

If I did not mention it, again I will mention M. Scott Peck's book "The World Waiting To Be Born" and some of the other books that he has written, "People of the Lie: The Hope for Healing Human Evil," his discussion about evil in America. His initial book, at least the one that most of us are familiar with is "The Road Less Traveled." We do need more civility and more grace in our lives in America today.

So, Mr. President, I could not allow this situation to develop without again responding from my heart and from my soul to say that if my words the other day, in fact, have heightened or have increased the lack of civility, I apologize to my colleagues. But I ask you as I do this that you be honest with yourselves, ask yourself about your actions and about your rhetoric. Ask yourselves the question, How, in fact, can we find a way to work together?

Mr. President, I yield the floor.

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER (Mr. D'AMATO). The Senator from Illinois.

SINCERITY IN THE U.S. SENATE

Mr. SIMON. Mr. President, first, if I may comment on the remarks of our colleague from Florida. It was a gracious and generous statement on his part. I think all of us—PAUL SIMON has been guilty, like most of us have been guilty from time to time, of getting—you know, we get a little wrought up more than we should from time to time.

Part of the answer to the question raised by Senator MACK is, if we assume that our colleagues are just as sincere about their position as we are, it makes for a different kind of an atmosphere.

If my colleagues have real good memories, you may remember I was a Presidential candidate at one time. I remember a reporter for one of the major newspapers telling me that he had been talking to Senator HELMS and Senator THURMOND, with whom I frequently disagree, and both of them spoke very highly of me. He wanted to know how that could be, and I mentioned, whenever I get into a debate I try to remind myself that the other person is just as sincere as I am.

I think that helps. But that is not the sole answer. The question that Senator MACK poses is, How can we work together more? It is not a question easily answered. But I think it is very important for the future of the Senate and the future of our country, and I thank him for posing the question.

DIRECTING THE SENATE LEGAL COUNSEL TO BRING A CIVIL ACTION

The Senate continued with the consideration of the resolution.

Mr. SIMON. Mr. President, I rise on the subject that the Presiding Officer knows more about than I do, because he has had to sit through all these

Whitewater hearings. I have been designated by the Judiciary Committee as a Democrat to sit on that hearing along with Senator HATCH being designated by the Republicans from the Judiciary Committee.

What do we do? I think whenever—it really is kind of related to what we have just been talking about—when ever we can work things out without confrontation, I think we are better off in this body, and the Nation is better off.

I really believe the White House has gone about as far as they can go without just giving up completely on this constitutional right that people have in terms of the lawyer-client relationship.

I am also concerned about the amount of time that we are taking on this question. I cast one of three votes against creating the committee. Senator GLENN, who is on the floor, cast one and Senator BINGAMAN, who is on the floor, cast one. My feeling was, we were going to get preoccupied and spend a lot of time on something that really did not merit that amount of time.

We have spent infinitely more time: 32 days of hearings, as the Presiding Officer knows better than I, on this; 152 individuals have been deposed; the White House has produced more than 15,000 pages of documents; and Williams & Connolly, the President's personal attorney, has produced more than 28,000 pages of documents. We have spent a huge amount of time.

We have spent much more time on Whitewater in hearings than we spent on health care in hearings last year on an issue infinitely more important to the people of this country; much more time on Whitewater than on hearings on drugs, for example. We may have had 2 or 3 days of hearings on drugs this year. I do not know. It certainly is not more than that. We have had 1 day of hearings so far this year on Medicare.

I think when we spend huge amounts of time on this, we distort what happens in our country. I read the excellent autobiography of the Presiding Officer, Senator D'AMATO, and unlike a lot of autobiographies that are obviously written by someone else, it is pure vintage AL D'AMATO. But I know AL D'AMATO, our distinguished colleague, represents a State with a lot of poverty. We have spent infinitely more time on this issue than we have spent on the issue of poverty in our country. Mr. President, 24 percent of our children live in poverty. No other Western industrialized nation has anything close to that.

I hope we use the telephone a little more frequently, get together a little more and see if we cannot work this thing out without confrontation. I think everyone benefits.

