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ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

August 16, 1994

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ROB PORTMAN, OHIO

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INDEPENDENT

MAJORITY—(207) 225-6051
MINORITY—(202) 225-6074

The Honorable Kenneth Starr
Independent Counsel
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Starr:

In February, 1994, I instructed the minority staff of the Committee on Government Operations to initiate a probe into the death of White House aide Vincent W. Foster, Jr. This probe included both a review of the U.S. Park Police investigation into the cause of death and the activities of White House staff in the days following the discovery of Mr. Foster's body.

During the past several months Special Counsel Robert B. Fiske, Jr. has cooperated to help ensure that my probe did not interfere with his own investigation. On several occasions my staff even provided his office with names of individuals who may have relevant information on this matter.

I am enclosing for your information a summary report released on August 12 regarding the first phase of my review. This report endorses the conclusions of both the Park Police and Mr. Fiske that Vincent Foster committed suicide in Fort Marcy Park, Virginia on July 20, 1993. My probe on the actions by White House staff to prevent the U.S. Park Police from conducting a thorough investigation into this matter will continue.

It is my hope that we can work together to ensure that my efforts do not interfere with your ongoing investigation. I would be pleased to meet with you, as I did with Bob Fiske, to discuss this matter fully.

Sincerely,


William F. Clinger, Jr.
Ranking Republican

Enclosure

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SUMMARY REPORT BY

WILLIAM F. CLINGER, JR
Ranking Republican
Committee on Government Operations
U.S. House of Representatives

on the

DEATH OF WHITE HOUSE DEPUTY COUNSEL
VINCENT W. FOSTER, JR.

August 12, 1994

William F. Clinger, Jr., Ranking Republican
Matthew Fletcher, Republican Staff Director
Kevin M. Sabo, Republican General Counsel
Lisa Odle Kaufman, Republican Special Counsel

BACKGROUND

On February 24, 1994, I began a probe into the death investigation of White House Deputy Counsel Vincent W. Foster, Jr. In part, this investigation was prompted by the numerous conflicting accounts reported by various news agencies.¹

What I have found during our extensive review is that a significant number of those news accounts were simply untrue or otherwise easily explained. In the final analysis, I reached the same conclusion as that of the U.S. Park Police and Special Counsel Robert B. Fiske, Jr.; namely, that on July 20, 1993, Vincent W. Foster, Jr. died from a self-inflicted gunshot wound to the mouth while at Fort Marcy Park (Fairfax County), Virginia.

As part of our probe, my staff or I interviewed emergency medical personnel from Fairfax County, Virginia, law enforcement officials, and other persons involved in the U.S. Park Police investigation of Mr. Foster's death. In addition, the Government Operations Committee was provided access to the theretofore undisclosed U.S. Park Police Report on the Foster death along with photographs taken at both the scene and the autopsy.

I initiated this investigation in my role as Ranking Republican to the Committee on Government Operations. It was conducted under the authority of Rule X of the Rules of the House of Representatives, which charges the Committee on Government Operations with responsibility for conducting reviews of the management and effectiveness of government operations and activities. Also, pursuant to 5 U.S.C. Sec. 2954, executive branch agencies are required to provide "any information. . . relating to any matter within the jurisdiction of the committee" when requested by any seven members of the Committee.

The purpose of this report is to provide a summary of this probe into the investigation of the death of Vincent Foster to my colleagues on the Government Operations Committee and in the House of Representatives. I also hope that this summary report, along with the detailed findings of Special Counsel Robert Fiske, will put to rest any lingering questions regarding the events of July 20, 1993.

FORENSIC EVIDENCE SUPPORTS SUICIDE

Respected Pathology Panel Reviews Physical Evidence

A review of the facts surrounding the death of Mr. Foster must start with (1) the overwhelming amount of forensic evidence supporting the conclusion that he died of a suicide, and (2) the stature of those brought in to review the autopsy results. Contrary to the belief of some commentators, the forensic pathology team ("Pathology Panel") working with Special Counsel Robert B. Fiske, Jr. did not rely solely on the autopsy conclusions of the Northern Virginia Medical Examiner, Dr. James C. Beyer.² Rather, the Pathology

Panel independently concluded that Mr. Foster committed suicide on July 20, 1993 at Fort Marcy Park, Virginia after their own review of the available evidence.³

The determination of the Pathology Panel organized by Special Counsel Fiske was based on independent observations and testing of Mr. Foster's soft palate, a review of the photographs taken at Fort Marcy Park and during the autopsy, a review of FBI lab reports, and an examination of Mr. Foster's clothing. The same or comparable evidence was available to the Pathology Panel as would have been available had they been present at the original autopsy. The Pathology Panel determined that the decedent's body did not need to be exhumed because numerous tissue samples were saved and available for examination.

