committee.

The judicial selection process is centered in the White House office. A lot of other White House Counsel's Offices did not have the breadth and authority we had (maybe because of Foster and his access to the First Lady). We had special responsibility for Court of Appeals and Supreme Court appointments. (Nussbaum interview, p. 5)

From the Reagan years onward, the judicial selection committee chaired by the Counsel typically included members of the White House Counsel's Office and the Department of Justice. In the Clinton administration, it also included representatives from the First Lady's Office and the Office of Legislative Affairs. Under George W. Bush, the judicial selection meetings continued on a weekly basis; convened by the White House counsel, they included the chief of staff, the director of the personnel office, the assistant for legislative affairs, and the attorney general and relevant assistant attorneys general. The counsel also held a second weekly meeting to discuss "judicial strategy"; at these sessions, "decisions are made about the timing for sending requests for confirmation to the Senate and about issues that may be foreseen about the confirmation process itself" (Patterson, 2008, p. 70).

The selection committee's assessments were both legal and political, weighing the potential nominee's legal philosophy and the likelihood of Senate confirmation. [See the Wallison interview for an extended discussion of the Reagan judicial selection process.]

Well, it's all done in conjunction with the Department of Justice and it's pretty obvious to any lawyer who the candidates are. It's not rocket science. The question is always, "Can you get the person you really...?" What's the matrix of confirmability with whom you really want to go with. You can't do your ideal person, usually, because there's a confirmation problem or there's a background problem or there's a money problem or there's something. So it never lines up perfectly. (Gray interview, p. 9)

Supervising the Vetting and Clearance Process

The Counsel's participation in the nomination and appointment process has minimally and consistently involved the Office in supervising the vetting and clearance process (FBI, IRS, 278 forms and financial disclosure forms) for all presidential nominees to the executive and judicial

branches. The time and resources consumed by these reviews is extraordinary. (See “Rhythms” in the Organization and Operations section, on this work over the course of an administration.)

Well, the FBI thing takes roughly three months although you can speed it up. You can do an expedite and do it in a week if someone has been through it before. I think we did Cheney over a long weekend. But if you're starting from scratch with somebody, normally it's three to four months depending on how old they are. If they're twenty-one, it won't take that long. If they're fifty-one, they have a whole life to go through especially if they've traveled. So it takes three months, average. It can take people three months just to fill out the forms so you really have to hammer people and say, “The FBI can't start until they know where you live and that means filling out the form.” (Gray interview, pp. 21-22)

When the background checks were complete – or even while they were progressing – decisions had to be made about whether to proceed with the nomination or appointment. In each administration, White House Counsels noted that different standards were applied to appointments than to nominations, and to nominations for less visible and more visible positions.

[Y]ou'd have some people that you might never send up to the Hill for confirmation, but because they were strong allies of the President, supporters and/or were people that had a lot to offer, you might appoint them to the President's Foreign Intelligence Advisory Board rather than nominate them to be undersecretary of defense because the President has unilateral appointment authority. Maybe they go to a Schedule C position in OMB or DAS [Deputy Assistant Secretary], Treasury or whatever. You were pretty darn pure about cabinet people, deputy secretar[ies]. We were awfully pure about State, Defense, Treasury, Justice. ... You make different calls about whether or not the person had access to classified information, whether or not they had grant contract awarding authority. Different people are suited for different things. Take a look at the [Senate] committee. There were some committees that would take no prisoners and others – the finance committee, I think, was pretty terrific about exercising discretion, where youthful indiscretions ... were not disenfranchising if the person was a great Treasury securities expert. (Culvahouse interview, p. 32)

Then, when the nominations were sent to the Senate, negotiations had to be conducted about the legislators' access to the reports.

How much of the FBI files do they get to see[?] We conduct the search; we do the FBI for our benefit not for their benefit.... That was subject to enormous negotiation.... Huge fights over that.... You have to negotiate them one by one.... [O]nce you concede to one committee, you can't cut back for another committee; they're going to demand the same treatment. But it's got to be renegotiated and reinvented every time. (Gray interview, p. 16)

Preparing the Nominee for the Confirmation Hearing

Beyond vetting the nominees, the Counsel's Office sometimes prepared them for the confirmation hearings. This preparation could take the form of “murder boards.”

We [the Reagan administration] did a lot of murder boards, not just for judicial nominees but for a lot of people. I probably did fifty murder boards in my twenty-two months.... You get a bunch of lawyers and legislative types pretending to be senators and acting like horse's rear ends.... You can have too many [people on a murder board]. To me, there is an art to running a murder board. I've seen some where too many people are trying to impress the nominee, which is not what you want to do. What you want to do is anticipate questions, to make it more difficult for him or her than it is going to be in fact, and hit all of the areas that he or she is going to be questioned about. Supreme Court nominees are very difficult because the hearings go on forever and ever. In my view, there should be four or five questioners max. There should be an understanding that a good enough answer is good enough. We're not striving for perfection here – we're striving for B-plus – and that you don't critique during the first two hours. You only critique on breaks thereafter.... This

person already is the President's nominee. It's too late [to educate them to policy positions]. The object is to get them confirmed and make sure they're not so immobilized with promises and commitments that they can't exercise discretion with a full range of options. (Culvahouse interview, pp. 18-19)

Although the Bush administration did not employ murder boards, Patterson reports that the screening process remained "intense" (2008, p. 69).

3. ADVISING ON PRESIDENTIAL ACTIONS RELATING TO THE LEGISLATIVE PROCESS

In recent presidential administrations, tasks in this category have included reviewing legislative proposals; reviewing bills presented for signature or veto, and drafting signing statements and veto messages; reviewing State and Defense Department authorizations and appropriations proposals; drafting budget rescissions and deferrals; participating in the negotiations associated with Senate treaty hearings; and being involved in legislative negotiations concerning policy, document requests (see also executive privilege, above), treaties, and nominations.

Congressional negotiations are a daily fact of life for the White House staff and, therefore, for the White House Counsel's Office.

Well, to begin with there is hardly anything the president can do without the cooperation of the Congress. Most of his programs require congressional approval. The budget requires congressional action. Congress is always slow and we go through these continued crises of shutting down the government and continuing resolutions, et cetera. Getting Congress to move is very, very important. (Cutler interview, p. 34)

The extent to which the Counsel's Office has been involved in these policy negotiations has varied within and across administrations. Two Counsels who were deeply engaged in policy making were Lloyd Cutler and C. Boyden Gray.

Well, you had a lot of dealings with Congress because both the members and their staffs would call you up about things they were particularly interested in that they wanted you to take up with the President, or get a decision favorable to their constituent or whatever. I was used to a considerable extent to do what you might call lobbying Congress, although I'm not a lobbyist myself in the normal sense of the word. (Cutler interview, p. 15)

The question is whether you take the lead or just participate in negotiations. I basically had to lead all the negotiations with the civil rights groups and the Congress on the Civil Rights Bill. I was sitting at the center of the table. I did not lead but I was a participant in all the negotiations down in [George] Mitchell's conference room in the Senate -- endless, endless meetings on the Clean Air Act. They would go until two, three, four in the morning sometimes. I wasn't leading those, but I was there. (Gray interview, p. 4)

At a minimum, however, Counsels have routinely been consulted about legislative matters. The resultant advising has typically involved as much politicking as it did lawyering. For example, the Reagan and Bush administrations seized upon signing statements, which are drafted by the Counsel's Office, as opportunities for statutory interpretation by the executive. These administrations used signing statements to urge courts to give the same legal weight to the "executive intent" of legislation as courts have traditionally given to its legislative intent. Accordingly, the Counsel's Office became deeply involved in the associated political and policy debates.

4. EDUCATING WHITE HOUSE STAFFERS ABOUT ETHICS RULES & RECORDS MANAGEMENT & MONITORING FOR ADHERENCE

Among the tasks in this category are distinguishing between White House expenses and campaign expenses; reviewing presidential travel; approving requests for appointments with the president, monitoring these for propriety, seemliness, legality, and executive privilege issues; responding to document requests and subpoenas directed to the president and to other White House and executive branch officials by congressional committees and Independent Counsels; and serving as the ethics officer for the White House staff and executive branch political appointees. [In this list, links are needed from the subpoena and ethics officer points to the Torkelson interview.] Past Counsels stress that this work is essential to a president's early success, because it allows an administration to put its people in place, to establish responsible procedures, and to advance its policy initiatives.

Perhaps the most prominent of the newer demands confronting the Counsel's Office is the intensified scrutiny of ethical matters within a presidential administration. This has generated a need for a central coordinator, alert to potential problems and able to take pre-emptive (or corrective) action. This issue arena is one of the many that draws the Counsel's Office closer to other White House units, and that obliges it to develop constructive relationships with Congress and various other political actors.

Ethics laws, to quote C. Boyden Gray, "are quite complicated and obscure and overworked and ought to be deregulated." (Gray interview, p. 1) The White House Counsel's Office is needed to explain these laws to political appointees and to the members of the White House staff. This role is needed particularly at the outset of an individual's service in the White House or executive branch, throughout the campaign season, and during investigations. (See "Rhythms" in Organization and Operations)

Orienting New White House Staff and Executive Branch Officers

Federal ethics statutes and regulations are typically more stringent than those enacted in the states. Likewise, the standards for the legislative and executive branches are different, creating the need for former Congress members and staffers to be carefully briefed.

At the beginning of my tenure, we circulated [an ethics] memo that had all the details. Everyone who was going to be appointed by the President would get this memo, everyone on the White House staff got this memo. It was a memo from me and it laid out in detail what all the rules were. But then I also would meet with groups of people who were about to enter on to their jobs, in some cases they already had entered on to the jobs, maybe thirty at a time.... All through the administration anyone who was going to be appointed to a job [was affected]. And I would go through what the rules were and then I would give them a little lecture about how important it was to abide by these rules and how the President was trusting them to abide by these rules; that every time something happens, at no matter what level of an agency, it is always the President's responsibility that it happened. "You've been appointed by Ronald Reagan. I will vouch for his honesty and his integrity and his desire to do things the right way. So you owe him a responsibility to act in the most ethical possible way. If there's ever a question you should check with your Counsel or you can check with me and I'll be happy to provide you with any advice that you need on these questions." (Wallison interview, p. 27)

These orientation sessions would be reprised when an individual left the White House. For example, the Counsel staff would review the Presidential Records Act and would "remind everyone that these are presidential documents; you're not walking out of the White House with them; these are things that become part of the permanent record." (Brady interview, p. 7)

Monitoring and Educating Staffers during Campaigns

The need to educate and monitor staffers is particularly acute during the campaign seasons, both congressional and presidential. Then, the Counsel's Office staff has been called upon to provide general briefings and to circulate a more general memo about campaign activities. Changes in the associated laws may create an even greater need for this information.

[W]e had two very active ethicists in the Office. One of them was Beth Nolan and the other was Cheryl Mills. Both of them, that was their field. Beth was in charge of ethics in the White House and Cheryl was her deputy. So the driving force was that the Hatch Act had just been amended and it has caused some changes. It now allowed people to get more involved than they had been previously. As I recall, it was Beth probably who said we really need to get a memo out to everybody telling them what they can and can't do and not to overread the Hatch Act changes thinking they can do more than they should. (Mikva interview, p. 17)

Reviewing Investigations and Associated Proceedings

As is suggested by the Counsel's role in responding to document requests and subpoenas directed to members of the White House staff and other executive branch officials, many Counsels have had to oversee investigations. Whether conducted by Independent Counsels or congressional committees, these proceedings have consumed much of the Counsel's resources. (See also the Organization and Operations and the Lessons Learned sections.)

My first job [in the Clinton administration], which occupied the bulk of my time really, was to look in to the so-called White House – Treasury relationship having to do with the RFC in reference to the Justice Department of the whole Whitewater matter.... Then I had to look into the Espy case; I had to look into the Cisneros case, et cetera.... A lot of [developing ethics rules for the White House staff] was done in collaboration with the so-called Office of Legal Ethics, which is an independent quasi-Executive Branch agency, and which has the responsibility under the various ethics statutes to write regulations, give opinions as to what you can and cannot do. Now every department has an ethics officer so there is frequent consultation with the ethics officers. But a lot of that came up in this Whitewater, Treasury, White House contact investigation. (Cutler interview, p. 20) [Cf. the Office of Government Ethics in the Executive Office of the President — <http://www.usoge.gov/>]

Bernard Nussbaum has described Washington as practicing a “culture of investigation.” (Nussbaum interview, p. 4) That environment is not likely to change in the near future. Although the expiration of the Independent Counsel statute will almost certainly alter the investigatory process, investigations will doubtless continue and will have profound implications for the Counsel and the Counsel's Office.

5. HANDLING DEPARTMENT, AGENCY, AND WHITE HOUSE STAFF CONTACTS WITH THE DEPARTMENT OF JUSTICE

The relations between the Justice Department and the Counsel's Office often are quite close. On occasion, for example, DOJ appointees and Counsel staff members have been recruited to and from one another's offices. This occurred in the case of Clinton Counsel Beth Nolan, who was the Assistant Attorney General-designate in the Office of Legal Counsel. Similarly, Clinton Solicitor General Walter Dellinger previously served as an Associate Counsel and as Assistant Attorney General for the OLC. In the George W. Bush administration, the first deputy White House Counsel, Timothy E. Flanigan, had directed the OLC in the first Bush administration.