Let me add one final thing. I am 67 years old now. I have been around long enough to know that when we get into these things, we really do not know the

ultimate consequences. It is like throwing a boomerang: It may hit here, it may hit there, it may hit somewhere else.

I hope this resolution is turned down and the alternative of Senator SARBANES is approved. But I am a political realist. I know that is not likely to happen, because of the partisan kind of confrontation that has occurred and is occurring in this body much too much. But I hope we try, once this gets over, to pull our rhetoric down, and I think all of us benefit when that happens.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I want to thank the Senator from Illinois for his eloquent and heartfelt remarks. He has the admiration of us all. He is going to be missed in this institution.

Mr. President, I would like to speak for a few minutes with regard to the issue at hand having to do with the subpoena and the President's claim of privilege to resist that subpoena.

I have been called upon over the past several weeks and months on many occasions, by members of the media, and others, to comment on the Whitewater investigation, to give my opinion. Others have, too, I am sure. In my case, I was minority counsel to the Watergate committee many years ago. People want to draw those comparisons.

I refuse to make those comparisons. I do not think it is appropriate to make those comparisons. In fact, I have said as little as possible about the whole matter. I left town as a much younger man, having spent a year and a half investigating Watergate, and I had been on another committee assignment or two as counsel to the U.S. Senate. Some time ago, I kind of became tired of investigating and, frankly, would like to spend more of my time in trying to build things up than in trying to appear to be trying to tear things down.

I think there is something important going on here that has to be commented upon with regard to the issue at hand. It looks like perhaps something might be worked out with regard to this particular subpoena, with regard to the particular notes that are being sought by this subpoena, and I hope that is the case. But there is something more important that is happening here that is going to have ramifications, I am afraid, for the next several months in this body and in this country, and that is, we should not get so caught up in the fine print and lose sight of the fact that, once again, we have a President who is claiming privilege to shield information from a committee of the U.S. Senate and ultimately from the American people, and it is a very, very weak claim at best. But even if it were a strong claim, Mr. President, it concerns me greatly that the President, under these circumstances, with the history that we have in this country of congressional

investigations and the obvious need that the Congress has and congressional committees have for information to get to the bottom of any perceived wrongdoing, that the President would choose to stand behind a privilege to keep this information from coming out.

It cannot stand. It cannot be successful. I have watched the predicament that is unfolding in the Senate with increasing concern, thinking any day that it might be resolved, but by resisting this subpoena and trying to keep this information from the public, I believe the President is making a tragic mistake. His action will only serve to raise questions as to what is being hidden. It will keep this investigation alive much longer than it otherwise would. It will fuel the cynicism of a public that is already all too distrustful of its public institutions. And for what purpose?

The White House says that the President is taking this position in order to defend a principle, and that principle is the President's right to private conversations with his attorney. But nobody is disputing that right. What is being disputed is the President's right to privileged conversations with lawyers who are Government officials paid by the taxpayers when the matters involved are personal in nature and do not have to do with the Presidency.

This assertion of the attorney-client privilege by ordinary citizens in the face of congressional subpoenas have been consistently struck down by this Nation's courts. The privilege is designed, basically, for litigation between private parties. In case after case, the courts have concluded that allowing it to be used against Congress would be an impediment to Congress' obligation and duty to get to the truth and carry out its investigative and oversight responsibilities.

If the President is claiming special status because he is President, then his assertion is really one of executive privilege and not attorney-client privilege. While I can still remember Sam Ervin's repeated admonitions that no man is above the law and that we are entitled to every man's evidence, I still concede that executive privilege can be a valid claim, under some circumstances. However, the President must assert it.

As I understand it to this point, he has chosen not to assert executive privilege. Of course, there may be political consequences associated with the claim of executive privilege, but the President cannot have it both ways. He cannot assert attorney-client privilege as a defense to a congressional subpoena which, if asserted by a private citizen, would stand little chance of prevailing, and then try to place the shroud of the Presidency around it without claiming Executive privilege.

As best I can tell, Mr. President, no President in history has ever claimed attorney-client privilege to defeat a congressional subpoena.