Summary of Forensic Evidence

- It is indisputable that the gun was fired while in Mr. Foster's mouth. This conclusion is supported by the nature of the wound in the mouth and head as well as the smoke and gun powder residue found in the soft palate of the mouth. The report issued by Special Counsel Fiske discusses this forensic evidence in considerable detail. That being the case, one of two conclusions remain: (1) Mr. Foster committed suicide, or (2) Mr. Foster was forced to put the gun in his mouth and pull the trigger.⁴
- The uncontested evidence supports the conclusion that Mr. Foster placed the gun in his mouth himself. There were no signs of a struggle at Fort Marcy Park, no bruises on Mr. Foster's body or tears in his clothing, and no broken teeth. Moreover, Mr. Foster was not under the influence of any controlled substances or alcohol that may have been used to render him helpless. Lab reports reveal that no alcohol or controlled substances were found in Mr. Foster's bloodstream.⁵
- The conclusion that Mr. Foster committed suicide is also supported by the marks left on Mr. Foster's thumb and forefinger. Consistent with the testimony of the Fairfax County paramedics, Mr. Foster's thumb was trapped by the trigger guard. The remaining mark is consistent with the rebound of the trigger. Because the indentation on Mr. Foster's thumb matches exactly with the rebound of the trigger, it would have been virtually impossible to artificially make such a mark. Similarly, the imprint on Mr. Foster's forefinger is identical to the imprint on the back of the gun. The powder burns also support a finding of suicide.
- Along with select members of my staff, I had complete access to photographs taken at Fort Marcy Park and during the Northern Virginia Medical Examiners autopsy. These photographs support statements by the U.S. Park Police and the Pathologist Panel regarding the location of the body, trigger guard marks, and gunpowder residue.

someone else put gun in his mouth & pulled trigger

NO EVIDENCE SUPPORTS MOVEMENT OF BODY

Although the forensic evidence indicates that Mr. Foster committed suicide, several issues not addressed in satisfactory detail by Special Counsel Fiske have been of concern to some commentators. They are addressed below:

Movement of the Foster Body

First, a major concern is the possible movement of Mr. Foster's body after he died. As reported, the amount of blood on and surrounding Mr. Foster's body at Fort Marcy Park was not substantial.

- It is apparent that the lack of a substantial amount of blood was the direct result of the position of Mr. Foster's body at the time of death. Because Mr. Foster was lying on an angle, the blood drained downward instead of encompassing his entire body. However, the paramedics who lifted Mr. Foster's body and placed it in the body bag for transport to the hospital recorded that the body was "drenched with blood" once it became level. By the time the body bag was opened at the hospital, Mr. Foster's shirt and undershirt were covered in blood.
- The bloodstain on the right shoulder of Mr. Foster's shirt is admittedly difficult to explain but not determinative that the deceased was moved after he committed suicide. Any number of facts would explain the bloodstain; perhaps the head was moved by the Park Police or emergency personnel on the scene. Regardless of what caused the bloodstain, however, it cannot be disputed that if the body was moved into the park additional signs would support that conclusion. Mr. Foster's clothing was drenched with blood once he was moved to the hospital. His clothing would have been equally drenched if he had been moved into the park.
- Commentators have also made issue with the lack of skull fragments found at the scene suggesting it also supports the conclusion that Mr. Foster was moved to the park. The scene was not searched for bone fragments, however, until approximately nine months after Mr. Foster's death. Although it is not surprising that numerous objects were found at the scene, such as Civil War artifacts, skull fragments are animal matter. As such, they could have been moved by scavenging animals or even washed away. There was not a large amount of fragments that were missing as the exit wound was only 1 1/4 by 1 inch in diameter. Likewise, the bullet was never found, but one need only visit Fort Marcy Park to understand that the bullet could have fallen anywhere in the park. The fact that it was not located is not determinative in light of the previously discussed forensic evidence.
- The lack of fingerprints on the gun found in Mr. Foster's hand has also been used to suggest that he did not fire the weapon or that his body had been moved and the

gun was later placed in his hand. Pathologists have suggested, however, that fingerprints are not always identifiable. Other factors, such as the amount of oils on the decedents fingers, the humidity, and the temperature may result in fingerprints not remaining on an object.

