

12/6/18  
JRS

WHITE HOUSE LITIGATION - DISTRICT COURT PAPERS

Page Denied

TELECOPY COVER SHEET

**OFFICE OF THE INDEPENDENT COUNSEL**

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

Date: October 25, 1996

TO: The Honorable Susan Webber Wright, Judge  
United States District Court for the Eastern  
Company Name: District of Arkansas

Fax Number: 501-324-6576      Telephone Number: 501-324-5422

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 2 (including this cover sheet)

Message: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CONFIDENTIALITY NOTE

This facsimile is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this facsimile or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this facsimile in error, please notify us immediately by telephone and return the facsimile by mail.

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO	3341	
CONNECTION TEL		85013246576
SUBADDRESS		
CONNECTION ID		
ST. TIME	10/25 16:23	
USAGE T	00'56	
PGS.	2	
RESULT	OK	

TELECOPY COVER SHEET

**OFFICE OF THE INDEPENDENT COUNSEL**

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

Date: October 25, 1996

TO: The Honorable Susan Webber Wright, Judge  
United States District Court for the Eastern  
 Company Name: District of Arkansas

Fax Number: 501-324-6576 Telephone Number: 501-324-5422

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 2 (including this cover sheet)

Message: \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

TELECOPY COVER SHEET

**OFFICE OF THE INDEPENDENT COUNSEL**

1001 Pennsylvania Avenue, N.W., Suite 490N

Washington, D. C. 20004

telephone (202) 514-8688

facsimile (202) 514-8802

Date: October 25, 1996

TO: David E. Kendall, Esq.

Company Name: Williams & Connolly

Fax Number: 202-434-5029 or 5061 Telephone Number: 202-434-5145

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 2 (including this cover sheet)

Message: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**CONFIDENTIALITY NOTE**

**This facsimile is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this facsimile or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this facsimile in error, please notify us immediately by telephone and return the facsimile by mail.**

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO	3342	
CONNECTION TEL		94345029
SUBADDRESS		
CONNECTION ID		
ST. TIME	10/25 16:33	
USAGE T	01'36	
PGS.	2	
RESULT	OK	

TELECOPY COVER SHEET

**OFFICE OF THE INDEPENDENT COUNSEL**

1001 Pennsylvania Avenue, N.W., Suite 490N

Washington, D. C. 20004

telephone (202) 514-8688

facsimile (202) 514-8802

Date: October 25, 1996

TO: David E. Kendall, Esq.

Company Name: Williams & Connolly

Fax Number: 202-434-5029 or 5061 Telephone Number: 202-434-5145

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 2 (including this cover sheet)

Message: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

TELECOPY COVER SHEET

**OFFICE OF THE INDEPENDENT COUNSEL**

1001 Pennsylvania Avenue, N.W., Suite 490N

Washington, D. C. 20004

telephone (202) 514-8688

facsimile (202) 514-8802

Date: October 25, 1996

TO: Andrew Frey, Esq. and  
Gary Winters, Esq.

Company Name: Mayer, Brown & Platt

Fax Number: 202-861-0473 Telephone Number: 202-778-0602 (Frey)  
202-778-0193 (Winters)

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 2 (including this cover sheet)

Message: The attached fax transmission is HIGHLY CONFIDENTIAL.

---

---

---

---

---

---

---

---

**CONFIDENTIALITY NOTE**

This facsimile is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this facsimile or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this facsimile in error, please notify us immediately by telephone and return the facsimile by mail.

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO 3343  
CONNECTION TEL 98610473  
SUBADDRESS  
CONNECTION ID  
ST. TIME 10/25 16:35  
USAGE T 00'40  
PGS. 2  
RESULT OK

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

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

Date: October 25, 1996

TO: Andrew Frey, Esq. and Gary Winters, Esq.

Company Name: Mayer, Brown & Platt

Fax Number: 202-861-0473 Telephone Number: 202-778-0602 (Frey)  
202-778-0193 (Winters)

FROM: Kenneth W. Starr, Independent Counsel

Number of Pages: 2 (including this cover sheet)

Message: The attached fax transmission is HIGHLY CONFIDENTIAL.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Page Denied



Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied



Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Page Denied

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Filed November 21, 1997

No. 97-3006

IN RE: SEALED CASE

---

Consolidated with  
No. 97-3007

---

Appeals from the United States District Court  
for the District of Columbia  
(No. 95ms00446; No. 95ms00447)

---

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN,  
WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH,  
ROGERS, TATEL and GARLAND, *Circuit Judges*.