Richard Nixon did not claim attorney-client privilege. He allowed White House counsel, John Dean, to testify. Ronald Reagan did not claim attorney-client privilege during Iran-Contra. Notes and documents of his White House counsel were produced, along with those of the lawyer for the National Security Council, the lawyer for the Foreign Intelligence Advisory Board, and the lawyer for the Intelligence Oversight Board. In both of these investigations, those documents were produced without the claim of any sort of privilege.

President Nixon finally claimed Executive privilege with regard to the White House tapes and, of course, ultimately saw his claim of privilege defeated in the Supreme Court in the case of U.S. versus Nixon. So if the President is going to assert greater privilege protection than any of his predecessors, perhaps he is doing it solely for the purpose of protecting a legal principle. But the President must understand that the people are going to assume that there may be other reasons, in light of this country's history.

So let us examine the strength of the President's legal position. In the first place, an invocation of the attorney-client privilege is not binding on Congress. It is well established that in exercising its constitutional investigatory powers, Congress possesses discretionary control over witnesses' claims of privilege. It is also undisputed that Congress can exercise its discretion completely without regard to the approach that courts might take with respect to that same claim.

In the 19th century, House committees refused to accede to the claims of attorney-client privilege that developed from actions taken during the impeachment trial of Andrew Johnson and in the investigation of the Credit Mobilier scandal. House committees in the 1980's also rejected claims of attorney-client privilege. For example, in 1986, the House voted 352 to 34 to deny the privilege claims of Ferdinand Marcos' attorneys.

The Senate, too, has rejected invocations of attorney-client privilege on numerous occasions. In 1989, the Subcommittee on Nuclear Regulation rejected the privilege claim with respect to its investigation of restrictive agreements between nuclear employers and employees who might impact safety.

The subcommittee's formal opinion rejecting the claim of privilege asserted:

We start with the jurisdictional proposition that this Subcommittee possesses the authority to determine the validity of any attorney-client privilege that is asserted before the subcommittee. A committee's or subcommittee's authority to review or compel testimony derives from the constitutional authority of the Congress to conduct investigations and take testimony as necessary to carry out its legislative powers. As an independent branch of government with such constitutional authority, the Congress must necessarily have the independent au-

thority to determine the validity of non-constitutional evidentiary privileges that are asserted before the Congress.

Importantly, as the Congressional Research Service found, "No court has ever questioned the assertion of that prerogative * * *." Indeed, a 1990 Federal court decision, *In the Matter of Provident Life & Accident Co.*, found that whatever a court might hold concerning application of a claim of attorney-client privilege in a court proceeding, "is not of constitutional dimensions, [and] is certainly not binding on the Congress of the United States." Instead, committees, upon assertion of the privilege, have made a determination based on a "weighing [of] the legislative need against any possible injury."

This longstanding history, Mr. President, of discretionary congressional acceptance of the attorney-client privilege reflects the basic differences between judicial and legislative spheres. The attorney-client privilege is not constitutionally based. It is a judge-made doctrine based on policy considerations designed to foster a fair and effective adversary legal system. It theoretically promotes the interest of an individual facing an adversary civil or criminal action.

But the U.S. Senate is not a court. We do not have the authority to make final determinations of legal rights, or to adjudicate individuals' liberty or property. In fact, it is probably unconstitutional under the separation of powers doctrine for us to be bound by judicially created common law rules of procedure. Under Article I, section 5 of the Constitution, each House determines its own rules. And the rule of this body in connection with attorney-client privilege claims is longstanding and consistent: We balance the legislative need for the information against any possible injury. And, of course, a committee of this body has made that determination.

Does President Clinton want to rely on a technical, legal defense when the issue is whether his own White House has engaged in wrongdoing? The legislative need is obvious: to determine the truth of allegations of potential wrongdoing at the White House. Enforcing the subpoena furthers that interest. The integrity of the investigatory process is at stake here. The President's only potential interests are the free flow of information that is protected by Executive privilege, and the desire to shield what is potentially damaging information. To me, the balance is very clear: The subpoena must be complied with.

Even if we were to abandon our historic discretionary consideration of attorney-client privilege in favor of adopting judicial rules for its application, we would still reject the objections to the subpoena. Courts would not find the attorney-client privilege to apply on these facts.