Statements by "CW" Contradicted or Easily Explained

Recent statements of the so-called Confidential Witness ("CW") appears to be in question. CW is the reference to the man driving a white van who initially found Mr. Foster's body in Fort Marcy Park around 6:00 p.m. He has asked that his identify be kept confidential.

A comparison of CW's statements to FBI agents working for Special Counsel Fiske, as reflected in the Fiske report, and those statements given under oath to Representatives Dan Burton, John Mica and Dana Rohrabacher reveal that the substance of each statement is very similar, if not identical.

-- In both instances, CW insists that the palms of Mr. Foster were facing upward and there was no gun in Mr. Foster's hand when CW found the body.⁶ However, in both instances, CW acknowledged that from the position he was standing, it was possible that if Mr. Foster had a gun in his hand, CW could have missed it. Special Counsel Fiske's report states, "CW acknowledges that, because of his position at the top of the berm and the heavy foliage, there could have been a gun in the man's hand that he did not see."⁷

CW reiterated this point in his sworn statement when he acknowledged that "a trained policeman standing at the top of the hill that [sic] even when he [the policeman] was told he [Mr. Foster] had a gun in his hand still did not see it [the gun]. I cannot . . . say, I would have seen it [the gun]."⁸ Because my staff and I had access to photographs taken at Fort Marcy Park, we carefully reviewed a photo taken from roughly the same location that CW claims to have stood. Because of the dense foliage that was clearly seen in the picture, Mr. Foster's hands could not possibly have been seen without moving to his side. CW admits that he did not move to Mr. Foster's side to examine Mr. Foster's hands.

-- Questions have also been raised about the alleged existence of a wine cooler bottle near Mr. Foster's body and a stain on Mr. Foster's shirt which appeared to be a combination of wine and vomit. These assertions were made by the CW. The lab reports conducted on Mr. Foster's shirt reveal that the stain was purely blood and no traces of wine or vomit were found. The U.S. Park Police asserts that no wine coolers were found near Mr. Foster's body, but wine coolers were in an automobile located in the parking lot but not belonging to Mr. Foster. Additionally, no alcohol was found in Mr. Foster's bloodstream.

- Questions have been raised regarding a discrepancy between CW's recollection of the various contents of the two cars located in the parking lot at Fort Marcy Park the afternoon of Mr. Foster's death. All parties involved agree that there were two cars in the parking lot -- one belonged to Vincent Foster and was grey in color and the other was a white Honda. According to CW, inside the white Honda were two wine coolers and a jacket that matched the pants CW saw on Vincent Foster.

In contrast, the U.S. Park Police investigation (at the time of the death) and Special Counsel Fiske's investigation (nine months later) both determined, based on information from the owner and passenger of the white Honda, that the wine coolers were in fact in their car. As well, no jacket was in their car despite the testimony of the CW. The U.S. Park Police found the jacket matching Mr. Foster's pants in the car belonging to Mr. Foster.

- Also of concern is the statement by CW that the ground at the bottom of the berm where the body was found was trampled and worn. It would be impossible to determine, however, whether the ground was trampled by the footsteps of Mr. Foster pacing back and forth or by the footsteps of others.

Other Evidence of Marginal Value

- Several commentators have questioned the origin of carpet fibers found on Mr. Foster's body or clothes. Although the origin of those fibers and hair have not been substantiated, a determinative finding of the origin is not practical nor necessary in light of other overwhelming forensic evidence. Specifically, carpet fibers may be transmitted from almost any source. It would be impossible to determine when or where the carpet fibers found on Mr. Foster's clothing would have originated.
- Rumors have also arisen concerning a blond hair found somewhere on Mr. Foster's body, possibly on his undershorts. Prior to beginning the autopsy, Mr. Foster's clothing was removed and commingled together. Therefore, it is impossible to determine which piece of clothing the hair was originally attached.

The blond hair found on Mr. Foster could have come from anyone. Possibly, the hair belonged to his daughter who has long blond hair. The day of his death, Mr. Foster was driving the car typically driven by his daughter. Moreover, the morning of his death, Mr. Foster drove his daughter to work, leaned over and kissed her good-bye -- an act whereby a hair could have easily been transmitted. The hair could have also belonged to anyone of the guests at the swearing-in ceremony of FBI Director Louis Freeh which took place in the Rose Garden the day of Mr. Foster's death. Because the forensic evidence so conclusively points to a suicide, the origin of the blond hair is hardly relevant.