On Appellees' Suggestion  
for Rehearing *In Banc*

O R D E R

Appellees' Suggestion for Rehearing *In Banc* and the response thereto have been circulated to the full court. The

---

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing *in banc*, in which *Circuit Judge* GINSBURG joins with respect to the issue of attorney-client privilege, is attached.

*Circuit Judges* SENTELLE and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom GINSBURG, *Circuit Judge*, joins with respect to the issue of attorney-client privilege, dissenting from the denial of rehearing *in banc*: Dramatically departing from the common law rule that protects the attorney-client privilege after a client's death, and threatening the vitality of that privilege, this case raises issues of exceptional importance worthy of *in banc* consideration. See FED. R. APP. P. 35(a)(2). The case especially warrants *in banc* review because the consequences of the court's new balancing test will extend far beyond federal criminal cases in the District of Columbia. Clients involved in civil or criminal proceedings anywhere in the country have no way of knowing whether information they share with their lawyers might someday become relevant to a federal criminal investigation in Washington, D.C. As the Supreme Court noted regarding the psychotherapist privilege, "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996).

As I pointed out in my dissent, the common law rule has been incorporated in the Uniform Rules of Evidence and the Model Code of Evidence, adopted by the Supreme Court's Advisory Committee, and codified by at least twenty state legislatures. *In re Sealed Case*, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting). The Independent Counsel cites two cases that have abrogated the privilege after a client's death, but neither is relevant here. In both *State v. Gause*, 489 P.2d 830 (Ariz. 1971), and *State v. Kump*, 301 P.2d 808 (Wyo. 1956), courts held that an accused husband could not invoke the privilege on behalf of his dead wife to bar his wife's lawyer from testifying, a situation quite different from this case where the attorney himself has invoked the privilege on behalf of his deceased client. As the court in *Gause* said, "the privilege is that of the client and must be claimed by the client or someone authorized by law to do so on the client's behalf." *Gause*, 489 P.2d at 834. Until this court's decision, only one reported case—a never-cited opinion of a mid-level Pennsylvania appellate court—actually supported posthumous abrogation of the privilege when asserted by the lawyer in a

nontestamentary dispute. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

According to the Independent Counsel, empirical support is “nonexistent” for the proposition that abrogating the attorney-client privilege after the client’s death will chill client communication. Opposition of the United States to Appellees’ Petition for Rehearing With Suggestion for Rehearing In Banc at 12. But because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client’s death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary. In place of such evidence, he offers only his opinion that “any hypothesized chilling effect would be minimal,” *id.*, citing only this court’s opinion that it “expect[s]” its balancing test’s “chilling effect to fall somewhere between modest and nil,” *Sealed Case*, 124 F.3d at 233. Without convincing evidence that abrogating the privilege will do no harm to client communications, this court should not abandon centuries of common law.

Invoking a parade of horrors not before us, the Independent Counsel claims that injustice will result if courts cannot abrogate the attorney-client privilege after the client’s death. While in some cases the privilege will deny information to the trier of fact, it does so in order to promote a broader and more important value—encouraging the free flow of information from client to lawyer. The common law long ago determined that the benefits gained by recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the trier of fact in any particular case. *Id.* at 241 (Tatel, J., dissenting).

Petitioner also seeks rehearing *in banc* with respect to the court’s work product ruling. *Id.* at 235–37. Because drawing a precise line between fact and opinion work product is a difficult and sensitive question with serious implications for the attorney-client relationship, and because I think the court has drawn the line in the wrong place, this issue also warrants *in banc* review.