Courts do not view the attorney-client privilege as a fundamental judicial

procedural requirement that is vital for fairness. The most prominent expert on the law of privileges and evidence, Dean Wigmore, wrote of the attorney-client privilege the following: “[i]ts benefits are all indirect and speculative, its obstruction is plain and concrete * * *. It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.” The second, sixth, and seventh circuits have all adhered to that approach. Although the submissions by the White House counsel’s office and the Clintons’ private attorneys read the privilege very broadly, the courts construed it very narrowly.

Courts universally require the party asserting the existence of the attorney-client privilege to bear the burden of establishing its existence. Blanket assertions of the privilege are rejected. The proponent must demonstrate conclusively that each element of the privilege is satisfied. This means that specific facts establishing an attorney-client privilege must be revealed. Conclusory assertions are not sufficient. And the proponent must also prove that the privilege has not been expressly, or by implication, waived.

In this respect, it must be noted that courts have rejected the linchpin of the President’s argument supporting the existence of an attorney-client privilege here. He claims that if the information requested by the subpoena were produced to the special committee, the privilege would be waived as to other conversations in other proceedings. But the U.S. Court of Appeals for the District of Columbia Circuit specifically has held to the contrary. In its 1979 decision *Murphy versus Department of the Army*, the court ruled that disclosure of allegedly privileged material to a congressional committee would not waive the privilege in any future litigation. As CRS notes, “There appears to be no case holding otherwise, and several which have followed *Murphy*.”

The President simply has not proven that the elements exist which are necessary to satisfy the attorney-client privilege. For courts to accept the privilege, the attorney must be acting as an attorney for the client and the communication at issue must be made for the purpose of securing legal services. That is not true here for two major reasons.

First, attendees at the critical November 5 meeting, including individuals who were not acting as attorneys for President Clinton. Bruce Lindsey is a lawyer, but he did not act as the President’s lawyer in this meeting. Nowhere in either the White House or Clinton personal lawyer submissions is any claim made that Mr. Lindsey passed communications from either the President or Mrs. Clinton to any other lawyer. Nowhere in his testimony before the special committee did Mr.

Lindsey establish that he was present at this meeting as a lawyer for President Clinton or that he discussed confidential communications between himself and the Clintons.

Several of those present were Government lawyers, including Mr. KENNEDY, to whom the subpoena was directed, Mr. Nussbaum and Mr. Lindsey. And a Government lawyer cannot establish a personal representational relationship with the President about a private matter. In prior administrations, when the President had private legal issues, a private attorney was hired because the Government attorney could not raise the attorney-client privilege in the context of a Government investigation. That is the situation we have here. This was particularly true where the facts that were the subject of a Government investigation relate to the President’s personal, not official, acts. Here, of course, the acts are not only personal, but predate President Clinton’s assumption of the Office of the Presidency.

So the discussion, by the President’s own admission, concerned logistics, dividing responsibilities among different groups of lawyers, not providing legal advice. Such communications simply fall outside the scope of the attorney-client privilege. In fact, they are no different than any other communications among Presidential advisers. Their character is not changed by the fact that some of the participants have law degrees. Hence, to the extent that official Government business was discussed at this meeting, the only theory preventing its disclosure would be, again, executive privilege, which the President refused to invoke.

Moreover, the communications at this meeting were made in the presence of persons who were not lawyers for President Clinton. Because the attorney-client privilege inhibits discovering truth, the courts are quick to find that the privilege has been waived. Where attorneys voluntarily disclose confidential client communications with a third party, the privilege is destroyed. The communication is no longer confidential and a justification for the privilege disappears. Confidentiality was lost for these communications because attorneys for the President shared information with others who did not represent the President. Lawyers cannot serve two masters. Those who represent the Government as a client do not represent the President as a client.

For this reason, the President’s claim of a joint defense privilege is not applicable. President Clinton raises this argument because he claims that the conversation of November 5 involved two clients: The President in his official capacity, and the President in his personal capacity. But these are not two different clients facing a common adversary. The President in his official capacity is represented by Government lawyers. A Government lawyer’s client is the Government, and

that client’s interest may be to enforce the laws against the President as an individual. That is a different interest than that represented by the President’s personal lawyers. Thus, these lawyers were potential adversaries, not lawyers sharing information for multiple clients against a common adversary.