Monitoring Contacts with the Department of Justice

The Counsel's Office functions as a gatekeeper for all contacts between the White House and the Department of Justice.

... all requests for OLC opinions had to go through me, all communications with the department had to go through my office.... [T]here were certain exceptions but no one could call over to the Deputy Attorney General and the solicitor general directly; they had to go through me. My typical point of contact was the Deputy Attorney General for everything except OLC opinions, then I would call the head of OLC. (Culvahouse interview, p. 16)

The White House Counsel's oversight is meant to ensure that communications between the White House and the Justice Department are properly conducted. Any effort to influence the legal judgments of the Department would generate significant difficulties for an administration. Reagan Counsel A.B. Culvahouse noted, for instance, that departmental statements of administrative policy were routinely reviewed *unless* Justice was issuing them. Contacts with the DOJ, in brief, have serious implications for presidential power and for policy development, and therefore are carefully supervised.

Requesting OLC Legal Opinions

The resources of the OLC -- including its institutional memory -- render this office an invaluable source of legal expertise for the White House Counsel. Quite simply, the Counsel's Office cannot provide all the information and the advising that an administration needs.

OLC is the single most important legal office in the government. More important really in terms of scholarship and memory and research -- White House Counsel's Office doesn't really have the staff to do all [that] and they shouldn't. It should be done in OLC.... [T]he White House doesn't go to court without the department.... OLC was a huge problem for us in the sense that they were putting on a brake. We were free to ignore their advice but you knew so you did so at your peril because if you got into trouble you wouldn't have them there backing you up, you wouldn't have the institution backing you up. So you did it at your risk; you did it at your risk.... You're best able to avoid the land mines if ... you restore the rightful place of the Office of Legal Counsel. When in doubt, ask them and they'll tell you where the land mines are. (Gray interview, pp. 18-19, 21)

Several other Counsels echoed Gray's description of the OLC as a formidable ally and a significant check on the White House. However, precisely because of the similarities in their responsibilities, the relationship between the White House Counsel and the OLC can be highly competitive. Both are recognized as legal experts immersed in politics and policy. Exacerbating matters, the jurisdictions of their offices, having evolved through practice, are blurred and lack strict bureaucratic rationality.

Yet, to an even larger extent, this competitive relationship reflects differences between the organizations. The White House Counsel is appointed by the president and does not require Senate confirmation. The members of the Justice Department include presidential appointees who are free of Senate confirmation, presidential nominees who are subject to Senate confirmation, and careerists. As such, Department officials have numerous and crosscutting loyalties. Further, while the president's claim to executive privilege in regard to communications with the White House Counsel has been delimited in recent years, any possibility of the president successfully making such a claim in regard to the OLC may have been sacrificed in the Reagan administration.

... it had to do with a request by the Senate Judiciary Committee for all of William Rehnquist's files when he was head of the Office of Legal Counsel at the Justice Department.... I thought that was simply harassment and I thought they were trying to create the kind of issue they could use to stop the nomination. I and the person who was then head of the Office of Legal Counsel in the Justice Department both felt this was a good executive privilege claim because the Office of Legal Counsel is the lawyer for the entire government, and in effect for the President, and everyone discloses everything to them to get rulings

about legal issues. The whole underpinning of the attorney/client privilege, which is part of the executive privilege, is to get people to disclose all relevant information so you can give them the right advice. I thought, if there was ever a case, this was it. So I sent a memo to the President saying I thought he ought to claim executive privilege in this case, but Meese did not like it at all that idea. We debated it in front of the President and the President decided he wouldn't claim it.... [I]t turned out not to be as serious a problem as I thought, except that it creates a precedent. In the future, if someone wants the files of the Office of Legal Counsel, they are more likely to get them because this precedent exists. The result of that is that some people aren't going to go to the Office of Legal Counsel for advice if they have to disclose things that they don't want turned over to a Senate committee. (Wallison interview, p. 20)

Requesting a legal interpretation from the OLC, therefore, is clearly a strategic undertaking. If the Counsel does not involve the OLC -- or, having received the OLC's interpretation, proceeds to set it aside -- the White House is isolated and will lack support for its actions. Politically, this is risky and even dangerous. C. Boyden Gray, for example, unequivocally concluded that the White House should never go to court without Justice's support. At the same time, the OLC is staffed by experts who cannot claim executive privilege and, in any event, have allegiances that extend beyond the White House.

PRINCIPAL RELATIONSHIPS IN THE EXECUTIVE BRANCH

Depending on the course of politics and policy in a presidential administration, the White House Counsel will interact with most of the executive branch departments and agencies. Likewise, given its functions, this Office could -- and often does -- interact with every White House unit. At the very least, the Counsel's Office will communicate with the General Counsels throughout the executive branch, and will also process the paperwork associated with every presidential nominee or appointee. Having acknowledged the extent and scope of the Office's network, this section highlights the offices and departments with which past Counsels were in most frequent contact.

THE WHITE HOUSE

Within the White House, the Counsel's principal relationship -- and greatest source of influence -- has been either the president or the Chief of Staff. To whom the Counsel reports frequently has been a product of individual Counsels' past professional relationships, and this authority relationship has been clearly established at the time of appointment. This clarity is essential, if the president wishes to avoid destructive competition between two offices that are crucial to the success of the administration and its policy agenda.

The President

In electing to have the White House Counsel report directly to the president, presidents often have appointed individuals who were their longstanding friends or professional colleagues. Counsels with this profile included the following individuals:

- Ford Counsel Philip Buchen, a former classmate and law firm partner of the President;
- Carter Counsel Robert Lipshutz, a longtime friend and former attorney for the President;
- H.W. Bush Counsel C. Boyden Gray, who worked for George Bush throughout his twelve-year tenure in the White House;

- Clinton Counsel Bernard Nussbaum, who had hired Hillary Rodham Clinton to work on the Nixon impeachment investigations and remained a good friend of the Clintons throughout the intervening years;
- W. Bush Counsel Alberto Gonzales, a friend of and former counsel to Governor Bush.

Even with the advantage of a prior relationship with the president, Counsels have faced various challenges to their position and their influence. Some have found that prior relationships were insufficient guarantees of influence.

I talked to Hillary about some of these things [policy and political problems]. She agreed with me about the Independent Counsel, but she folded on me. She just came in and said, "The President wants to get on with his agenda." There was trust and confidence between the First Lady and me, but she was torn between me and her husband. I had only a few friends in the White House, including the First Lady. (Nussbaum interview, p. 7)

The White House staff is likely to include a number of longtime presidential colleagues, all of whom may compete for access to the Oval Office.

Of course, even if the Counsel is able to sustain a close relationship with the president, there is no guarantee that the president will seek or follow advice. President Ford's decision to pardon former President Richard Nixon, arguably the most significant legal decision of his administration, was made without any consultation. Counsel Philip Buchen provided only *post hoc* support and legal reasoning.

Two administrations have recruited Counsels to raise the profile and significantly re-establish the Counsel's Office within the Washington community (see, too, "Turnover" in Organization and Operations). President Jimmy Carter appointed Lloyd Cutler to meet these needs; President Bill Clinton named Cutler, and then former Congressman and U.S. Court of Appeals Judge Abner Mikva and former U.S. Attorney and D.C. Corporation Counsel Charles Ruff; President George W. Bush turned to former Reagan White House counsel Fred Fielding. Cutler, in particular, has publicly stressed that he entered office with a promise of direct communication with the president. He claimed to have held President Carter to that commitment.

When I was asked by the President [Carter] to take this job, it was a mid-life crisis of his administration, the so-called "malaise" period. I said, "What kind of a role do you want me to play?" I knew him, but I didn't know him that well. He said, "I want you to play sort of a Clark Clifford role." I got that in writing and, of course, Clifford was so venerable and such a great storyteller, everybody thought that Harry Truman never made a move without consulting Clark Clifford. And every time I got left out of a meeting I would go to Jordan or I would go to the President and I would say, "I think that Harry Truman would have wanted Clark Clifford in this meeting." I was older than all the rest of them so nobody could gainsay me.... In theory I had the same deal with President Clinton but I didn't have the time to really capitalize on it. (Cutler interview, pp. 10-11)

The White House Counsel and Presidential Privileges

The issue of confidentiality in the president's communications with the White House Counsel is currently a matter of intense concern. Of the various legal privileges that a president or a Counsel *might* claim -- executive privilege, government attorney-client privilege, work product protection, deliberative process protection, and common interest doctrine -- the two that are most salient are executive privilege and government attorney-client privilege.

The courts view these two as clearly distinct. Executive privilege refers to the constitutionally-based protection of confidentiality of a president's communications with any government officer when the chief executive seeks advice on the exercise of official governmental duties. (See the Wallison interview, p. 18, for a good explanation of the basis for executive privilege and how it may

apply.) Its purpose is to promote candid and frank discussions between a president and his advisors. Government attorney-client privilege is a variant of the common-law attorney-client privilege, but with the following crucial distinctions:

1. the client is the Office of the President of the United States; and
2. the advice being rendered by a government attorney to the president is “for the purpose of securing primarily either
 - (i) an opinion on law, or
 - (ii) legal services, or
 - (iii) assistance in some legal proceeding.”

(*In re Sealed Case*, 737 F. 2d at 98-99 [quoting *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 [D. Mass. 1950]] in *In re Bruce Lindsey* [Grand Jury Testimony], 158 F. 3d 1263 [D.C. Cir. 1998])

Because the White House Counsel’s Office is in the unique position of providing *both* political and legal advice to the president, navigating the shoals of presidential privileges is an especially tricky venture. Judicial acceptance of a privilege claim is determined by many factors, such as the following:

- whether the nature of the conversation is political or legal;
- whether the person communicating with the president is doing so in either a legal or political capacity;
- whether the request for presidential communications comes from the courts, Congress or an Independent Counsel;
- whether the information is needed in a civil or criminal proceeding;
- whether the sufficiency of the asserted public interest in confidentiality outweighs the strength of the need for the information by another institution; and
- whether the requested information is available from an alternative source.

Varying combinations of these factors will produce different judicial outcomes, making for complex and unpredictable results.

The Clinton administration was embroiled in numerous legal controversies where it vigorously asserted a whole host of privilege claims, and it found little comfort in the federal court decisions in these cases. Legal scholars and commentators have reacted critically to that administration’s decision to litigate. In contrast, most other White Houses found ways to assert such claims, but ultimately chose to resolve these conflicts through compromise, thus preserving the existence of the privilege. In essence, the Clinton administration forced the issue into the judicial process, and the courts ruled against it, narrowing considerably any maneuverability for such claims in the future.

The impact of these rulings on government attorney-client privilege and on the White House Counsel’s Office’s relations with the president, in particular, was especially damaging. In July 1998, the United States Court of Appeals for the District of Columbia ruled that Deputy Counsel Bruce Lindsey was not protected by government attorney-client privilege from testifying before a federal grand jury about conversations with the president about possible criminal conduct by the president and other government officials. The Court said:

With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure...Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency. (*In re Bruce Lindsey* [Grand Jury Testimony], 158 F. 3d 1263 [D.C. Cir. 1998])

In reaction, Counsel Charles Ruff commented:

The practical result of the court’s decision is that the president and all other government officials will be less likely to receive full and frank advice about their official obligations and duties from government attorneys. (Marcus, 1998, p. 1)

Thus, the Counsel's Office suffered a severe blow from this decision, and its ramifications will profoundly affect the next Counsel. In one sense, the specific circumstances of this case, where a Deputy Counsel was subpoenaed to testify in federal court about possible criminal behavior by a president, were so idiosyncratic as to be unlikely to recur very often. Yet to Bush Counsel C. Boyden Gray, the most unfortunate aspect was that the privilege was lost in a case concerning the president's personal behavior, rather than his official duties or matters of national security, where assertions of presidential privilege are treated more deferentially by the courts.² Gray called this "the weakest possible case," which produced "rulings that reduce the leverage future presidents will have in cases when it really matters." (Strobel, 1998, p. 10)

Executive privilege in the years since the end of the Clinton administration has taken some different turns. It has arisen in circumstances that are far different than those of the Clinton years, including: 1) Vice President Cheney's refusal to provide information about his National Energy Policy Development Group to the General Accountability Office administrator and to government watchdog groups, Judicial Watch and the Sierra Club; 2) requests for top White House officials to testify before national commissions; 3) demands by congressional committees for documents and testimony from judicial nominees and other candidates requiring Senate confirmation, along with requests for senior White House officials to testify before congressional investigating committees; and 4) revising the law pertaining to access to presidential records (see Baker, 2005, p. A6). White House action on all of these fronts has been exceptionally strong and consistent in its mission to protect presidential communications. Most would judge that the results of its efforts have been largely successful.

The Bush administration made no secret of its intention to be aggressive in its protection of presidential prerogatives, and to be especially protective of executive privilege. It stated openly that it believed that previous administrations had relented too easily when faced with requests for confidential White House communications, and that this reluctance to push this concept to the limits had seriously weakened protection for the office and for the use of executive privilege by future occupants. It criticized the Reagan administration for succumbing too quickly to demands for presidential documents, on the other hand, it noted that the Clinton administration took its claims of executive privilege to court, and lost on all counts. Thus, under both previous administrations, protection for executive privilege had diminished.