- Another area of concern seems to be the existence of semen found on Mr. Foster's undershorts. Those who suggest that the presence of semen demonstrates that a sexual liaison occurred on the afternoon of Mr. Foster's death ignore the testimony of medical experts who suggest that it is not uncommon for an individual, at the time of death, to defecate, urinate, or even ejaculate.
- Finally, some have questioned why Mr. Foster's body was not exhumed. Based upon the uncontroverted forensic evidence coupled with the pain such a procedure would understandably cause the Foster family, it was determined that Mr. Foster's body need not be exhumed. As suggested above, the Pathology Panel reasonably determined that sufficient evidence was preserved to allow them to conduct their own independent review.

CONCLUSION

I must agree that not every question regarding the death of White House aide Vincent Foster has been definitively answered. Nonetheless, I have reached the conclusion that all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1992.

Perhaps the unexpected death of any high government official will needlessly bring cries of conspiracy from many in our society. That is unfortunate. The death of Mr. Foster has been reviewed in detail by the experienced professionals at the U.S. Park Police, who were performing their tasks under extremely difficult circumstances. Special Counsel Robert Fiske took that investigation one step further by establishing a panel of noted forensic pathologists who reviewed all of the available evidence and reached the same conclusion as that of the Park Police. I reviewed the work of these two organizations and, with this report, support their findings.

Accordingly, this report closes the Government Operations Committee minority investigation on this stage of the death of Vincent Foster. The focus of this probe will now turn to the second portion of the investigation dealing with the handling of Mr. Foster's documents and the potential obstruction of justice by White House staff in the days following Mr. Foster's death.

My special thanks to officials of Fairfax County, Virginia, the U.S. Park Police, and the Office of Special Counsel Robert B. Fiske, Jr. for their assistance in conducting this review.

ENDNOTES

1. Despite an early determination by the U.S. Park Police that Vincent Foster had committed suicide, numerous news stories began to appear in early 1994 suggesting that the Park Police did not thoroughly perform their job or that the White House staff had improperly impeded the police investigation. These articles include:
 - On January 13, 1994, Washington Post reporter Michael Isikoff reports that DoJ and FBI agents have begun retracing the original handling of the Foster probe in a search for evidence that would shed light on his state of mind at the time of his death. Isikoff further reports that this effort began because the investigators were concerned that top White House aides may have hindered the U.S. Park Police from obtaining key evidence.
 - On January 27, 1994, the New York Post's Chris Ruddy reports that some of the first people to discover the body of Foster have raised new questions about the conclusion that it was a suicide. According to Ruddy, "The questions involve the position of Foster's body; the fact that the gun was still in Foster's hand and had no blood on it; the small amount of blood on and near the body; and the swiftness with which the death was declared a suicide."
 - In late January, 1994, the Wall Street Journal filed suit in U.S. District Court to "force the release of reports on White House lawyer Vincent Foster's death. The DoJ had earlier planned to release these reports.
 - On February 3, 1994, the New York Post reports that former FBI Director William Sessions said that the FBI "was kept out of the investigation into Vincent Foster's alleged suicide because of a 'power struggle within the FBI and the Department of Justice'". Sessions "said the FBI did not get involved in the probe for political reasons."
 - On February 4, 1994, ABC New's Jim Wooten reports that Secret Service records "show that the day after Foster died Nussbaum did take a photograph from the office and one of his assistants returned a trash bag previously removed from the office."
2. The autopsy was performed by Dr. Beyer. The autopsy was authorized by Dr. Donald Haut of the Office of the Chief Medical Examiner, Northern Virginia District, Commonwealth of Virginia. The Medical Examiner's Certificate, better known as a death certificate, is signed by Dr. Haut and lists the cause of death as "self-inflicted gunshot wound mouth to head."

3. **The Forensic Pathologist Panel included four experienced and respected forensic pathologists. They include:**
- (a) **Dr. Charles S. Hirsch - Chief Medical Examiner for the City of New York.**
 - (b) **Dr. James L. Luke - Forensic Pathology Consultant, FBI Investigative Support Unit, FBI Academy.**
 - (c) **Dr. Donald T. Reay - Chief Medical Examiner for King County, Seattle, Washington.**
 - (d) **Dr. Charles J. Stahl - Distinguished Scientist and Armed Forces Medical Examiner, Armed Forces Institute of Pathology, Washington, D.C.**

No evidence has been presented which would challenge the integrity of these experts.