The court's conclusion that because the interview was "preliminary" and "initiated" by the client, the lawyer may not have "sharply focused or weeded" the words of the client, *id.* at 236, reflects a view of the lawyer's role very different from my own experience. No lawyer approaches a client's problems with a "blank slate." Appellees' Petition for Rehearing With Suggestion for Rehearing En Banc at 14. Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients. Of course lawyers may want to encourage wide-ranging discussions at first meetings, but they do so in order to draw out and record information they think might be important. Unless they take verbatim notes, the questions they ask and those facts they write down reflect their own views about what is important to their client's case. Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgments, and thought processes of counsel." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

The notes in this case demonstrate quite clearly that the lawyer actively exercised his judgment when interviewing his client. In two hours, he created only three pages of notes. Far from taking verbatim notes, the lawyer obviously wrote down what he thought was significant, omitting everything else. The notes bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections. The notes clearly represent the opinions, judgments, and thought processes of counsel.

After this decision, no lawyer will risk having his notes end up before a grand jury because of a judicial finding that he had not "sharply focused or weeded" the words of the client; lawyers will simply stop taking notes at early, critical meetings with clients. Not only will this damage the ability of lawyers to represent their clients but in the end there will be no notes for grand juries to see. Similar consequences, of course, may flow from the court's new attorney-client privi-

lege balancing test; advised that their disclosures might be unprotected after death, clients may simply not talk candidly. As the Supreme Court noted in the psychotherapist privilege context, “[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being.” *Jaffee*, 116 S. Ct. at 1929. This court’s two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process.

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3006

September Term, 1997

95ms00446

95ms00447

In re: Sealed Case

United States Court of Appeals  
For the District of Columbia Circuit

Consolidated with 97-3007

**FILED** NOV 21 1997

BEFORE: Wald, Williams and Tatel, Circuit Judges

**ORDER**

Upon consideration of appellees' petition for rehearing filed October 8, 1997, it is

ORDERED that the petition be denied.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY:

*Robert A. Bonner*

Robert A. Bonner

Deputy Clerk

Circuit Judge Tatel would grant the petition.

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3006

September Term, 1997

95ms00446

95ms00447

In re: Sealed Case

United States Court of Appeals  
For the District of Columbia Circuit

Consolidated with 97-3007

**FILED** NOV 21 1997

**BEFORE:** Edwards, Chief Judge; Wald, Silberman, Williams,  
Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel  
and Garland, Circuit Judges

**ORDER**

Appellees' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY:   
Robert A. Bonner  
Deputy Clerk

A statement of Circuit Judge Tatel dissenting from the denial of rehearing in banc, in which Circuit Judge Ginsburg joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges Sentelle and Garland did not participate in this matter.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3006

September Term, 1997

95ms00446

95ms00447

In re: Sealed Case

United States Court of Appeals  
For the District of Columbia Circuit

---

Consolidated with 97-3007

**FILED** NOV 21 1997

**BEFORE:** Edwards, Chief Judge; Wald, Silberman, Williams,  
Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel  
and Garland, Circuit Judges

## ORDER

Appellees' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

## Per Curiam

**FOR THE COURT:**

Mark J. Langer, Clerk

BY:



Robert A. Bonner

Deputy Clerk

A statement of Circuit Judge Tatel dissenting from the denial of rehearing in banc, in which Circuit Judge Ginsburg joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges Sentelle and Garland did not participate in this matter.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3006

September Term, 1997

95ms00446

95ms00447

In re: Sealed Case

United States Court of Appeals  
For the District of Columbia Circuit

---

Consolidated with 97-3007

**FILED** NOV 21 1997

**BEFORE:** Wald, Williams and Tatel, Circuit Judges

## ORDER

Upon consideration of appellees' petition for rehearing filed October 8, 1997, it is

**ORDERED** that the petition be denied.

## Per Curiam

**FOR THE COURT:**

Mark J. Langer, Clerk

BY:

*Robert A. Bonner*

Robert A. Bonner

Deputy Clerk

Circuit Judge Tatel would grant the petition.

Page Denied



UNITED STATES DEPARTMENT OF JUSTICE  
OFFICE OF THE SOLICITOR GENERAL  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

TELEFAX TO:

RECIPIENT'S NAME: David E. Kendall

AGENCY/FIRM: Williams & Connolly

ADDRESS: 725 12th Street, NW  
Washington, DC 20005

TELEPHONE NUMBER: ( 202 ) 434-5000

TELEFAX NUMBER: ( 202 ) 434-5029

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): \_\_\_\_\_  
IF YOU DO NOT RECEIVE THIS NUMBER OF PAGES, PLEASE CALL THE NUMBER BELOW.