National Commissions

The administration permitted National Security Adviser Condoleezza Rice to provide sworn testimony before the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission") in a public hearing on April 8, 2004 after lengthy negotiations produced an agreement that would allow her to testify but with an acknowledgement that this would not create a precedent. It would have been constitutionally tenable, though not politically palatable, for the president to insist that she not testify, since the topic under inquiry was the most extraordinarily sensitive, national security matter and would invariably involve her conversations with the president. Whether it created a precedent for the future, despite protestations to the contrary, remains to be seen until the next time a similar situation arises.

Demands from Government Agencies and from Independent Groups

Vice President Cheney put up strong resistance to efforts from the GAO and from independent groups to compel him to release records from his energy task force meetings. He won

² In a comparable context, see the contrast between *Clinton v. Jones* (520 U.S. 681 [1997]) (no presidential immunity from civil liability for personal conduct) and *Nixon v. Fitzgerald* (457 U.S. 731 [1982]) (absolute presidential immunity from civil liability for acts taken in an official capacity). See, also, *U.S. v. Nixon* (418 U.S. 684 [1974]) for special consideration of privilege claims based on national security.

the round with GAO Comptroller David Walker in December 2002 when District Court Judge John D. Bates ruled that the GAO lacked standing to sue the vice president for refusing to turn over the records (see *Walker v. Cheney*, 230 F. Supp.2d 51 [D.D.C. 2002]). In February 2003, the case ended when the GAO decided not to appeal the ruling. The case did not reach the point where Vice President Cheney needed to actually claim executive privilege, rather, he won the court battle more on procedural grounds rather than on substantive ones.

The second case filed against Vice President Cheney requesting access to his task force records came from Judicial Watch and the Sierra Club. Similarly to the district court ruling in the GAO case, the U.S. Supreme Court ruled in June 2004 largely on procedural grounds but with language that was clearly deferential to the executive branch, noting that “special considerations control when the Executive Branch’s interest in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated” (see *Cheney et al. v. U.S. District Court*, 542 U.S. 367 [2004]). At issue in the case was the question of whether the D.C. Circuit Court of Appeals had the authority to issue a writ of mandamus against the District Court, as requested by the Vice President, which would order the District Court to halt the discovery process in the suit by the two groups against the Vice President.

Without reaching the substantive question of executive privilege, the Supreme Court ruled that the Court of Appeals did have the discretion to grant a mandamus petition but that it had misinterpreted the scope of protection afforded to presidential immunity from judicial process in *U.S. v. Nixon* (418 U.S. 683 [1974]), and that the protection in civil suits here was broader than that in criminal proceedings, as in *Nixon*. The Court remanded the case to the Court of Appeals for further action, reminding it of “the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract from the energetic performance of its constitutional duties” (*Cheney et al. v. U.S. District Court*).

In a unanimous ruling in May 2005, the Court of Appeals dismissed the lawsuit altogether, thus, sparing Vice President Cheney from having to disclose the details of internal government meetings under federal open meetings laws. The decision contained language that bolstered the executive branch’s protection of confidentiality, despite the fact that no specific claim of executive privilege was actually presented in the case: “The president must be free to seek confidential information from many sources, both inside the government and outside” (see *In Re: Cheney*, No. 02-5354 [2005]). The decision was viewed predictably by opposing sides: the administration was cheered by the strong affirmation of the principle of executive branch confidentiality, while open government advocates saw it as a setback to its efforts to make government accountable and transparent.

[Demands from Congress: The Senate Confirmation Process and Oversight Investigations](#)

A number of Bush administration nominations faced demands from Senate committees for documents from prior executive branch positions held by specific nominees. There was an unusually high number of these confrontations during the Bush years because there was a pattern of selecting nominees who had held previous sensitive positions in either the current Bush or Reagan administrations. It could be – or should have been - expected that these nominees would be asked by Senate committees during the confirmation process to discuss their prior work and to produce some of it as evidence of their professional competence. When the White House balked at these requests and claimed that the Senate was overstepping its bounds, a clash between the branches ensued. What makes this especially noteworthy is the frequency of such interchanges.

The administration faced this issue of Senate demands for documents from judicial nominees at least four times: with Miguel Estrada on his nomination to the D.C. Circuit Court of Appeals, and with Harriet Miers, John Roberts and Samuel Alito on their nominations to the U.S. Supreme Court. The administration allowed the Estrada and Miers nominations to be withdrawn rather than to relinquish the papers, while it managed to reach some accommodation with the Judiciary Committee on the Roberts and Alito selections. Estrada, Roberts and Alito all had some

combination of prior work at either the Department of Justice (in either the Solicitor General's office or in the Office of Legal Counsel) or in the White House Counsel's office in the Reagan administration. Miers was the sitting White House Counsel at the time of her nomination to the Supreme Court. In all of these cases, it was predictable that there would be inter-branch clashes, given the already politically charged environment of Senate confirmations and the uncommon ingredient that each of these nominees had worked in executive branch offices that claimed some degree of confidentiality from having to disclose their work-product to a coordinate branch of government.

A similar pattern evolved with the nominations of sitting White House advisers to other executive branch positions, raising the issue of high-profile officials already serving in non-Senate confirmed positions in the White House who would now face public scrutiny in open Senate confirmation hearings where, as with the judicial nominations, the Senate committees would expect to question the nominees and have access to their records as a basis for judging their professional fitness. Among those included were National Security Adviser Condoleezza Rice, on her nomination as Secretary of State and White House Counsel Alberto Gonzales, on his nomination as Attorney General. The record here was successful on both, although the confirmation hearings were exceptionally testy, leaving some bitterness on both sides that would come back to haunt these two new Cabinet members in subsequent Hill appearances.

As the Bush administration heads towards the end of its tenure, there are executive privilege battles still underway, and the expectation is that these conflicts may well persist into the next administration. They have the potential to pose the most significant challenges to executive privilege since the 1974 Supreme Court decision in *U.S. v. Nixon*, since they involve officials closest to the president.

The most serious of these current conflicts arose out of congressional efforts to find the facts about the Justice Department firing of nine United State attorneys in late 2006. Both houses of Congress instituted inquiries into this matter in 2007 through their respective Judiciary Committees, requesting documents and/or testimony from Alberto Gonzales (then-Attorney General), Harriet Miers (former White House Counsel), Sara Taylor (former White House political director), Josh Bolten (White House chief of staff), Karl Rove (then-Deputy White House chief of staff and former Director of the Office of Political Affairs), William Kelley (then-Deputy White House Counsel), and J. Scott Jennings (then-Deputy Assistant to the President in the Office of Political Affairs). The only witness to appear was Taylor, who testified before the Senate committee in July 2007, but refused to answer questions that she thought were protected by privilege.

This matter has already spawned three claims of executive privilege by President Bush in an effort to quash congressional attempts to demand White House communications and testimony about internal decision-making processes, contempt citations against Miers, Bolten and Rove, and a lawsuit initiated by the full House to force compliance with its subpoenas. That suit has resulted in two federal court decisions. The District Court ordered Miers and Bolten to appear before the House Judiciary Committee and to provide the subpoenaed documents (*Committee on the Judiciary of the U.S. House of Representatives v. Miers et al.* [No. 2008-0864, 7/31/08], while the D.C. Circuit Court of Appeals granted a temporary stay in this dispute (*Committee on the Judiciary of the U.S. House of Representatives v. Miers et al.* [No. 08-5357, 10/6/08]).

In the District Court opinion, Judge Bates (a George W. Bush appointee) used strong language to cast doubt on the administration's arguments. He rejected its theory of absolute immunity that maintained that the communications of close presidential advisers (and former advisers) were categorically privileged, and that Congress has no legitimate interest in inquiring about why the nine prosecutors were dismissed. He states, "The executive's current claim of absolute immunity from compelled Congressional process for senior presidential aides is without any support in the case law." Even more forcefully, he writes that, "At bottom, the Executive's interest in 'autonomy' rests upon a discredited notion of executive power and privilege. As the D.C. Circuit and the Supreme Court have made abundantly clear, it is the judiciary (and not the executive branch

itself) that is the ultimate arbiter of executive privilege. Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one, yet that is what the Executive seeks through its assertion of Ms. Miers's absolute immunity from compulsory process. That proposition is untenable and cannot be justified by appeals to Presidential autonomy" (*Committee on the Judiciary of the U.S. House of Representatives v. Miers et al.* [No. 2008-0864, 7/31/08], p.86). He ruled that Congress, indeed, has a legitimate and an important interest in inquiry here because the House Judiciary Committee is specifically charged with oversight of the Department of Justice.

After the White House lost its effort to ask for a stay of the District Court's ruling, it appealed to the D.C. Circuit Court of Appeals, which, in a per curiam opinion on October 6, 2008, granted the administration the temporary delay it requested while the appeal from the District Court is pending. The appeals court recognized that "The present dispute is of potentially great significance for the balance of power between the Legislative and Executive Branches. But the Committee recognizes that, even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch – including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court – before the 110th Congress ends on January 3, 2009." Once the 110th House ceases to exist, the subpoenas will expire, and the case could become moot, but if not, "this course has the additional benefit of permitting the new President and the new House an opportunity to express their views on the merits of the lawsuit" (*Committee on the Judiciary of the U.S. House of Representatives v. Miers et al.* [No. 08-5357, 10/6/08]).

The continuation of this case into the new administration has prompted scholars to consider novel questions that it could raise. For example, could a former president still claim executive privilege on behalf of former aides? And if he did, wouldn't it be up to the incumbent president to decide whether such claims are in the best interest of the institution of the presidency (Froomkin, 8/1/08)? Judge Bates noted in his opinion that "A former President may still assert executive privilege, but the claim necessarily has less force, particularly when the sitting President does not support the claim of privilege" (*Committee on the Judiciary of the U.S. House of Representatives v. Miers et al.* [No. 2008-0864, 7/31/08]).

One additional development of note here is Attorney General Mukasey's September 30, 2008 appointment of a special prosecutor, Nora Dannehy. She will investigate the firing of the U.S. attorneys to determine if there was White House involvement, if the firings were politically motivated, and if there is sufficient evidence to bring criminal charges against those responsible for the decisions to dismiss the attorneys. Mukasey agreed to appoint a prosecutor on the recommendation of an internal Justice Department report that cited frustration in its own inquiry because two key witnesses, Miers and Rove, were uncooperative. The prosecutor will have subpoena power which the internal department probe did not. Within days of the prosecutor's appointment, the Department of Justice issued a statement that the White House would cooperate fully with the prosecutor (The BLT, 10/1/08).³

The final contribution of the Bush administration to post-Clinton executive privilege controversies may be the one with the longest shelf-life, since it began in November 2001 and still lingers today. This is the matter of public access to presidential records. President George W. Bush issued an executive order on November 1, 2001 titled "Executive Order 13233: Further Implementation of the Presidential Records Act" that purported to "provide for an orderly process, so that information can be shared..." (Fleischer, White House Briefing, 11/1/01). Critics saw in the revised procedures real potential for indefinite delay in the release of records, along with other

³ An interesting side note here is the letter sent to the Department of Justice from Deputy White House Counsel Emmet Flood that detailed the documents that the White House did and did not release to the Department for its internal inquiry. It withheld internal documents about the firings but did not assert privilege, since the Department of Justice is part of the executive branch. Flood noted, however, that the documents were "covered by the deliberative process and/or presidential communications component of executive privilege in the event of a demand from them by Congress" (The BLT, 10/1/08). Clearly, this controversy will continue to unfold, both in the courts and in Congress.

objections (e.g., diminution of the archivist's role, expanding the authority of former presidents to withhold records, authorizing presidential assistants or relatives to make privilege claims, and extending the right, for the first time, to the Vice President to make privilege claims.

The controlling authority for public release of presidential records was the Presidential Records Act of 1978 (PRA), along with an executive order from the Reagan administration issued in 1989. The underlying principle was public ownership of presidential papers, with access and release pursuant to regulations established ultimately by the National Archives and Records Administration (NARA).

Scholars and other groups mobilized on two fronts to challenge the order: they testified in Congress and sued in federal courts. It took six years for their congressional testimony to finally bear fruit, but it was an unfinished victory. The House passed H.R. 1255, the Presidential Records Act Amendments of 2007, by a vote of 333-93 on March 14, 2007, but the bill has been held up in the Senate by "holds," first by Senator Jim Bunning (R-KY), and then by Senator Jeff Sessions (R-AL). The legislation would: 1) establish a 40-day deadline for current and former presidents to raise executive privilege claims; 2) limit the authority of former presidents to withhold presidential records, 3) limit the right to make executive privilege claims to presidents alone, and not their heirs or assistants, and 4) withdraw the right to claim executive privilege afforded to Vice Presidents in EO 13233. It seems all but assured that there will not be a Senate vote by the end of the 110th Congress (and the president vowed to veto it, if passed). Thus, it would need to be re-introduced in the 111th Congress or the EO 13233 revisited by the new administration.