- 4. **Several commentators have argued that Mr. Foster's body, after he died, was moved to Fort Marcy Park. This issue will be addressed below.**
- 5. **Small traces of an anti-depressant, which Mr. Foster was known to have taken, was found in Mr. Foster's bloodstream.**
- 6. **Fiske report at 30; Deposition at 43.**
- 7. **Fiske report at 30.**
- 8. **Deposition at 19.**

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Panel independently concluded that Mr. Foster committed suicide on July 20, 1993 at Fort Marcy Park, Virginia after their own review of the available evidence.³

The determination of the Pathology Panel organized by Special Counsel Fiske was based on independent observations and testing of Mr. Foster's soft palate, a review of the photographs taken at Fort Marcy Park and during the autopsy, a review of FBI lab reports, and an examination of Mr. Foster's clothing. The same or comparable evidence was available to the Pathology Panel as would have been available had they been present at the original autopsy. The Pathology Panel determined that the decedent's body did not need to be exhumed because numerous tissue samples were saved and available for examination.

Summary of Forensic Evidence

- It is indisputable that the gun was fired while in Mr. Foster's mouth. This conclusion is supported by the nature of the wound in the mouth and head as well as the smoke and gun powder residue found in the soft palate of the mouth. The report issued by Special Counsel Fiske discusses this forensic evidence in considerable detail. That being the case, one of two conclusions remain: (1) Mr. Foster committed suicide, or (2) Mr. Foster was forced to put the gun in his mouth and pull the trigger.⁴
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gun was later placed in his hand. Pathologists have suggested, however, that fingerprints are not always identifiable. Other factors, such as the amount of oils on the decedents fingers, the humidity, and the temperature may result in fingerprints not remaining on an object.

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Finally, some have questioned why Mr. Foster's body was not exhumed. Based upon the uncontroverted forensic evidence coupled with the pain such a procedure would understandably cause the Foster family, it was determined that Mr. Foster's body need not be exhumed. As suggested above, the Pathology Panel reasonably determined that sufficient evidence was preserved to allow them to conduct their own independent review.

CONCLUSION

I must agree that not every question regarding the death of White House aide Vincent Foster has been definitively answered. Nonetheless, I have reached the conclusion that all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1992.

Perhaps the unexpected death of any high government official will needlessly bring cries of conspiracy from many in our society. That is unfortunate. The death of Mr. Foster has been reviewed in detail by the experienced professionals at the U.S. Park Police, who were performing their tasks under extremely difficult circumstances. Special Counsel Robert Fiske took that investigation one step further by establishing a panel of noted forensic pathologists who reviewed all of the available evidence and reached the same conclusion as that of the Park Police. I reviewed the work of these two organizations and, with this report, support their findings.

Accordingly, this report closes the Government Operations Committee minority investigation on this stage of the death of Vincent Foster. The focus of this probe will now turn to the second portion of the investigation dealing with the handling of Mr. Foster's documents and the potential obstruction of justice by White House staff in the days following Mr. Foster's death.

My special thanks to officials of Fairfax County, Virginia, the U.S. Park Police, and the Office of Special Counsel Robert B. Fiske, Jr. for their assistance in conducting this review.

ENDNOTES

1. Despite an early determination by the U.S. Park Police that Vincent Foster had committed suicide, numerous news stories began to appear in early 1994 suggesting that the Park Police did not thoroughly perform their job or that the White House staff had improperly impeded the police investigation. These articles include:

- On January 13, 1994, Washington Post reporter Michael Isikoff reports that DoJ and FBI agents have begun retracing the original handling of the Foster probe in a search for evidence that would shed light on his state of mind at the time of his death. Isikoff further reports that this effort began because the investigators were concerned that top White House aides may have hindered the U.S. Park Police from obtaining key evidence.
- On January 27, 1994, the New York Post's Chris Ruddy reports that some of the first people to discover the body of Foster have raised new questions about the conclusion that it was a suicide. According to Ruddy, "The questions involve the position of Foster's body; the fact that the gun was still in Foster's hand and had no blood on it; the small amount of blood on and near the body; and the swiftness with which the death was declared a suicide."
- In late January, 1994, the Wall Street Journal filed suit in U.S. District Court to "force the release of reports on White House lawyer Vincent Foster's death. The DoJ had earlier planned to release these reports.
- On February 3, 1994, the New York Post reports that former FBI Director William Sessions said that the FBI "was kept out of the investigation into Vincent Foster's alleged suicide because of a 'power struggle within the FBI and the Department of Justice'". Sessions "said the FBI did not get involved in the probe for political reasons."
- On February 4, 1994, ABC News's Jim Wooten reports that Secret Service records "show that the day after Foster died Nussbaum did take a photograph from the office and one of his assistants returned a trash bag previously removed from the office."