TELEFAX FROM:

SENDER'S NAME: Emily Spadoni

ROOM NUMBER: 5614 Main

TELEPHONE NUMBER: ( 202 ) 514-2218

TELEFAX NUMBER: ( 202 ) 514-

COMMENTS:

NO.96-1783 Office of the President v. Office of Independent Counsel

- CONFIDENTIAL INFORMATION ENCLOSED -

*Pursuant to 26 U.S.C. § 6103 and other applicable restrictions, the information contained in this transmission is intended only for the sole use of the individual or entity named above and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this transmission is strictly prohibited. If you have received this communication in error, please notify us immediately. Thank you.*

TRANSMITTED: DATE: 6/6/97 TIME: \_\_\_\_\_ INITIALS: \_\_\_\_\_

No. 96-1783

---

---

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

---

OFFICE OF THE PRESIDENT, PETITIONER

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

---

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

---

LODGING

---

SETH P. WAXMAN  
Acting Solicitor General  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217

---

---

Page Denied

Page Denied

Page Denied

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

---

OFFICE OF THE PRESIDENT, PETITIONER

*v.*

OFFICE OF INDEPENDENT COUNSEL, ET AL.

---

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

---

**BRIEF AMICUS CURIAE FOR  
THE UNITED STATES,  
ACTING THROUGH THE ATTORNEY GENERAL,  
SUPPORTING CERTIORARI**

---

SETH P. WAXMAN  
*Acting Solicitor General*  
FRANK W. HUNGER  
*Assistant Attorney General*  
JOHN C. KEENEY  
*Acting Assistant Attorney  
General*  
EDWIN S. KNEEDLER  
MICHAEL R. DREEBEN  
*Deputy Solicitors General*  
JAMES A. FELDMAN  
*Assistant to the Solicitor  
General*  
*Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

---

---

Page Denied

No. 96-1783

---

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1996

---

OFFICE OF THE PRESIDENT,  
*Petitioner,*

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.,  
*Respondents.*

---

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

---

**REPLY BRIEF FOR THE PETITIONER**

---

ANDREW L. FREY  
*Counsel of Record*  
KENNETH S. GELLER  
LAWRENCE S. ROBBINS  
GARY A. WINTERS  
*Mayer, Brown & Platt*  
*2000 Pennsylvania Ave., NW*  
*Suite 6500*  
*Washington, D.C. 20006*  
*(202) 463-2000*

*Special Attorneys for the  
Petitioner*

---

---

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

---

OFFICE OF THE PRESIDENT,  
v. *Petitioner,*

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

---

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

---

BRIEF OF WILLIAM T. COLEMAN, JR.,  
ARTHUR B. CULVAHOUSE, JR., LLOYD N. CUTLER,  
NICHOLAS deB. KATZENBACH, ABNER J. MIKVA,  
AND ELLIOT L. RICHARDSON  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

---

WILLIAM T. COLEMAN, JR.\*  
555 13th Street, N.W.  
Suite 500 West  
Washington, D.C. 20004  
(202) 383-5325

ARTHUR B. CULVAHOUSE, JR.  
LLOYD N. CUTLER  
NICHOLAS deB. KATZENBACH  
ABNER J. MIKVA  
ELLIOT L. RICHARDSON

\* *Counsel of Record*

In The  
**Supreme Court of the United States**

OCTOBER TERM, 1996

---

OFFICE OF THE PRESIDENT,  
*Petitioner,*

v.

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

---

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

---

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

---

Professor Paul F. Rothstein  
GEORGETOWN UNIVERSITY  
LAW CENTER  
600 New Jersey Ave., N.W.  
Washington, D.C. 20001  
(202) 662-9094

Robert A. Long, Jr.  
Ivan K. Fong\*  
COVINGTON & BURLING  
1201 Pennsylvania Ave., N.W.  
P.O. Box 7566  
Washington, D.C. 20044-7566  
(202) 662-6000

*Counsel for Amici Curiae*

\* Counsel of Record

June 2, 1997

---

---

Page Denied

Page Denied

MAYER, BROWN & PLATT

CHICAGO  
BERLIN  
BRUSSELS  
HOUSTON  
LONDON  
LOS ANGELES  
NEW YORK  
MEXICO CITY CORRESPONDENT  
JAUREGUI, NAVARRETE, NADER Y ROJAS