The case in the courts was filed immediately by the American Historical Association, the National Security Archive, and other professional groups, seeking injunctive and declaratory relief, asking the court to find that "the order was an impermissible exercise of the executive power" (*AHA v. NARA*, No. 01-2447, 10/1/07). These critics viewed President Bush's effort to revise Reagan's executive order as, instead, a repeal of the PRA and replacement of it with a new executive order whose provisions ran counter to the spirit and the law of the PRA. District Judge Colleen Kollar-Kotelly dismissed the case on jurisdictional grounds in a decision on March 28, 2004, but the plaintiffs filed a motion to "alter or amend" the judgment, and the court agreed in September 2005 to reconsider its earlier ruling. On October 1, 2007, Judge Kollar-Kotelly struck down the section of the EO that permits a former president to indefinitely delay the release of White House records, ruling that it is contrary to the PRA. The court did not reach the objections to the EO that relate to claims of privilege, holding that they were not yet ripe for judgment because no incumbent or former president or former vice president had actually asserted a privilege claim to any document at issue at that time.

Two other records-related issues, with privilege implications, will remain "live," even as the Bush administration winds down. District Judge Kollar-Kotelly ordered Vice President Cheney and the National Archives in a ruling on September 18, 2008 to preserve all of his official records (*Citizens for Responsibility and Ethics in Washington et al. v. Richard Cheney et al.* [No. 2008-1548]). A watchdog group, Citizens for Responsibility and Ethics in Washington, along with scholars and others, sued Vice President Cheney in an effort to insure that he would comply with the Presidential Records Act. These plaintiffs feared that Cheney might destroy or withhold some of his documents, given that he had previously claimed that the Presidential Records Act applied to only some of his papers. His filing with the court indicated that he had a narrow interpretation of "vice presidential records," which he said applied to records that related to "constitutional, statutory or other official or ceremonial duties" of the vice president that come within "the category of functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" or "the category of the functions of the Vice President as President of the Senate" (Lee, 9/21/08, p. A5). But commentators pointed out that such a definition would exclude records pertaining to his work on the National Security Council and in other matters where he acted without instructions from the president (Lee, p. A5).

Finally, the admission of the White House in 2007 that its email servers had not preserved messages from 2003-2005 created a controversy, provoking congressional hearings before the House Committee on Oversight and Government Reform and a lawsuit by Citizens for Responsibility and Ethics in Washington.

The Chief of Staff

The alternative authority relationship, in which the Counsel reports to the Chief of Staff, was chosen in the Reagan administration. Reagan's White House Counsels had previously been professional colleagues of the Chief of Staff. Still, a change in the Chief of Staff did not necessarily result in the appointment of a new White House Counsel. The Reagan Counsels left office for a variety of personal and institutional reasons: Fred Fielding, because he "was ready to go out into the real world"; and Peter Wallison, because of pressures generated by Iran-contra. (Wallison interview, p. 1) A.B. Culvahouse, the third and final Reagan Counsel, served two Chiefs of Staff, Howard Baker and Kenneth Duberstein.

Although reporting to the president through the Chief of Staff might appear to be a disadvantage, Culvahouse argues otherwise.

[Howard Baker] is my mentor and my friend. He was my ace in the hole in the White House. I think to the extent I was an effective White House Counsel is because he gave me a lot of support as did the President. But people did not try to go around me or over me very frequently and never very successfully. (Culvahouse interview, pp. 21)

Still, the Reagan White House Counsels did preside over an office that was widely seen as being focused more on law than on policy.

In the Reagan White House, the Counsel's Office was viewed as sort of an additional final check. Unlike I think some other White House Counsel's Offices, we didn't really have a policy agenda. We felt like we were to be honest brokers as well as lawyers. (Culvahouse interview, p. 2)

It seems, therefore, that the expectation that the Counsel relates to the Chief of Staff, rather than directly with the president, contributed to effecting a significant change in the orientation of this office.

The White House Staff

The White House Counsel's Office is in contact with virtually every unit in the White House. The consequent dialogues and negotiations add immeasurably to the Office's workload. Tight deadlines compound the difficulties.

Everything else [apart from Iran-contra] there were lots of cooks, lots of principals and lots of lawyers, and sometimes just trying to reach a decision or trying to force a decision in a timely way tended to be a lot of what I did. For right or wrong, we have to get an answer to this question and get it today. ... The timing was forced by your own judgment or sometimes you'd have deadlines. Sometimes you'd have the ranking Republican on the committee calling up and saying if you don't tell us what you think the committee is going to go forward tomorrow regardless. (Culvahouse interview, p. 28)

The scarcest resource is always time, obliging the Counsel to exercise careful judgment in determining which meetings to attend and in allocating staff. (See Organization and Operations for a more detailed discussion of these issues.)

Past Counsels have stressed that their participation in domestic and foreign policy-making may facilitate decision-making and avert difficulties. Notably, the Counsel has chaired the War Powers Committee in recent administrations and, in a number of White Houses, including George W. Bush's, has regularly attended the meetings of senior domestic policy-makers. In particular,

speechwriting and legislative advising draws the Counsel's Office into contact with a wide range of other White House units. This circumstance has prevailed since the Eisenhower administration.

[I]t is our judgment that Counsel to the President should have, in addition to his other functions, the responsibility of coordinating the development of the proposed legislative program for the President. After the legislative program has been approved by the President it should be the function of Counsel to coordinate the content of the State of the Union message, the Budget Message, and Economic Report, as well as special legislative messages to make sure they comport with the President's program.

This part of the Counsel's job during the Eisenhower Administration worked exceedingly well during those eight years.... This function ... will require that Counsel to the President work very closely with the Director of the Office of Management and Budget, the Secretaries of the various departments, and also the General Counsels of the various departments. He will also have to work very closely with the President's Press Secretary, the President's Assistant in charge of Congressional Relations, the Chairman of the Council of Economic Advisors, and the President's Assistant in charge of preparing Presidential messages. (Memo, Eisenhower Special Counsel Gerald Morgan and Associate Special Counsel Edward McCabe to Ford White House Counsel Philip Buchen, 2 October 1974.)

The following list provides examples of the units with which the Counsel's Office has predictably and consistently established strong relationships.

Communications Office, regarding presidential speeches, travel, and campaign expenses. This relationship may be especially close during the campaign seasons, when travel expenses and contacts are subject to strict legal standards.

Legislative Affairs, regarding legislation, nominations, and confirmations. Some White House Counsels have participated directly in legislative negotiations, even communicating directly with Senators about judicial appointments.

Personnel Office, regarding appointments and clearances. This responsibility also causes the White House Counsel's Office to consult regularly with the FBI and the ABA. C. Boyden Gray noted that the relationship between these two offices was so close that his assistant married the director of the Office of Presidential Personnel. (Gray interview, p. 26)

Office of Political Affairs, regarding travel and campaign expenses.

Press Office, regarding presidential press conferences. In some administrations, the Counsel's Office has also prepared presidential statements about federal court rulings that affect the presidency or the executive branch.

Office of Management and Budget, regarding budget proposals, rescissions, and deferrals.

National Security Council staff, regarding foreign policy.

The Office of the Vice President

As the office of the Vice President has increased dramatically in stature, functions and influence during the last thirty years, the office of Counsel to the Vice President also has undergone a change in profile and, thus, a change, or at least a deepening, in its relationship to the office of White House Counsel. Analysts credit Walter Mondale with the expanded role of this office, as he negotiated the outlines of his responsibilities with President Carter at the time of Carter's selection of Mondale as his running mate. Mondale made clear that he wanted to be a "roving minister" (one without a specific policy portfolio), and that he expected to have "a seat at the table," advising the president on all major issues. Al Gore had a similar arrangement with President Clinton, with a special focus on the "reinventing government" initiative and on overseeing technology policy.

But, the most dramatic advance in vice presidential influence came with Vice President Richard Cheney's eight years in office during the George W. Bush administration, and it was accompanied by the equally stunning transformation of the office of Counsel to the Vice President. The redefinition of the office of the Vice President under Cheney seems likely to be one of the chief legacies of the Bush presidency. *Washington Post* reporter Barton Gellman in his book, *Angler: The Cheney Vice Presidency* (2008), quotes former Vice President Quayle as saying that Cheney had the understanding from Bush that he would be a "surrogate chief of staff" (Gellman, 2008, p. 58). According to Gellman, Cheney had an "unseen hand" and an operative role in every major policy decision, both domestic and foreign, including the most sensitive, high-profile issues of national security, the economy, the environment, and interpretations of law.

Whether the change in role of the vice president's office can be attributed primarily to the sheer force of personality, policy command and personal political network of Dick Cheney (and could, thus, revert back to a more modest form with a subsequent vice president) or whether the actual structure and function of the office have changed in a more long-term way that is likely to outlive its most powerful occupant is not yet known. But few would deny that the vice-presidency under Cheney has been profoundly more influential than any of his predecessors.

The increased scope of the substantive responsibilities of the Vice President demanded that the office of Counsel to the Vice President would be in the loop on all of these policy discussions and decisions. It is for this reason that the office of Counsel to the Vice President, at least under the Bush administration, operated in close tandem with the White House Counsel's office to an unprecedented degree. In his book, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007), former OLC head Jack Goldsmith confirms this changed role of the Vice President's Counsel. Referring to the Bush administration, he says: "...in no previous administration was the Vice President's Counsel so integrated into the operations of the powerful Counsel's Office. This changed in the Bush II presidency, when the Vice President's small office fused into the President's operating structures. The new arrangement reflected Vice President Cheney's enormous influence on President Bush" (Goldsmith, 76). He further noted that the Vice President's Counsel under Cheney was "an altogether different type of Vice President's Counsel, one who received all of the important government documents that went to Alberto Gonzales, and was always in the room when Gonzales was discussing an important legal issue" (Goldsmith, 2007, p. 76).

Cheney's choice of David Addington as his Counsel, and later as his Chief of Staff, was pivotal in the re-conceptualization of both offices – that of the Vice President and that of Counsel to the Vice President – because Addington shared Cheney's penchant for an invigorated vice presidency (and presidency), and, thus, both offices increased in power and function simultaneously. Here, too, the sheer force of Addington's personality and intellect may suggest that this redefined view of the office of Counsel to the Vice President may reflect the expectations only of its current occupant and, thus, may not last beyond the present administration. It is a choice that the next Vice President will need to make between a more traditional model of Vice President and Counsel to that office versus the model of those two offices under Cheney and Addington. Under either scenario, it seems clear that a stronger connection between the two Counsel offices, Vice President and White House, has now been forged, and might be expected to continue, although, as always, personality and relevant professional expertise of the players will still be important contributors to how these two Counsel offices will interact in the future.

DEPARTMENTS AND AGENCIES

Perhaps the most distinctive contribution of the White House Counsel to the wider White House staff comes through its consultations with the Department of Justice, and more specifically with the Office of Legal Counsel. The White House Counsel, as discussed in the Functions section above, properly serves as the gatekeeper for all communications with the Department of Justice.

The Department of Justice

The extent and nature of a White House Counsel's contact with the Department of Justice has been particularly influenced by three factors:

1. The extent of the president's judicial agenda, including judicial nominations;
2. The strength of the president's relationship with the Attorney General; and
3. The relative activism of the White House Counsel and the Attorney General as policy-makers.

A larger judicial agenda creates the need for more contacts with the Justice Department. Similarly, a strong presidential relationship with an activist Attorney General may establish a line of communication that is more exclusive of the White House Counsel.

All of the Justice Department contacts, however, are made in a political environment that is highly suspicious of White House – Justice Department associations. Close relationships between Presidents and Attorneys General in the Nixon and Reagan administrations, for example, injured the credibility of both of these offices. This, in its turn, hampered the officeholders' ability to implement their policy decisions. Likewise, past executive privilege decisions may discourage presidents from contacting the Justice Department, because those communications have even less protection than do those with White House aides.

The Attorney General

The Attorney General and the White House Counsel appear, at first glance, to share similar advisory roles and jurisdictions. Notwithstanding differences in accountability (the Attorney General is subject to Senate confirmation) and circumstances (executive branch department vs. White House), the distinctive contributions of the White House Counsel and the Attorney General have more often been negotiated through practice than by invoking abstract principles. Conflict has occurred frequently, and presidential libraries contain numerous memoranda of understanding between attorneys general and White House Counsels.

White House Counsels and Attorneys General, however, have rarely been equals within an administration. Presidents have tended to name either an Attorney General or a White House Counsel with whom they were well-acquainted. The selections have, more often than not, been connected to the judicial agenda of the president: a longer judicial agenda has generally coincided with the nomination of a presidential colleague to the Attorney General's office.

The appointment of a close presidential colleague to the White House Counsel's Office, however, may allow the Office to enter into more substantive policy discussions. Though C. Boyden Gray hedges his comments with a series of qualifiers, he acknowledges that he did influence the direction of several key legislative negotiations.

[President Bush] kept drawing me into the Civil Rights Bill in 1990-1991. I didn't really want to do that because it was very difficult politically, but he kept yanking me back into it.... But I would say that civil rights was legal policy, not necessarily part of the Counsel's Office historically any more than the ADA [Americans with Disabilities Act] was. I did very little on the ADA act.... I had a lot to do in the prior administration about teeing it up for then-Vice President Bush to make it a campaign promise during the '88 campaign. But I spent very little time on it once we got in the White House.... I was involved very little, maybe ten or twenty hours worth. It was very little. The hours I spent were very important, it turned out, but I was not involved in the day-to-day negotiation of the language or the lobbying.