2. The autopsy was performed by Dr. Beyer. The autopsy was authorized by Dr. Donald Haut of the Office of the Chief Medical Examiner, Northern Virginia District, Commonwealth of Virginia. The Medical Examiner's Certificate, better known as a death certificate, is signed by Dr. Haut and lists the cause of death as "self-inflicted gunshot wound mouth to head."

3. The Forensic Pathologist Panel included four experienced and respected forensic pathologists. They include:
- (a) Dr. Charles S. Hirsch - Chief Medical Examiner for the City of New York.
 - (b) Dr. James L. Luke - Forensic Pathology Consultant, FBI Investigative Support Unit, FBI Academy.
 - (c) Dr. Donald T. Reay - Chief Medical Examiner for King County, Seattle, Washington.
 - (d) Dr. Charles J. Stahl - Distinguished Scientist and Armed Forces Medical Examiner, Armed Forces Institute of Pathology, Washington, D.C.

No evidence has been presented which would challenge the integrity of these experts.

- 4. Several commentators have argued that Mr. Foster's body, after he died, was moved to Fort Marcy Park. This issue will be addressed below.
- 5. Small traces of an anti-depressant, which Mr. Foster was known to have taken, was found in Mr. Foster's bloodstream.
- 6. Fiske report at 30; Deposition at 43.
- 7. Fiske report at 30.
- 8. Deposition at 19.

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INDEP COUNSEL
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United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS

WASHINGTON, DC 20510-8075

STEVEN B. MARNS, STAFF DIRECTOR AND CHIEF COUNSEL
HOWARD A. MENELL, REPUBLICAN STAFF DIRECTOR

September 26, 1994

Mr. Kenneth Starr, Esq.
Independent Counsel
2 Financial Center
10825 Financial Center Parkway
Suite 134
Little Rock, Arkansas 72211

Dear Mr. Starr:

Pursuant to Senate Resolution 229, the Senate Banking Committee is conducting an investigation and hearings into, among other subjects, the nature and extent of communications between officials of the White House and the Department of the Treasury or the Resolution Trust Corporation ("RTC") relating to the Whitewater Development Corporation and the Madison Guaranty Savings and Loan Association. The Committee's investigation included reviewing thousands of documents, deposing many knowledgeable witnesses, and conducting public hearings.

In the course of the proceedings, the Committee has developed evidence which strongly suggests that certain individuals may have purposely misled Congress. Accordingly, we request that you and your staff review the accuracy of the testimony given to this Committee on February 24, 1994, and more recently during depositions and hearings in July and August. At the conclusion of your review, you may wish to consider whether criminal charges should be brought. While we are still reviewing the testimony of White House officials, we are now writing to express concern over the testimony of Treasury Department witnesses Mr. Roger Altman, Ms. Jean Hanson, and Mr. Joshua Steiner.

ALTMAN TESTIMONY

On February 24, 1994 Deputy Secretary of the Treasury Roger Altman testified before this Committee, as part of our semi-annual oversight hearings on the RTC. During this hearing, Mr. Altman was questioned extensively on the nature and extent of contacts with the White House, and on the handling of criminal referrals that the RTC had made that mentioned the Clintons. The evidence is overwhelming that Mr. Altman's answers were inaccurate and incomplete. In addition to concealing the number of contacts between the White House and Treasury or RTC, Mr. Altman

concealed the nature of the contacts. Mr. Altman's attempt to mislead the Committee continued through a series of letters he sent to the Committee which purported to correct his earlier testimony.

Pursuant to Senate Resolution 229, in July and August 1994, Altman was deposed by Counsel for the Committee and also testified at public hearings. On both occasions, Mr. Altman was under oath. Altman's testimony on critical points is contradicted by the testimony of other witnesses and the documentary evidence. It appears that Altman did not testify truthfully at his deposition or at these more recent hearings.