2000 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20006-1882

202-463-2000  
TELEX 892603  
FACSIMILE  
202-861-0473

FACSIMILE COVER SHEET

Time: 4:17 pm

Date: April 16, 1997

MESSAGE TO:

FROM:

John D. Bates

Andrew L. Frey

FIRM: Office of the Independent Counsel

NO. OF PAGES 3 ALL PAGES MUST BE NUMBERED

FAX NO.: (202) 514-8802

TELEPHONE: (202) 778-0602

IF YOU HAVE ANY TRANSMISSION DIFFICULTY, PLEASE CONTACT THE FACSIMILE DEPARTMENT AT 202-463-2000

When transmitting to our machines, please include your cover sheet and number all pages consecutively.

SPECIAL INSTRUCTIONS:

[Empty rectangular box for special instructions]

Messages transmitted via: Pitney Bowes — 202-861-0473

Our machines are automatic and compatible with Group I, II and III machines.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

Transmitter: Shirley Hite

SUPREME COURT OF THE UNITED STATES

Office of the President  
Petitioner

v.

No. 96-1783

Off. of Ind. Counsel, et al.  
Respondent

To John D. Bates Counsel for Respondent:

YOU ARE HEREBY NOTIFIED pursuant to Rule 12.3 that a petition for writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on May 12, 1997, and placed on the docket May 14, 1997. Pursuant to Rule 15.3, the due date for a brief in opposition is June 13, 1997. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday, or federal legal holiday.

Unless the Solicitor General of the United States represents the respondent, an appearance/waiver form is enclosed and should be sent to the Clerk only in the event you do not intend to file a response to the petition.

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

Andrew L. Frey  
Counsel for Petitioner

Mayer, Brown & Platt  
2000 Pennsylvania Ave., N.W.

Number and Street

Washington, D.C. 20006

City, State, and Zip Code

(202) 778-0602

Telephone Number

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

APPEARANCE FORM / WAIVER

**SUPREME COURT OF THE UNITED STATES**

No. \_\_\_\_\_

\_\_\_\_\_ v. \_\_\_\_\_  
(Petitioner) (Respondent)

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

Please check one of the following boxes:

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

\_\_\_\_\_  
\_\_\_\_\_

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

Signature \_\_\_\_\_

Date: \_\_\_\_\_

(Type or print) Name \_\_\_\_\_

- Mr.    Ms.    Mrs.    Miss

Firm \_\_\_\_\_

Address \_\_\_\_\_

City & State \_\_\_\_\_ Zip \_\_\_\_\_

Phone (     ) \_\_\_\_\_

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

CC:

Supreme Court Rule 9  
APPEARANCE OF COUNSEL

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

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

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-1783

OFFICE OF THE PRESIDENT, PETITIONER

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **typewritten BRIEF AMICUS CURIAE FOR THE UNITED STATES, ACTING THROUGH THE ATTORNEY GENERAL, SUPPORTING CERTIORARI** (to be replaced with printed copies) via Hand Delivery and First Class mail, postage prepaid, on this 6th day of June, 1997.

See Attached Service List

SETH P. WAXMAN  
Acting Solicitor General

June 6, 1997

96-1783

OFFICE OF THE PRESIDENT  
OFFICE OF INDEPENDENT COUNSEL, ET AL.

ANDREW L. FREY  
KENNETH S. GELLER  
LAWRENCE S. ROBBINS  
MAYER, BROWN & PLATT  
2000 PENNSYLVANIA AVE., STE. 6500  
WASHINGTON, DISTRICT OF COLUMBIA 20006

HAND DELIVER

DAVID E. KENDALL  
NICOLE K. SELIGMAN  
MARCIE R. ZIEGLER  
WILLIAMS & CONNOLLY  
725 12TH ST., N.W.  
WASHINGTON, DISTRICT OF COLUMBIA 20005

HAND DELIVER

KENNETH W. STARR  
OFFICE OF THE INDEPENDENT COUNSEL  
1001 PENNSYLVANIA AVE., N.W.  
SUITE 490 NORTH  
WASHINGTON, DISTRICT OF COLUMBIA 20004