I had to have permission to work on the Clean Air Act. I wanted to work on it because I had an interest in it but it was something that [Chief of Staff John] Sununu was wary about and the President was a little nervous about because of the time it would take from other responsibilities. Again, I could only do it because I had discharged my other obligations. I think at the end of the day people were appreciative of my being involved in it. (Gray interview, p. 2)

The Office of Legal Counsel (OLC)

If the White House Counsel and the Attorney General regularly vie for the president's attention, the White House Counsel's Office and the Office of Legal Counsel are even more frequently competitors in legal interpretation. Though cooperative relationships have been established – doubtless facilitated by the exchange of personnel between the offices – they tend to jockey for advantage within an administration. (See Functions, especially item 5 on White House Counsel – Justice Department relations, for an extended discussion of these practices.)

I doubt there was very much communication directly with the Office of Legal Counsel that didn't go through White House Counsel's Office. In fact, as I've said many times in forums that have talked about this issue, the real conflict between offices, inherent conflict, is between the White House Counsel's Office and the Office of Legal Counsel at the Justice Department because the White House Counsel's Office is growing and growing and is acquiring more and more capabilities to do that kind of research and analysis that the Office of Legal Counsel does and it does it for the President. But there is a real tendency on the part of cabinet officers also to come to the White House Counsel's Office and ask for advice about legal issues. ... [M]ost of the time the Office of Legal Counsel at the Justice Department never hears about it. It just goes on. But when the White House has a constitutional question that's really the point at which this becomes quite sensitive because that is an area that the Office of Legal Counsel has traditionally handled for the White House. But if the White House staff is large enough and they consider themselves strong enough and smart enough, they can handle those things too and advise the President on constitutional issues. The White House always wins over the agencies, always, because they're closer to the President. So they have first dibs, if you will, on any issue that comes up to the presidential level. If there's a constitutional question about the President's power, if they want, they can make that decision on their own without consulting the OLC. Whenever you get a situation like that where some group has first opportunity and doesn't even have to inform the other group over time that first group is going to grow larger and larger and more competent and eventually freeze out completely the Office of Legal Counsel. I think that[s] a long-time trend that's going to occur. (Wallison interview, pp. 21-22)

On this same point, C. Boyden Gray has stressed that the ambitions of the White House Counsel's Office (in Wallison's words, above, "large enough ... strong enough ... smart enough") can endanger an administration. Gray advises re-establishing the OLC as an influential legal commentator, concluding that the advantages gained from the OLC's insights far outweigh any disadvantages resulting from its sometimes critical stance.

Traditionally, OLC has labored under the radar screen, as an office of highly-trained legal professionals whose responsibility is to provide authoritative legal opinions to guide the actions of the president and executive branch agencies. Former White House Counsels of both political parties have remarked how critical it is for the Counsel to seek OLC's opinion on constitutional questions, and to treat that opinion with respect and deference, even when it means telling the president that there is no constitutional authority to do what he proposes (see, for example, comments by Cutler and Gray on pp. 6-7 *infra*).

More recently, some would suggest that there has been a different twist in this relationship during the years of the Bush administration. Rather than a contentious or wary relationship between the two offices, they have, instead, operated often as close, cooperative allies, resulting in outcomes that are unhelpful to both. The attacks of September 11, 2001 thrust OLC into the prime role of providing legal analyses to the White House Counsel's office on the extraordinary new set of antiterrorism policies the president was contemplating. Beginning almost immediately thereafter, OLC produced controversial legal opinions interpreting the scope of the president's authority under the Commander-in-Chief clause and determining the applicability of domestic statutes and obligations under the Geneva Conventions relating to torture and domestic spying.

The central role of OLC was revealed when, in June 2004, some of these memos were leaked to the public and disseminated widely. The spotlight on this office was, indeed, atypical and

unwelcome, but the greater issue is the institutional impact of an OLC that was compliant with, rather than skeptical of, a president's desired policies and unorthodox theories of the office. This coordinated approach between OLC and the White House Counsel's office resulted in considerable damage to the professional reputations of both, but especially to OLC, because it had previously guarded its historically uncompromising tradition jealously and with justifiable pride. Of greatest significance, however, is that an OLC that gave the White House Counsel's office the uncritical legal advice it wanted to hear and carry back to the president rather than a strictly honest appraisal of the law that outlined the applicable legal restraints on executive power acted inappropriately as an advocate for the president's policy goals and, in the end, did both the Counsel's office and the president a disservice when these policies came under withering public criticism and judicial challenge. The concern for the politicization of OLC resulted in congressional hearings and proposed legislation to more closely oversee its work (e.g., The OLC Reporting Act, S.3501, which would require the Attorney General to report to Congress when the Department of Justice concludes that the executive branch is not bound by a statute).

This recent decline in trust and reputation of OLC suggests that future White House Counsels should be attentive to those who are appointed to serve in OLC and to the quality of advice they receive from OLC. As a response to public criticism of OLC, a group of fourteen former OLC attorneys who had served in the Clinton administration released a document on December 21, 2004, "Principles to Guide the Office of Legal Counsel," to offer an explanation of the traditional conduct of the office, and to urge a return to these principles. First among their ten guidelines was this: "When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action." (See: http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf.) This statement makes unambiguously clear the connection between OLC and the Counsel's office and the crucial, *constitutional* significance of accurate, unvarnished legal advice from the former to the latter.

Other Executive Branch Departments and Agencies

With the notable exception of the Justice Department, the White House Counsel typically communicates with the executive branch departments and agencies through the General Counsels.

We used to have more or less monthly meetings of all the General Counsels of the departments and the executive branch. It's a little more difficult to meet with the General Counsels of the so-called independent agencies, as you know, but we do meet even with them on some matters.... Typically a lot of it would be show and tell, what we're doing and what that General Counsel thought was a problem that would go to the White House. A lot of it has to do with the ground rules for executive privilege and turning documents over to Congress which we don't think should be turned over to Congress but which the department under the thumb of Congress always wants to turn over without ever consulting the President whose privilege it is not to provide them. (Cutler interview, p. 7)

C. Boyden Gray noted that the White House Counsel's Office is "supposed to be the lead focal point for all of [the General Counsels'] dealings with the White House.... They come to you. We tried to have meetings on a regular basis but it degenerated after a while because you saw them all so much anyway." (Gray interview, p. 23) He added that exceptions to this rule occurred, in most departments and agencies, only when the secretary or the agency chief executive had issues to discuss with the White House Counsel. Occasionally, Gray said, he would speak with the deputy secretary. Communications with the independent regulatory agencies were handled with special care and circumspection.

The Justice Department, however, was the standard exception. The White House Counsel and the Attorney General typically were in daily communication with one another.

ORGANIZATION AND OPERATIONS

The internal organization of the White House Counsel's Office has changed considerably since John Dean established the unit in the Nixon White House. Dean was the first Counsel whose duties primarily focused on "lawyering," and he was the first as well to seek out new legal responsibilities and draw them into a separate office in the White House.

Since the 1970s, the size of the Office of White House Counsel has expanded from two to three attorneys to more than 40 lawyers at times during the Clinton administration. The counsel's office under George W. Bush at times had more than 35 staffers (Patterson 2008, p. 67); after the Democrats took over Congress in the 2006 elections, triggering investigations into range of issues, the office increased in size to a total of 22 lawyers (Baker 2007).

Some former Counsels attribute this growth to the increasingly hostile Washington environment faced by recent presidents and the mounting scrutiny of their appointees. Lloyd Cutler recalls, for example: "In Carter's day, when I came in, including myself, there were six lawyers. Twenty-five years later, under [Bill] Clinton, there are probably forty lawyers, fifty lawyers. Part of that is dealing with the attacks on the President and these enormous vetting responsibilities that descend on the White House counsel." (Cutler interview, p.7) Similarly, John Tuck, an aide to Chief of Staff Howard Baker in the Reagan White House, recalled "a whole huge shadow Counsel's Office" that developed following the Iran-contra revelations. (In Baker interview, p. 15).

Although presidents from FDR through Richard Nixon had aides with the titles of "Special Counsel" or "Counsel," such staffers typically had more wide-ranging policy responsibilities. The origin of the title "Special Counsel" can be traced back to Samuel Rosenman, the FDR speechwriter who oversaw much domestic policy during World War II. Rosenman served on the New York state court of last resort until FDR finally persuaded him to move to Washington to work full-time for the President in the early 1940s. "Special Counsel" was viewed as an appropriate title for the lawyer and former judge. Later aides with the title (for example, Clark Clifford and Charles Murphy in the Truman administration, Theodore Sorensen under Kennedy, Harry McPherson in the Johnson White House, and John Ehrlichman in the first year of the Nixon administration) also were lawyers and typically participated in policy development and speechwriting. The Eisenhower White House to some extent was an exception: Gerald Morgan, as Special Counsel, and Edward McCabe, an Associate Special Counsel, worked on tasks quite similar to some of those in the contemporary Counsel's Office.

INTERNAL DIVISION OF LABOR

The Counsel's Office has been structured internally in numerous ways. Typically, however, the White House Counsel, as a senior presidential adviser, participates in myriad activities and issues, many of which cannot be predicted or planned for. Indeed, the Counsel's time often is consumed almost completely in handling crises or unexpected demands. Thus, Reagan Counsel Peter Wallison remembered: "At least politics and crises are the two things that you have to be sure [to handle]—one of the reasons you want to get a staff that is capable and has the lines of authority and lines of responsibility clear is that at some point you are going to be completely consumed with something and that means your office has to function without you. So you need a really good and capable deputy, which I had [in] Jay Stephens, and you need very good lawyers, and then they have to know what their areas of responsibility are so that they don't have to keep coming to you." (Wallison interview, p. 34)

Deputy Counsels

Counsels beginning with John Dean all have included at least one Deputy Counsel on their staffs. (For occupants of this position, see Appendix Two) A Deputy Counsel routinely serves as the

primary overseer of workflow within the Office as well as a substitute for the Counsel. The Deputy also may perform other tasks at the direction of the Counsel.

James Castello was the deputy who really was my person and managed the staff and was at the second meeting I couldn't be at if I was at the first one. [He] probably had the most to do with the legislative agenda. He met regularly with the legislative office and made sure that there weren't any surprises on the Hill that the President didn't know about or what was going up as our core legislation didn't have any pitfalls in it. (Mikva interview, p. 21)

Such deputies typically are charged with assuring that the Counsel sees only the highest priority items. On personnel issues, for instance, Reagan Counsel, A.B. Culvahouse stated:

...I clearly was the principal advisor to the President ... within the White House on the vetting process which included not only the people to be nominated by the President but also people who would be appointed by the President even if they did not require Senate confirmation as well as anyone who would get a White House staff badge. Even the Park Service people who pruned the plants would come through the White House Counsel's Office. I never saw their files or anything, unless there was a problem. So the default rule was if there was a problem certified as such by my deputy then it would be put on my desk. So I saw 10 per cent of the files roughly. (Culvahouse interview, p. 4)

Likewise, C. Boyden Gray noted: "My deputy [inaudible] read far more forms than I did but if there were problems with any high-ranking person it got kicked up to me and then I would have to deal with it, either deal with it with the President, or deal with the cabinet officer if it was one of his top people" (Gray interview, p. 11).

In the Clinton White House, long-time presidential confidant Bruce Lindsey served for much of the administration as a "Deputy Counsel for Special Projects." According to Abner Mikva, besides a host of other activities,

... there was always a special project he was involved in either for the President or because the President would indicate to me or [Chief of Staff] Leon [Panetta] that he wanted somebody that could really use his clout effectively. For instance, Bruce was the point man on the baseball strike. ... I don't think I said Bruce, go do the baseball strike. It was known that we needed somebody who could go in there and say the President really thinks this ought to be done or that ought to be done, and nobody could do that like Bruce. So he spent a lot of time on things like that. (Mikva interview, p. 17)

Throughout the George W. Bush presidency, White House counsels relied on a single deputy counsel.

Immediate Support Staff

In addition, the Counsel's immediate staff (often an administrative assistant and an executive secretary) usually is responsible for assuring that external deadlines are met and internally work is parceled out appropriately. A.B. Culvahouse, for example, reported having "three non-attorney people who worked for me: an executive assistant, an administrative assistant and an executive secretary. The first two spent most of their time assigning out projects and making sure the work was done and the deadlines were observed." (Culvahouse interview, p. 8)

Special Counsels

In recent White Houses, aides with the title of "Special Counsel" have on occasion appeared in the Counsel's Office. Typically, these are staffers assigned to handle short-term or "crisis" situations that may involve congressional or other investigations, such as the Iran-contra or Whitewater affairs. Most observers attribute the swelling of the Counsel's Office over the course of an administration to such crises and the heightened external scrutiny of administrations.

Other Work

Moreover, given the range of diverse responsibilities that have come to be lodged in the Office of White House Counsel, some substantive division of labor usually appears. For instance, a Deputy Counsel and one or more other members of the Office participated in judicial selection in the Carter, Reagan, Bush, and Clinton administrations. Although presidents have always paid most attention to nominations to the U.S. Supreme Court, recent White Houses also have focused on nominations to the U.S. Courts of Appeals and, to a somewhat lesser extent, the U.S. District Courts.