Additionally, courts have adopted the crime-fraud exception to the attorney-client privilege. Courts will not apply the privilege to communications that may facilitate the commission of improper acts. The notes that are the subject of the subpoena concern a meeting at which discussions may have been held about certain information that may have been improperly passed to private lawyers for purposes of preparing a defense.

The work product privilege has also been raised, Mr. President, but it does not apply to this conversation, either. The attorney work product privilege is not constitutionally based and applies to Congress only on a discretionary basis. Further, it is qualified. It is not absolute. The sufficient showing of need will brush aside the work product privilege. The Clinton briefs quote broad generalities about the privilege, but as the Supreme Court held in *Hickman v. Taylor*, “We do not mean to say that all [] materials obtained are prepared * * * with an eye toward litigation are necessarily free from discovery in all cases.” The materials at issue were not prepared in anticipation of litigation on behalf of President Clinton. Mr. Kennedy was a Government lawyer. His notes could not have been taken in anticipation of preparing litigation strategy for President and Mrs. Clinton. His client was the Government, not the Clintons, therefore, work product privilege is simply inoperative.

Even if this doctrine applied, it is readily overcome when production of material is important to the discovery of needed information. Some courts have even refused to call the doctrine a privilege. In short, Mr. President, President Clinton simply has not met the burden of showing that either of these privileges apply to the notes that are the subject of this subpoena. His legal position is unprecedented and extremely tenuous. Clearly, Congress does not have to honor such a position.

I suggest to my colleagues on the other side of the aisle that we do not want to establish a precedent that says that future Presidents can use White House counsel with regard to personal matters or even matters that occurred before the President was elected and be shielded from congressional inquiry.

With regard to the references to partisanship that we have read and heard so much about, now that the battle lines have seemingly been drawn on this matter, we are told it will pretty much be a partisan vote. I find it somewhat ironic that over the past several years that many of those who wanted to investigate seemingly everything that came down the pike, now have

gotten to be sensitive about congressional overreaching and partisanship.

Unfortunately, it always just seems to depend on whose ox is being gored. You look back over the congressional investigations and you will see that invariably there is some partisanship involved in it because the majority party investigates the President of the other party and the minority party cries "politics" and talks about how much money we are wasting and how much money we are spending. I remember those conversations back when some of these other investigations over the years were started. The pattern seems to be the same.

So now we can all assume our natural and customary positions as Republicans and Democrats, or we can actually look to the merits of the case. I suggest that we do that. I think the American people would appreciate it. It would not be unprecedented.

The vote in the Senate to form the Watergate Committee, for example, was a unanimous vote at a time when still most people thought that it was, in fact, a third-rate burglary. When it came time to subpoena President Nixon's White House tapes, the vote on the Watergate Committee was unanimous, including that of the distinguished Senator from Hawaii, Senator INOUE. When it came time to sue the President to enforce that subpoena, I signed the pleadings as counsel to the committee. All this was not because the proceedings were totally free of partisanship. It was because we believed the privilege was not being properly asserted by the President. I respectfully suggest that the same is true here.

I still have hope that the President will reconsider his position—not over the question of a handful of notes—over the general proposition of whether at this particular time in our history we want to see another President claim a privilege to keep information from the American people.

We are not writing on a blank slate here, Mr. President. Our country has a history with regard to such matters and it has had an effect on us as a people. This day in time when a President who withholds information from the public has a higher duty and a higher burden than ever before. The people want the facts. They want the truth. The President, any President, should have a very good reason for denying it. The President in this case simply does not have one. I yield the floor.

The PRESIDING OFFICER. Under the unanimous consent agreement the Senator from Ohio is to be recognized.

The Chair, in my capacity as a Senator from the State of New York, asks unanimous consent that, thereafter, Senator MURKOWSKI from Alaska be recognized.

Without objection, it is so ordered.