Here are several examples: On February 24, Altman testified that the "sole" purpose of a February 2, 1994 meeting at the White House was to discuss the statute of limitations as it applied to the Madison case. [Feb. 24 Hearing, page 63] Altman described the "whole conversation" as pertaining only to a generic discussion of the statute of limitations. In response to a direct question, he stated that the "one question" he was asked by White House officials at the February 2nd meeting was whether private counsel for the parties would be receiving a similar briefing. [Feb. 24, page 55-56] Based on evidence developed in our investigation, we now know that this testimony was unequivocally false. As even Mr. Altman has recently admitted, the truth is that at the February 2nd meeting there was an extensive discussion of whether Altman should recuse himself. White House officials asked Altman many questions about recusal and about who would be the decision-maker in the Madison Whitewater case if Altman withdrew from the case. They also rendered advice regarding his decision. Indeed, Joshua Steiner reported in his diaries that the White House told Altman that his decision to recuse himself was "unacceptable", and that Altman was under "intense pressure" from the White House not to recuse himself.

At the February 24th hearing several Senators also put probing questions to Altman aimed at determining whether there were any other White House contacts apart from that contact on February 2nd. Senator Gramm specifically asked Altman whether he or his staff had "any communication" with the White House. [Feb. 24, page 55] Altman disclosed only the February 2nd meeting. Senator D'Amato asked: "Was there any other meeting that may have been requested". Altman said: "No." [Feb. 24, page 61]. Yet, it is now undisputed that there were numerous contacts which Altman failed to disclose. One of the more significant meetings which Altman concealed occurred on February 3rd when Altman himself requested a meeting at the White House to announce that he would not recuse himself. Altman has offered no credible explanation for why he denied this contact when responding to Senator D'Amato's direct question.

In addition, during the February 24 hearing, Mr. Altman was specifically asked about the handling of criminal referrals that mentioned the Clintons. Mr. Altman responded that normal procedures were being followed, and nobody at his agency advised the White House staff of the existence of the referrals. [Feb. 24, pages 40-41, 69] To quote the hearing record:

Senator Bond: How was the White House notified of the referral?

Mr. Altman: They were not notified by the RTC, to the best of my knowledge.

Senator Bond: Nobody in your agency, to your knowledge, advised the White House staff that this was going to be a major -- this could be a major source of concern?

Mr. Altman: Not to my knowledge.

It has since come to light that there were at least two meetings in September and October 1993 when Treasury Department officials disclosed the existence, and discussed relevant details, of the criminal referrals with White House officials. And there is highly credible evidence that these contacts were undertaken with the knowledge and at the direction of Mr. Altman. [Feb. 24, page 69]

At some points in his February 24th testimony Mr. Altman characterized his February 2nd meeting as a "substantive contact". Senator Domenici insisted on probing whether the use of the modifying term "substantive" implied the existence of other contacts, and asked "you are not suggesting you had more than one are you?" Altman answered "No. I am just saying that if you run into someone in the hall, if you see that thing in the paper this morning, I am not including that." [Feb. 24, page 70] The undisputed fact that Altman purposely met with White House officials on February 3rd solely to discuss his recusal absolutely belies his answers to Senator Domenici.

Altman's deception is exacerbated by the fact that he had several opportunities to correct his testimony through the submission of letters to the Committee. Rather than truthfully correct his testimony, Altman persisted in his deception. After receiving notice from the White House that his testimony could be misleading, and similar advice from Treasury General Counsel Jean Hanson, Altman submitted carefully worded letters to the Committee purporting to correct the record. Conspicuously absent from Altman's first two letters is any mention of "recusal" or "criminal referrals." In his third letter to the Committee dated March 11, 1994 Altman affirmatively misrepresented that in his contacts with the White House he did not "seek advice, nor was it given". Sworn testimony from at least six witnesses establishes that White House Officials did advise Altman on his recusal.

HANSON TESTIMONY

A second Treasury Department witness whose testimony merits scrutiny is Ms. Jean Hanson, General Counsel to the Treasury Department. As General Counsel to the Treasury Department, Hanson had responsibility to assure that to her knowledge Roger Altman did not provide false information to Congress. The evidence, however,

indicates that Hanson failed to act when confronted with Altman's blatant attempt to mislead the Committee. The evidence shows that Hanson had knowledge at the time of Altman's testimony that he was testifying falsely. She also had knowledge that at least two letters sent by Altman to the Senate Committee which she reviewed were not complete.