Similarly, after the initial flurry of “vetting” for nominations and appointments at the beginning of an administration, typically one Assistant or Associate Counsel and a Security Assistant or Clearance Counsel (and staff) in the Office handle FBI and financial disclosure reports on nominees to executive branch openings (see, e.g., Wallison interview, pp. 12ff). The lawyer also is responsible for taking the confidential reports to Capitol Hill to the chairs and ranking minority members of the appropriate Senate committees, with potentially problematic allegations flagged. In the second term Clinton White House, a “Senior Counsel” was among those handling these responsibilities.

Other tasks that commonly have been assigned to particular lawyers in the Counsel’s Office have included interpreting ethics legislation and additional ethics rules issued by an administration for staffers in the White House Office and Executive Office of the President, and, on occasion, for cabinet officials and other presidential appointees. Presidential travel and distinctions between “official” and “political” events and funding also have received specialized scrutiny. Moreover, Reagan Counsel A.B. Culvahouse recalled:

Someone in my office would have reviewed and approved anything that the President said, signed or issued his name to -- from the ridiculous declaring next week national dairy goat week which is the kind of thing that happens all the time, to pretty important things, veto messages, signing statements. And we would not only review it for form and legality but if it were legislation we would also have a recommendation: should the president sign, should he veto, should he let it become law without his signature....We would approve scheduling requests. If people were coming in to see the President, we would get a list of the attendees and look at them for propriety and seemliness and should the President see someone who ten years ago had been convicted of something. (Culvahouse interview, p. 8)

Still other attorneys in the Counsel’s Office focus on issues of international trade and transportation, defense and national security policy (to support the Counsel’s role as chair of the War Powers Committee), and government regulation. As noted earlier, another primary responsibility of the Office is to protect presidential prerogatives, frequently on matters involving executive privilege, the issuance of executive orders, or interpretation of legislation.

RHYTHMS OF QUADRENNIAL GOVERNANCE

Over the course of a presidential term, the activities, demands, and emphases of the Counsel’s Office typically follow common patterns. The first year is both demanding and somewhat distinctive. After that, the work of the Counsel’s Office -- like much of the rest of the administration -- to a significant extent reflects the presidency’s efforts to respond to external deadlines. Other tasks arise more routinely throughout an administration.

First Year

A major task that begins well before Inauguration Day and continues through most of the first year is vetting for nominations and appointments. C. Boyden Gray remembered: “for the first year that’s all you do, is read FBI reports and ABA reports. It’s not much fun. Financial disclosure reports. It’s not much fun.” (Gray interview, p. 1)

During this early period as well, the Counsel’s Office seeks to assure that all White House staffers and political appointees are informed of the ethics statutes, executive orders, and other administration rules under which they must work. Gray described his approach to handling the task:

“My rule of thumb was: ‘If it’s fun, stop! If it feels good, stop! If you’re having fun, you’re doing something wrong!’ That’s the way I summed up all the rules.” (Gray interview, p. 13)

At the outset, too, the Counsel’s Office needs to give White House staffers instructions on how to keep their files. Phillip Brady recalled that in the Bush administration, the Counsel and Deputy Counsel “... tried to be very careful to ensure all new employees were given a Counsel’s Office memo that would articulate what presidential documents are and what needed to be preserved and that sort of thing.” (Brady interview, p. 9)

The initial weeks and months of a new administration also bring numerous other demands. Chief among them: the president’s budget must be submitted by February 2nd, the economic report is due at about the same time, and the legislative agenda, congressional messages, and bills must be drafted and sent to Congress. The Counsel’s Office is involved in all of these activities.

Annual Cycles

Especially important annual cycles are the preparation of the president’s budget and the drafting of the State of the Union address and the Economic Report of the President. Although the Counsel’s Office is not the central player in any of these, it does perform the pivotal role of ensuring that the processes and the officials involved act in accordance with prevailing legal and ethical guidelines.

Electoral Cycles

As the mid-term congressional elections or a presidential re-election campaign approaches, the Counsel’s Office faces other tasks. The Office may well be besieged with requests for advice from other White House staffers and from political appointees throughout the executive branch about the sorts of partisan and electoral activities they and their aides are legally permitted to engage in. In most administrations, the Counsel and staff try to anticipate such requests and related problems by sending out written guidelines and holding information sessions.

Clinton Counsel Abner Mikva remembered the memo he wrote to White House staffers and other political appointees for the 1996 presidential campaign:

The idea came from the fact that that kind of the same memo had been written every four years since anybody could remember. I think we even had a copy of the memo that not Gray but one of the predecessors had sent out—maybe Fielding; it may have been Fielding—sent out during his [tenure]. (Mikva interview, p. 17)

Moreover, as elections approach,

...the President becomes more involved in direct politics which raises questions about ... how much of his time would be devoted to it, who pays for it, all those things. That becomes much more important every two years. Whether the President is running for election or not, usually he’s out doing things, raising funds or otherwise supporting candidates which require you to make these kinds of allocations in the best possible way to avoid charges of various kinds. (Wallison interview, pp. 32-33)

Mikva noted that in retrospect, “None of us saw fit to raise a warning flag for the President.”

I had seen what goes on in state politics. I’d been a state legislator for ten years. I know governors in Illinois pick up the phone when they’re sitting in the governor’s office and lean on people to give money to their campaign and the party. It’s just a fact of life and I suspect it goes on in most states. I’m sure it went on in Arkansas. I think this government came in to the White House not very sensitive to the fact that the White House and the federal government is a different place. So I should have warned the President. (Mikva interview, p. 18)

Indeed, Lloyd Cutler has remarked,

When a president is up for re-election, there are all sorts of temptations, things a president wants to do that may be legally questionable but that he wants to do to get re-elected. For a White House Counsel, those are the hardest calls to make. You should tell a White House Counsel to leave before that last year of a president's first term. (Cutler, Duke panel transcript, p.6)

The presidential electoral cycle also can influence submission of judicial nominations to the Senate. Former Deputy Counsel Phillip Brady noted: "There's a political year consideration, too, as you get closer and closer to presidential elections the Senate becomes less and less receptive to confirming nominees for lifetime appointments depending on what happens in the next presidential election." (Brady interview, p. 4)

Final Year

The last year of a presidency can be "dangerous." (Culvahouse, Duke panel transcript, p. 5) This is a time when requests for pardons, commutations, executive orders, and other presidential actions may be likely to reach fever pitch. It also is a time when presidents may be especially responsive to those who have supported and worked with them for numerous years.

More Regular Tasks

Many of the other tasks handled by the Counsel's Office are performed throughout an administration. Reagan Counsel A.B. Culvahouse recalled, for example, this included the judicial selection committee, which met "every two weeks and more frequently if—basically the idea was to get people's nominations up as soon as possible so if the FBI was able to process background checks and all the materials were in we sometimes would meet every week." (Culvahouse interview, pp. 8-9) Executive orders also need to be drafted throughout an administration.

In contrast, Culvahouse continued:

Congress tends to work in fits and starts. ... The legislative agenda can be heavy or it can be light. There were also Statements of Administration policy that we would review. If it was a statement of Justice Department policy, we would not review it. Sometimes we would say, "This should not come out of the White House; the Justice Department or the State Department should issue this." Sometimes we would be involved in deciding who ought to comment on the bill, and who ought to testify. If it was going to be a Statement of Administration policy, which is in effect attributed to the President, we would look at those carefully. Those would be in effect a letter that would say here's what the Administration thinks about S-332, the omnibus such and such act. (Culvahouse interview, p. 9)

Other legislative decisions to which the Counsel's Office responds are more routine: There was someone who handled the disease of the week. Congress passes all of these little bills all the time establishing that cystic fibrosis week will be such and such and a presidential proclamation is required. So somebody has to read what Congress said and then prepare the proclamation. It's called the disease of the week. When there was all this talk about testing urine and blood for drugs, I had someone handle that, and he was our fluids man. It was pretty informal but yet I knew what each of the people in the Office would be handling. So I could always bring that person in—. (Wallison interview, p. 16)

In addition, throughout an administration, new individuals must be nominated for and appointed to positions throughout the executive branch. After the first year, "The nomination process was fairly continuous... So every week there would be nominations to be processed, people to be vetted, ethics agreements to be looked at" (Wallison interview, p. 9). Informing new hires about ethics regulations also had to continue.

Meanwhile, questions about presidential travel continually arise. In the Reagan White House, for example, "Alan Raul ... was in charge of presidential travel. That was a big and difficult issue because of what had to be paid for by private funds, by political funds or by government funds. So

they were constantly, the people in the political office and in the travel office, they were constantly calling Alan for advice on that subject.” (Wallison interview, p. 31)

Crises / Scandals / Unexpected Events

Counsels, of course, find themselves (and their staffs) handling unexpected situations and, on occasion, crises, at least as seen from the administration's perspective. As chair of the War Powers Committee, the Counsel has responsibilities whenever U.S. troops are (or may become) involved in hostilities.

Lloyd Cutler, who served as Counsel for both Presidents Jimmy Carter and Bill Clinton, observed that the job has become more driven by scandal and congressional efforts to probe more deeply into administrations:

We were doing executive privilege in the Carter days; we were doing it in the Clinton days. We had demands from congressional committees for White House documents and agency documents; drafts of legal opinions, for example, were so much more pervasive. Mostly, it's the difference that when I worked for Carter while we did have the Billy Carter problem and a few others, Hamilton Jordan's alleged drug violations -- which turned out to be entirely untrue, while we had a couple of those, most of what I did was substantive. ... In Clinton's time I had the same understanding that I could be in on all these things but I had to put in so much of my own daily effort, and my staff did, on the investigations of the President, Whitewater, et cetera, that I had no time. ... I would say working for Carter -- which was a year and a half -- not more than 20 per cent [of the Counsel's work] was what I call playing defense. Under Clinton it was closer to 80 per cent. (Cutler interview, p. 8)

A scandal of one sort or another also is likely to occur at some point during an administration. In the words of Peter Wallison:

...you can always count on ... some kind of big scandal. It just is like that; something is going to happen. And when I went in to that office I assumed there was going to be a blizzard. What I didn't realize was that there would be a hundred-year snow in the form of Iran-Contra. You don't know those things. I knew there would be something that was really going to take my time and for the last six months I was there it was virtually all Iran-Contra. I just couldn't get away from it. (Wallison interview, p. 33)

THE COUNSEL'S DAILY SCHEDULE

Although there certainly is no “typical day” for a White House Counsel and the larger Office, some daily routines can be identified. For the Counsel, most days involve a stream of meetings, including meetings of the White House senior staff, meetings with the Counsel staff, participation in discussions of policy initiatives and major speeches, and weekly or bi-weekly sessions on judicial nominations. President Bush's Counsel, C. Boyden Gray, pithily summarized the job as “Meetings all day long. Meetings, meetings, meetings” (Gray interview, p. 25). When surprises or crises occur, of course, the Counsel is typically on call.

Peter Wallison, for example, remembers:

I would usually arrive at the White House about seven in the morning. The staff meeting was at eight; that is, the senior staff meeting was at eight. So I would come in; I'd read the newspapers.... to see if there was anything in the newspapers, anything I hadn't already heard on the radio coming in in the morning or before I went to bed the night before. ... In most cases, I would then go to the staff meeting at eight o'clock. Sometimes I would go down to [Chief of Staff Donald] Regan's office in advance of the staff meeting and I would raise a subject that I saw in the papers or heard about, something like that, that I thought he might want to talk about at the staff meeting or that he might not want to talk about at the staff meeting or he might have to have an answer if the question comes up at the staff meeting about what I thought. ... I would get ten, fifteen minutes with him about something before

the staff meeting started. That was fairly rare. Then we'd go in the staff meeting. ... Then after the staff meeting ... every morning I would have my own staff meeting. ... And I would review with them the things that came up at the senior staff meeting that would relate to the things that they were doing. So they would each get directions about what were the issues the White House was dealing with today and what they were going to hear from their clients. (Wallison interview, pp. 30-31)

A. B. Culvahouse's recollections are similar:

We'd have a senior staff meeting which was twenty-five people in the Roosevelt Room every morning at 7:30. Then we'd have a meeting in [Chief of Staff Howard] Baker's office that was never on the schedule but which everyone knew about of six people. Howard [Baker], [Deputy Chief of Staff Kenneth] Duberstein, [Press Secretary Marlin] Fitzwater, [National Security Assistant Colin] Powell, me, [Assistant to the President for Communications Thomas] Griscom and Dan Crippen. ...It was basically referred to as the "real meeting." ...[The first meeting was about] what was going to happen, what was coming up, sort of broadly defined. But it was not a secure meeting because if you talked about anything really interesting it would find its way to the press. (Culvahouse interview, pp. 25-26; cf. interview with Baker, p. 16)

Culvahouse also had a daily staff meeting "... at least early on, during the Iran-Contra investigations, and then I would meet with the other staff at least twice a week." (Culvahouse interview, p. 27)

After meeting with the Counsel staff, in Peter Wallison's words, the Counsel "... start[s] to handle the crises of the day, whatever they happened to be. Mostly that's what you did. William French Smith was once asked what it was like to be Attorney General and he said it's one damn thing after another. And that's basically what it's like to be White House counsel; it's one damn thing after another." (Wallison interview, p. 31)