CONCERN FOR CONGRESS

Mr. GLENN. Mr. President, I rise to speak very briefly about the remarks

that Senator BYRD made on the floor. Mr. President, the subject that Senator BYRD brought up today is something that has been bothering me in an increasing way all during this year. Perhaps it is because some of the tensions are particularly high with regard to the directions that the Government, the Congress, is trying to take us this year. These concerns have bothered me as much as they have Senator BYRD and not just in the examples he mentioned earlier today but some others, also.

I think it is time to reflect briefly on that and I will not take the Senate's time for very long, but I want to make a few remarks in support of his earlier statement.

Our Government is formed with the respect of the view of all parties. We look back and our Constitution did not establish a benevolent monarchy where one person makes the decisions for all of our country and moves us ahead or behind on the decisions of one person. We have split powers in Government. We have a legislative, executive and a judicial branch of Government. We have seen our system of constitutional Government evolve into 435 House Members and 100 Members of the U.S. Senate. Mr. President, 535 people were sent here not to be of one mind or one kind of person or one view, but sent here expecting to bring our varied views from all over the country and work out the best solution to what the future of this country may be.

Try as they may, no one person or one small group has all the wisdom so that they can confidently say we are right and you are wrong. That is not the way we are set up. And when it comes down to where we stoop to just name calling, which has happened on the floor, it tells more to me about the speaker than it does about the object the speaker happens to be belittling at the moment.

I think we maybe should remember something that too often is forgotten on the floor. That is, you cannot build yourself up by tearing someone else down. When someone uses belittling or semi-insulting language to the President of the United States, does that demean the President? No, it does not. It demeans the speaker. And it brands the speaker as someone who is, perhaps, covering up an inability to deal with the matters at hand by attacking the other side in a belittling way. The resort to invective and character assassination is not constructive legislative discourse, as the voters expected. We have seen examples here on the floor in the last few months of signs being put up, "Where is Bill? Where is Bill? Hey, where is Bill?" Arms waving, "Where is Bill?" Playing to the cameras and referring to the President as "that guy," repeatedly.

We had, one evening here, over by the exit door over there on the east side of the floor, a number of House Members who had come over here and were on the floor that day. Senator BYRD was

making a short statement, and they were milling around and actually laughing at Senator BYRD, laughing out loud at Senator BYRD on the Senate floor, sneering at him. When we called attention to them there, they kept right up, one person in particular.

What has happened? I do not think we would have seen that some years ago. It is insulting, No. 1; insulting, not just to the President or not insulting just to Senator BYRD; it is insulting to the Senate of the United States of America. To me that is a new low. Is it any wonder, when we see our own Members behaving like that, any wonder why people have their doubts about the Congress of the United States?

"Politics," a great word, it stems from an old Greek word meaning "business of all the people." I cannot think of anything in a democracy, anything in this United States of America, that deserves more respect and deserves more effort, nothing is more important than that business of all the people.

We bemoan the lack of respect for Congress, while we need the greatest faith between the people of this country and their elected officials. We need the greatest faith, underline that, faith between each other here, if we are to accomplish what we are all about. We want to know that everyone here is working for the best long-term interests of the United States of America and not just trying to save their own egos at the moment by making belittling remarks about others here or about the President.

If we had a scale here and faith was on one end, doubt would be over here on the other. How do we move that scale toward faith? How do we restore faith? Not by casting insulting remarks at other officials. You have faith, you have confidence in our institutions, in our legislative, executive and judicial branches—we must have faith in Congress. We must do the things that will engender faith and confidence in Congress. We must do the things that will engender faith and confidence in the Presidency, whether Democrat or Republican, the office of the Presidency of the United States, the chief executive officer of our Nation. We must have faith and confidence in the Senate. We must have faith and confidence in Senators. We must have faith and confidence in each other if we are to accomplish our job.

As Senator BYRD said, to use deprecating language toward each other or toward the President moves toward doubt; it moves toward doubt and disension, and not toward that kind of faith that we need if we are to do our job. That just makes our problems even more intractable.

We are all proud of our mothers, of course. I am proud of my mother. She has long since departed this world, but she used to have a lot of little homilies and a lot of little sayings. I still remember some of them today.

When we, as kids, were being too critical of someone I remember my