HAND DELIVER

PAUL F. ROTHSTEIN  
GEORGETOWN UNIVERSITY LAW CENTER  
600 NEW JERSEY AVENUE, NW  
WASHINGTON, DISTRICT OF COLUMBIA 20001

FIRST CLASS MAIL

IVAN K. FONG  
COVINGTON & BURLING  
1201 PENNSYLVANIA AVENUE, NW  
P.O. BOX 7566  
WASHINGTON, DISTRICT OF COLUMBIA 20044-7566

FIRST CLASS MAIL

O'MELVENY & MYERS LLP

400 SOUTH HOPE STREET  
LOS ANGELES, CALIFORNIA 90071-2899  
TELEPHONE (213) 669-6000  
FACSIMILE (213) 669-6407

CITICORP CENTER  
153 EAST 53<sup>RD</sup> STREET  
NEW YORK, NEW YORK 10022-4611  
TELEPHONE (212) 326-2000  
FACSIMILE (212) 326-2061

1999 AVENUE OF THE STARS  
LOS ANGELES, CALIFORNIA 90067-6035  
TELEPHONE (310) 553-6700  
FACSIMILE (310) 246-6779

610 NEWPORT CENTER DRIVE  
NEWPORT BEACH, CALIFORNIA 92660-6429  
TELEPHONE (714) 760-9600  
FACSIMILE (714) 669-6994

EMBARCADERO CENTER WEST  
275 BATTERY STREET  
SAN FRANCISCO, CALIFORNIA 94111-3305  
TELEPHONE (415) 984-8700  
FACSIMILE (415) 984-8701

555 13<sup>TH</sup> STREET, N.W.  
WASHINGTON, D. C. 20004-1109  
TELEPHONE (202) 383-5300  
TELEX 896222 · FACSIMILE (202) 383-5414

June  
5th  
1 9 9 7

10 FINSBURY SQUARE  
LONDON EC2A 1LA  
TELEPHONE (0171) 256-8451  
FACSIMILE (0171) 638-8205

SANBANCHO KB-6 BUILDING  
6 SANBANCHO, CHIYODA-KU  
TOKYO 102  
TELEPHONE (03) 3239-2800  
FACSIMILE (03) 3239-2432

SUITE 1905, PEREGRINE TOWER, LIPPO CENTRE  
89 QUEENSWAY, CENTRAL  
HONG KONG  
TELEPHONE (852) 2523-8266  
FACSIMILE (852) 2522-1760

SHANGHAI INTERNATIONAL TRADE CENTRE  
SUITE 2011, 2200 YAN AN ROAD WEST  
SHANGHAI 200335, CHINA  
TELEPHONE (86-21) 6219-5363  
FACSIMILE (86-21) 6275-4949

WRITER'S DIRECT DIAL NUMBER  
(202) 383-5325

OUR FILE NUMBER  
600,000-010  
DCI-287309.V1

**BY HAND**

Honorable Kenneth W. Starr  
Office of Independent Counsel  
1001 Pennsylvania Avenue, N.W.  
Suite 490N  
Washington, D.C. 20004

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

Dear Mr. Starr:

Arthur B. Culvahouse, Jr., Lloyd N. Cutler, Nicholas deB. Katzenbach, Abner J. Mikva, Elliot Richardson, and I intend to file a brief as amici curiae in support of the petition for a writ of certiorari in No. 96-1783, Office of the President v. Office of Independent Counsel. Pursuant to Supreme Court Rule 37.2, we request that you consent on behalf of your client, the Federal Respondent, to the filing of our brief.

To indicate your client's consent, please countersign this letter below and return it in the enclosed envelope. A copy of this letter is also enclosed for your records. Please call me if you have any questions.

Sincerely,



William T. Coleman, Jr.

WTC, Jr:seb  
Enclosures

Page 2 - Honorable Kenneth W. Starr - June 5, 1997

Consented to on behalf of  
the Federal Respondent:

Kenneth W. Starr, Esquire  
Counsel of Record for the Federal Respondent

⊗ take no position on FL

⊗ Carol ~~...~~

↳ secretary  
↳ get him brief

Page Denied

Page Denied