Often, at least for contemporary Counsels, the days and weeks can be long ones. Some recall six-day weeks and weekdays of more than twelve hours, especially when crises arise. Taking over in the aftermath of the Iran-contra revelations, A.B. Culvahouse reported:

I'd try to get in by 7:15 so I could read the President's intelligence daily brief and get a briefing particularly on the Iran-Contra investigations, anything that had changed since the night before. I tended to leave probably 10-ish. Then I'd work like from 8:00 to 6:00 on Saturday. I worked every Sunday for the first while and then after about six months I tried to keep Sundays free for my family ... Of course you have the secure telephone at home which quickly became the blankity-blank White House phone because it would ring at all hours of the day and night. It had a unique ring. (Culvahouse interview, p. 27)

In the scandal-plagued Clinton administration, "being on Clinton's legal team, with its 18-hour workdays and constant pressure, burned people out. [Special Counsel Jane] Sherburne recalls working in her windowless office day after day, never seeing daylight." (Oliphant, 2000, p. 5) Clinton's third Counsel, Abner Mikva, commented on the physical demands:

I came in at sixty-nine and I was actually seventy by the time I left and the physical schedule was just more than I could handle. I would come in at six-thirty in the morning and leave at nine at night. I was the first one out of the White House. They were all still doing scheduling meetings and all kinds of things. I'd never served a president younger than I was and I realized that maybe if I'd had the personal relationship with him beforehand, which I didn't, maybe I could have played the nice graybeard that would be called in once in a while to consult. But to run the kind of schedule that the rest of the senior staff was running and that he had every reason to expect out of a White House Counsel was way beyond me. I walked out totally exhausted. It turned out I had pneumonia. I didn't realize that until after I left. (Mikva interview, pp. 22-23)

With some understatement, Jonathan Turley, a George Washington University law professor, remarked: "This was not a job to envy. Every[one] in the Clinton administration seemed to age before our eyes." (Oliphant, 2000, p. 4)

Under less harried circumstances in the Reagan administration, Peter Wallison recalled:

I didn't make a habit of it, I don't think, of being in on Saturdays. When Iran-Contra started, I did; I would go in Saturdays and Sundays. But before that it was a pretty easy job actually except for the constant pressures. It didn't involve my having to work very late most of the time. As a lawyer I was used to working twelve hours a day. I would always work twelve hours a day no matter when I got to the office. A tough day was sixteen hours but twelve hours was a pretty ordinary day. I doubt I left before seven many times; I probably left at eight. I don't have a distinct recollection of this but I do know that I wasn't seeing my family all that much during this time. (Wallison interview, p. 43)

The more striking memory may be the constant pressure. Wallison also observed:

In the White House you never get away from the tension and the pressure of the job. You can go home but you turn on the television or you listen to the radio or you look at a newspaper and there are things that you are working on or you know about or you know are coming at you that are in those media. So, even though you don't even recognize it, you're constantly at work and constantly under pressure. It can be extremely wearing for that reason. As I say, you don't recognize it. You don't know that you are always in front of an audience. You don't realize that but you are because your mind is constantly occupied with what is going on in your office. ... When you're in the White House you've got all the opponents that there are, in effect; all the political opponents are at you all the time. When you're in the Treasury Department or even when you're working for the Vice President—I had left that out—the pressure is much less. ... Everyone, however, has an interest in what the White House is doing so you have a legion of opponents. (Wallison interview, pp. 35-36)

Nonetheless, C. Boyden Gray has commented that, despite the “never-ending” pressure, “... some of it is unnecessary. I can say that looking back on it; perhaps I'm not sure I felt that way at the time. There are meetings that you don't have to attend, stuff you don't have to do. You have to discipline yourself just to walk away from it and go to the gym and work out. You can find time. I found time.” (Gray interview, p. 25) And, Mikva recalled, serving as Counsel was “exciting. You're at the point of some very important decisions. Whether you're making them or not, you're involved in the decisional process. You're dealing with interesting people, interesting situations. There just was not a single boring moment that I had.” (Mikva interview, p. 23)

TURNOVER: COUNSEL AND DEPUTY COUNSEL

Given the demands on the Counsel as well as the often unforgiving nature of Washington, it is scarcely surprising that relatively few Counsels stay in the position for more than two years. Only Philip Buchen (Ford) and C. Boyden Gray (Bush) stayed through their administrations. Fred Fielding worked even longer as Counsel to Ronald Reagan, serving from January 1981 until February 1986. (See Appendix Two)

In recent presidencies, Counsels have departed for a variety of reasons. Some -- such as John Dean -- became directly involved in administration scandals. Others -- J. Fred Buzhardt, Peter Wallison -- departed after the president or chief of staff who brought them to the White House was forced out. Still other Counsels joined the White House staff explicitly on a temporary basis, to help handle political or policy crises. In Democratic administrations, such figures have tended to be well respected, “old Washington hands” themselves (like Lloyd Cutler, Abner Mikva, and Charles Ruff). Fred Fielding was the Republican counterpart in the George W. Bush administration. In the Reagan administration, by contrast, the new Counsel, A.B. Culvahouse, was a trusted associate of the incoming Chief of Staff, Howard Baker, who himself fit this same profile.

When a Counsel has left the White House, in virtually all cases, his deputies have departed within several months. The only exception has been Clinton aide Bruce Lindsey, who was lodged in the Counsel's Office (typically as a “Deputy Counsel to the President for Special Projects”) from 1993 through 2000, working under multiple Counsels (and always with a second Deputy Counsel).

In addition, there has been somewhat higher turnover among deputies than among Counsels. Typically, Deputy Counsels leave to pursue other opportunities both in and outside the administration. Over the period from 1971 through 2008, no Deputy Counsel has succeeded a Counsel, although at least one (Cheryl Mills) turned down the job when it was offered to her. Clinton's sixth Counsel, Beth Nolan, served as an Associate Counsel in the first term. Deputy Counsels Cheryl Mills and William P. Marshall served as Associate Counsels (Mills under Nussbaum, Cutler, Mikva, and Quinn, and Marshall under Ruff) before being named Deputies.

LESSONS LEARNED

Advice from former Counsels can be helpful in trying to avoid some of the pitfalls from the past as well as in preparing for the rigors of the job prior to entering it. The following points are offered in that spirit, and have been culled from comments of past Counsels, published articles and general observation:

NAME THE COUNSEL AS EARLY AS POSSIBLE.

The president-elect (or, even better, the presidential nominee) should appoint the Counsel at the earliest possible time, since this position is key to shepherding the nomination and confirmation processes for all other presidential appointments.

According to C. Boyden Gray:

I can't emphasize enough the difficulty of absorbing all you have to absorb. It is bewildering. It is absolutely bewildering. And if people don't understand it they're going to get into trouble again and again and again. (Gray interview, p. 7)

Bush asked me to go to work for him two weeks before he was elected and he said, "I should have asked you two months ago." The White House Counsel's Office -- you asked [about] the people who shovel the most papers around and deliver them. The volume of paper that goes through the White House Counsel's Office is ten times the other offices combined. ... Because of all the forms and the other nomination papers. (Gray interview, p. 8)

The day a president is elected people should be shot right into the FBI the very next day. ... You should start people filling out those forms, I think, before the election. Certainly, the day of the election there ought to be 100 people doing nothing but filling out those forms. (Gray interview, p. 10).

Bernard Nussbaum, the first of six Counsels for President Clinton, echoed these sentiments about the need for an early start.

I was offered the job only a week before it was announced on January 6th. I was offered it in late December, when I went to Little Rock. I was appointed very late in the process. A president-elect needs to start by November, by the day after the election. He [the Counsel] needs to hire staff, hire secretaries - some were detailed over from the departments. And that was not a good thing. Detailing hurt the president. (Nussbaum interview, p. 1)

PREPARE TO ENTER AN EMPTY OFFICE

Most former Counsels have remarked about the lack of any institutional memory. There are a few folders, letters, and memos that have been left behind on such matters as war powers and presidential disability and succession, and A.B. Culvahouse talked about twenty- to twenty-five binders that he left for C. Boyden Gray as the next incoming Counsel (Culvahouse interview, p. 7).

Generally, however, there is little paper in the Office when a new Counsel enters. Bernard Nussbaum recalled:

When you walk into the White House at the beginning of an administration, it is empty. It is an amazing thing. All of the files are gone. Even the secretaries are gone (except one - Linda Tripp was my secretary for a year). Nobody knew what to expect. The Democrats were stunned. This was the first time in a generation (since 1968) that they were in power (with the exception of Carter). Nobody knows anything. But the minute you walk into the office, the phones are ringing. It's as if the ten biggest litigation cases in your life are going on simultaneously. I got a call from the State Department on the first day - and there were no lawyers over there, either. I went to the office straight from the inauguration, and went to work right away, doing executive orders on that first day. (Nussbaum interview, p. 1)

Gray remembers that the only materials left behind when he took over were "Folders that lay out some of the statutory - the [inaudible] [Anti-]Deficiency Act, the Ethics in Government Act, the Hatch Act, the Presidential Records Act, all of these." (Gray interview, p. 6)

Clearly, this is a matter that future Counsels may wish to modify. As Lloyd Cutler said, "This is an area [lack of institutional memory] where there could be a very substantial improvement" (Cutler interview, p.22)⁴

MEET WITH THE OUTGOING COUNSEL

Especially because of the lack of materials available to the new counsel, many former counsels have discussed the importance of meeting with their predecessor prior to taking over. Noted C. Boyden Gray:

I don't think Bernie Nussbaum spent as much as an hour with me. Vince Foster spent a little more time with John Schmitz [the deputy counsel]. But I spent maybe ten or fifteen hours with A.B. Culvahouse. I had been in the White House already for eight years and I still felt I didn't understand what I was doing...[I]t is enormously difficult to come in cold and understand all the statutes that apply...all the rules about travel...It's just very, very difficult. (Gray interview, p. 5)

EXPECT A STEEP LEARNING CURVE, THE UNPREDICTABILITY OF EVENTS, AND DEADLINES DICTATED BY THE MEDIA

Because the Counsel's responsibilities cover such broad territory, many have commented on the simply overwhelming nature of the materials that need to be mastered. The job entails a steep learning curve at the beginning, knowing where the "land mines" are, being sufficiently flexible to be able to switch gears immediately and respond to breaking crises, and working with incomplete information, especially when there is a need for a decision by the evening news. As Clinton Counsel Charles Ruff observed, "It's a job for which no training or experience exists for the crosscurrents of legal, political and constitutional issues." (Oliphant, 2000, p. 4)

In particular,

⁴ Until 1999, the National Security Council (NSC) staff retained records from one presidential administration to another, effectively building a "continuing archive on every pending [foreign policy] problem" (Cutler interview, p. 22) from the Truman administration onward. When court rulings during the Clinton administration declared that the NSC was subject to the Presidential Records Act, NSC staffers began copying the documents that they deemed essential to on-going governance. In October 2000, as this memo was being finalized, the files were still being duplicated and the National Archives and Records Administration (NARA) was still working with the National Security Council staff to determine where the original files would be deposited. Members of the White House Counsel's office, therefore, may wish to consult with the NSC staff to determine the status of this process. They should also note that NARA makes provision for expedited processing of documents requested by White House policy-makers.

The incoming White House counsel should interview previous White House counsel and be thoroughly immersed on all of the land mines that he or she is going to face...[The land mines are] all over the place. They're all over the place. (Gray interview, p. 21)

At the same time, one must always be prepared for the unexpected. Clinton Counsel Abner Mikva remarked: "there are those kinds of crises and the crisis management of walking in every morning, no matter what you have on your list of things to do, that isn't what you're going to spend your time on because something happens in between." (Mikva interview, p. 10)

And, always, past occupants urge, the Counsel has to pay attention to the news media.

You better worry about the media, because the media sets the agenda...Your day starts with *The Wall Street Journal*, *The New York Times*, *Washington Post*. They set the agenda. You may have four or five things on your list to do for the day. You probably won't get to any of them. (Nussbaum, Duke panel transcript, p. 5)

The demands of the media can be a special problem for those coming to the White House from private practice.

It's this terrible dilemma. If you're a lawyer, you want to have all the facts. And usually you want to have all the facts before you give advice to someone about what to do about it. In the White House, you have to act on the basis of what information you can get some time before the six o'clock news because if you don't have a White House position and the news is "the White House is divided and can't make up its mind," some opposition senator will go on the air and use up the space and tell you what was done wrong. So, you have to adjust to that; you have to operate on the basis of hunch and experience. (Cutler interview, pp. 12-13)

As Counsel, Cutler also said, "You're acting on the basis of not enough information and there's always this gnawing fear that you've gotten something wrong or you've said something you shouldn't have said." (Cutler interview, p. 31)

KNOW WHERE TO GO FOR INFORMATION

Having ready access to information, and knowing how and where to get it, as well as who has it, are clearly the most critical practical components of the job. A. B. Culvahouse, Lloyd Cutler and C. Boyden Gray emphasize the importance for a Counsel to "make sure you're part of the process. You cannot recognize the problems or deal with the problems unless you see them in their inception." (Culvahouse in Quade, 1988, p. 37). Cutler was quoted above with similar advice about recognizing the legal aspects of issues discussed in meetings (Cutler interview, p. 4), and Gray, also, noted the need to know which meetings to attend (Gray interview, p. 29).

Speaking anonymously, one Deputy Counsel offered the following advice:

[Y]ou will get every possible issue thrown at you, and there is no way you could have technical, legal expertise on all of them. Thus, the key quality to doing the Counsel's job well is to establish good personal relations with people throughout government, and to know where to go and whom to ask when you need specific information to do your job effectively.

MAINTAIN GOOD RELATIONS WITH THE OFFICE OF LEGAL COUNSEL IN THE DEPARTMENT OF JUSTICE

All Counsels agree it is essential to maintain good relations with the Office of Legal Counsel in the Department of Justice. They emphasize how critical it is to know when to turn to OLC for legal advice. C. Boyden Gray, for example, maintains that, as Counsel, "you're best able to avoid the land mines if... you restore the rightful place of the Office of Legal Counsel. When in doubt ask them, and they'll tell you where the land mines are." (Gray interview, p. 21)

DIVIDE THE COUNSEL'S OFFICE WHEN SCANDALS ARISE

When scandals arise, previous Counsels have walled off or isolated “scandal management” from the routine office tasks. Typically, “Special Counsels” have been appointed to work exclusively on the crisis, along with additional staff members that are specifically tasked to that purpose. A.B. Culvahouse recalled, for example, that Reagan Chief of Staff Howard Baker “told me to focus on Iran-contra and get a separate staff up and running to handle that and let my deputy handle the more routine stuff.” (Culvahouse interview, p. 25) Clinton Chief of Staff Leon Panetta explained the value of separating handling scandals from other tasks:

What you don't want to do is consume the general counsel's operation by that scandal. What you want to do is make sure that that's pulled out of the normal operation so that there is a separate focus on that. So you can basically say that crisis is being handled, these are people that are involved with it and it doesn't tie up the rest of the operation. (Panetta interview, p. 38)

*MONITOR THE PRESIDENT CLOSELY
IN THE LAST YEAR OF THE TERM*

A.B. Culvahouse has cautioned Counsels to beware of a president in his last year in office. “Never forget that your most important contribution is what you *don't* let happen in the last year of a presidency. That last year is a dangerous time.” (Culvahouse, Duke panel transcript, p. 5, emphasis in original) In a similar vein, Lloyd Cutler has said,

When a president is up for re-election, there are all sorts of temptations, things a president wants to do that may be legally questionable but that he wants to do to get re-elected. For a White House Counsel, those are the hardest calls to make. You should tell a White House Counsel to leave before that last year of a president's first term. (Cutler, Duke panel transcript, p.6)

*BE AWARE OF SHARP PUBLIC CRITICISM OF THE
WHITE HOUSE COUNSEL'S OFFICE*

The Office of White House Counsel is under attack these days -- for some of its actions during the Clinton administration, and even for its very existence. The title alone of a Duke University conference panel, “Should the White House Counsel's Office be Abolished?,” dramatically underscores the highly controversial nature of this office. A former competitor of the Counsel's Office, Carter Attorney General Benjamin Civiletti elaborated: “The White House Counsel's Office is an abomination, structurally inefficient, lots of potential for conflict because of its political nature.” (Civiletti, Duke panel transcript, p.1)

*UNDERSTAND THE IMPACT OF THE LOSS OF
GOVERNMENT ATTORNEY-CLIENT PRIVILEGE*

The existing skepticism surrounding the Counsel's Office has been further heightened by the dark implications many observers see from the loss of government attorney-client privilege, as a consequence of unsuccessful litigation by the Clinton administration. There is now even less reason for a president to use a White House Counsel for strictly legal purposes. Rather, presidents seem likely to turn to private counsel more often, especially when legal matters are unclear as to whether they involve “the president” or “the presidency.” All of the Counsels interviewed for this project reacted strongly to these court decisions: some decried the choice to litigate matters of privilege at all (Gray), rather than to seek accommodation with the source of the demand for testimony and

documents, while others (such as Cutler, Nussbaum, Mikva) lamented the very real and damaging consequences of these decisions. Abner Mikva concluded:

[The attorney-client rulings] make it almost impossible for a president to function the way we want a president to function. It's a very sad legacy. But, I think they had to litigate. They had no option. (Oliphant, 2000, p. 3)

Clinton Counsel Charles Ruff elaborated:

There's always a choice [whether to litigate the president's privileges]. You can acquiesce. We ended up deciding that the principles involved were sufficiently important to the institution that they needed to be pursued. (Oliphant, 2000, p. 6)

The fallout from these rulings on presidential privilege and, more generally, from the hostile and polarized political atmosphere caused by the independent counsel statute, has been considerable. Mikva, for example, recalls that he took no notes, kept nothing in writing.

We just never put anything in writing. At least I did[n't]. All the habits I learned as a good litigator where I took detailed notes about what was going on I threw out the window. (Mikva interview, p. 1)

One of his successors, Charles Ruff, operated the Office in the same way. "We did not take notes. We were subject to subpoena. People were very careful not to put things down in writing." (Oliphant, 2000, p. 2)

Future White House Counsels should study carefully the body of court opinions on presidential privileges. The District Court and D.C. Circuit Court of Appeals rulings in the matter of Bruce Lindsey's grand jury testimony are the key ones that deal with government attorney-client privilege and executive privilege. [*In re Sealed Case* (Bruce R. Lindsey) (Grand Jury Testimony), 5 F. Supp. 2d, 21 (D.D.C. 1998); *In re Bruce Lindsey* (Grand Jury Testimony), 158 F. 3d 1263 (D.C. Cir. 1998)]

NOTE THE CONTINUING SIGNIFICANCE OF ISSUES OF EXECUTIVE PRIVILEGE AND OTHER PRESIDENTIAL PREROGATIVES

Presidents Ronald Reagan and Bill Clinton took diametrically opposed approaches to executive privilege: Reagan waived privilege and submitted his diaries and thousands of White House documents to the Iran-contra investigators, while Clinton vigorously asserted his privileges and chose to litigate them in court. Yet, despite their contrasting strategies, both Reagan and Clinton were sharply criticized for damaging this constitutional power for future presidents. White House Counsels view with enormous care their responsibility to protect and guard a president's constitutional prerogatives, such as executive privilege.

RECOGNIZE THE DIFFICULT POLITICAL ENVIRONMENT FOR THE JUDICIAL APPOINTMENT PROCESS

One final word of caution for the next Counsel is a warning about how poisoned the process for judicial appointments has become. Speculation abounds that there may be anywhere from one to four Supreme Court vacancies sometime during the next president's term of office, vacancies that will fall directly into the Counsel's lap. The experience of getting federal judicial nominees through the confirmation process during the Clinton presidency and at times the W. Bush administration was a torturous one, with historic delays and much ill will. There does not appear to be reason for optimism that this confrontational relationship will change in the near future, especially if conditions of divided government persist.

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APPENDICES

APPENDIX ONE FUNCTIONS OF THE OFFICE OF WHITE HOUSE COUNSEL

- i) Advise on the Exercise of Presidential Powers and Defend the President's Constitutional Prerogatives*
 - review (and, in unusual cases, draft) executive orders
 - review all recommendations for pardoning and commutation
 - review requests for federal disaster relief
 - review CIA drafted intelligence findings and approve covert action proposals
 - interpret treaties and executive agreements
 - review all presidential statements and speeches for consistency and compliance with legal standards, and in anticipation of legal challenges
 - participate in editing the State of the Union address
 - advance recommendations about executive privilege
 - chair the president's War Powers Committee
 - manage the processes associated with presidential disability or succession
- m. Oversee Presidential Nominations and Appointments to the Executive and Judicial branch*
 - participate in the selection of nominees for the top Justice Department positions
 - participate in the selection of General Counsel nominees throughout the executive branch and in the NSC staff
 - chair the joint White House – Department of Justice judicial selection committee
 - supervise the vetting and clearance process (FBI, IRS, 278 forms, and financial disclosure forms) for all presidential nominees and appointees to the executive and judicial branches
 - negotiate Senate access to the FBI reports on each nominee
 - conduct “murder boards” to prepare nominees for Senate confirmation hearings
- n. Advise on Presidential Actions Relating to the Legislative Process*
 - review legislative proposals from the president, Executive Office of the President, and executive departments and agencies
 - review bills presented for signature or veto, preparing signing statements and veto messages
 - review State and Defense Department authorizations and appropriations proposals
 - draft budget rescissions and deferrals
 - participate in negotiations associated with Senate treaty hearings
 - participate in legislative negotiations concerning policy, document requests, treaties, and nominations
- o. Educate White House Staffers about Ethics Rules and Records Management and Monitor for Adherence*

distinguish between government expenses and campaign expenses

review presidential travel

approve requests for appointments with the president, monitoring those for propriety, seemliness, legality, and executive privilege issues

respond to document requests and subpoenas, directed to the President and to other White House and executive branch officials, by Congressional committees and Independent Counsels

serve as the ethics officer for the White House staff and senior executive branch appointees

p. Handle Department, Agency, and White House Staff Contacts with the Department of Justice

conduct all consultations with the Office of Legal Counsel and other Justice Department offices

request OLC legal opinions on matters of constitutional law

consult with and coordinate department and agency General Counsels

APPENDIX TWO: COUNSELS AND DEPUTY COUNSELS, 1969 -2008

President	Counsel	Dates	Deputy(ies)	Dates
Bush	Fred Fielding	2/07-	J. Michael Farren	5/07-
	Harriet Miers	11/04- 1/07	William K. Kelley	3/05- 3/07
	Alberto Gonzales	1/01-11/04	David G. Leitch Timothy E. Flanigan	12/02-11/04 1/01-11/02
Clinton	Beth Nolan	8/99- 1/01	Bruce R. Lindsey William P. Marshall	1/93- 1/01 12/99- 1/01
	Charles F. C. Ruff	2/97- 8/99	Cheryl Mills	/96- 8/99
	John (Jack) Quinn	11/95- 2/97	Kathleen Wallman	/96-
	Abner Mikva	9/94- 11/95	James Castello	3/95-
	Lloyd N. Cutler	3/94- 9/94		
	Bernard W. Nussbaum	1/93- 3/94	Joel I. Klein Vincent W. Foster	7/93- 3/95 1/93- 7/93
Bush	C. Boyden Gray	1/89- 1/93	John P. Schmitz	1/89- 1/93
Reagan	A.B. Culvahouse	1987- 1/89	Phillip D. Brady Jay B. Stephens	/88- 1/89 /86- /87
	Peter Wallison	4/86-		
	Fred F. Fielding	1/81- 2/86	Richard A. Hauser Herbert E. Ellingwood	1/81- 1/81-
Carter	Lloyd Cutler	10/79- 1/81	Michael Cardozo Joseph Onek	10/79- 1/81 9/79- 1/81
	Robert J. Lipshutz	1/77- 8/79	Margaret A. McKenna	1/77-12/79
Ford	Philip W. Buchen	8/74- 1/77	Edward C. Schmults Roderick Hills Philip Areeda	10/75- 1/77 4/75-10/75 10/74- 2/75
	J. Fred Buzhardt	1/74- 8/74		
	Leonard Garment John Dean John Ehrlichman	5/73- 1/74 7/70-4/73 1/69- 11/69	Fred Fielding	5/73- 1/74 ⁵

⁵ On counsel staff since 10/70

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THE WHITE HOUSE TRANSITION PROJECT



WHAT WHTP DOES

The White House Transition Project unites the efforts of academic institutions with those of the policy community and private philanthropy into a consortium dedicated to smoothing the transfer of governing essential to a functioning American republic. It manages two related programs, one on institutional memory and best practices, and one on presidential appointments. In both programs, the White House Transition Project brings to bear the considerable analytic resources of the world-wide academic community interested in the viability of democratic institutions on those problems identified as critical by those experienced hands that have held the unique responsibilities for governing. As such, the White House Transition Project brings ideas to bear on action.

The White House Interview Program

A common problem of the democratic transfer of power, the White House has no mechanism for maintaining an “institutional memory” of best practices, of common mistakes, and needed background information. Partisanship and growing complexity of the selection process exacerbate the natural tendency to avoid passing from one administration to the next the vital experiences necessary to carry on governing from one administration to the next. The lack of an institutional memory, then, literally turns the hallmark of the American constitutional system, its peaceful transfer of power, into a breathe-taking gamble. The White House Interview Program bridges the gaps between partisanship and experience by providing a conduit for those who have borne the extraordinary responsibilities to pass on their judgments to those who will enter the American nerve center. Its briefing materials compile these lessons from the practitioners with the long-view of academics familiar with executive organizations and operational dynamics. Provided to the transition planners for the national presidential campaigns and then to the president-elect’s newly appointed management team, these materials provide a range of useful perspectives from those who have held the same positions and faced the same problems that they cannot get on their own or from government resources.

Nomination Forms Online Program

Detailing the complex problems involved in nominating and then confirming presidential appointments, the WHTP’s Nomination Forms Online program provides the best available expertise on the nomination and confirmation process. Its software, *NFO*, constitutes the only fully-functional, open-architecture, completely reusable software for making sense of the morass of government questions that assail presidential nominees. In one place, this software presents nominees with all of the some 6,000 questions they may confront. Provided free as a public service by WHTP, *NFO* prompts nominees for needed information and then distributes and customizes answers to all of the forms and into all the questions that the nominee must answer on a subject.

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