Hanson testified at the recent hearings that she did not correct Altman at the February 24th hearing because she had not thought about the earlier Treasury White House contacts since the time of the September/October meetings. However, documentary evidence, and sworn testimony of Joshua Steiner, establish that Hanson was specifically requested in December to prepare a chronology of prior White House contacts. One of the documents produced by the Treasury Department is the actual chronology Hanson prepared in December. Also, a torn-up copy of the document was found in Treasury files. It is apparent from the documents that, contrary to Hanson's testimony, the subject of the September/October White House contacts was something which was actively recalled by her and others at the Treasury Department as recently as December -- less than two months before the February 24th hearings.

It also appears that Hanson reversed herself on the issue of why she did not correct Altman's false testimony on February 24. At her initial deposition Hanson testified that she did not correct Altman's testimony because at the time she did not have an opportunity to do so. Altman later testified before the Senate that he turned to her during his February 24th testimony to ask if his response was correct. Altman even identified the point on the videotape at which he turned to Hanson. Hanson was then re-deposed and confronted with the videotape. Only then did she acknowledge that she did have an opportunity to correct Altman, and did not do so.

STEINER TESTIMONY

Finally, the testimony of Joshua Steiner, Chief of Staff to Secretary of the Treasury, also merits examination. Steiner's diaries provided clear evidence regarding certain pertinent aspects of the Treasury contacts with the White House. Obviously, Steiner did not anticipate that his candid diary entries would be revealed to others. As contemporaneous written records, corroborated by substantial independent evidence, the diary entries contain the most accurate description of the pertinent events. Nevertheless, Steiner made every attempt in the course of his testimony at deposition and at the hearing to protect Altman and White House officials by departing from the plain meaning of his diary entries. It appears that in testifying Steiner departed from the truth.

CONCLUSION

We understand that these matters are within the scope of your ongoing investigation. Therefore, we request that you examine the evidence before this

Committee to determine if criminal charges against the above-mentioned witnesses are warranted. Our Committee is familiar with the salient issues raised with respect to the White House and Treasury or RTC contacts, and we have identified numerous passages of questionable testimony regarding those issues. We have identified testimonial and documentary evidence which contradicts the testimony of the Treasury witnesses. The above examples of misleading testimony are merely illustrative. Please let us know if we can be of assistance in briefing you or your staff with respect to these matters.

We look forward to your comprehensive examination of these issues.

Sincerely,

Alfred O'Carato

Connie Mack

James Hainlock

Eric Kell

Chris F. Bennett

Steve Dominick

Jeff Bond

Phil Gorman

Kevin Hahn

KWS

⊗ Congressman Klinges

- report
- establish relationship w/ Klinger's staff person
- read report + grateful for report

⊗ Dan Burton

- talk to CW
- don't serve up FBI agents for interviews
- what is DOJ + FBI policy?
- DOJ line attys did not interview or testify policy input people

Larry Monroe

↓
get him up here

Fort
Murray
Park →
Jack
Barnett

⊗ 2 FBI agents testified before Senate Banking

↓
know circumstances that led to it

→ letter of response w/ traditional DOJ + FBI policy ⇒ not

recent departures
Jack Keeney

past practice w/ IC's

Chris Ruddy report

central data base

Sam Dash

[get BURTON letters]

To: The Team
From: Denis J. McInerney
Date: September 23, 1994
Re: Possible Congressional Hearings

At Ken's suggestion, I am circulating the attached memo for your general information. I had prepared it for Bob in March in anticipation of meetings Bob was going to have with certain members of Congress. It discusses various thoughts Julie and I had regarding the problems inherent in Congressional hearings on matters we are still investigating.

To: Bob
From: Denis
Date: March 8, 1994
Re: Proposed Congressional Hearings

Here are some thoughts Julie and I had regarding the problems inherent in calling virtually any of the people on the list to testify before Congress:

I. General Points

(1) As a preliminary matter, it must be remembered that grand jury proceedings are secret for two very good reasons: they are the most effective, and fairest, way to find out the truth.

(Most of the points set forth below relate to how public congressional hearings would not only be less effective than grand jury proceedings in ferreting out the truth, they would affirmatively impede that process. But the fairness point should not be glossed over. The Grand Jury's traditional function of "protecting the innocent from unwarranted public accusation," US v. Mechanik, 475 U.S. 66, 73 (1986) (J. O'Connor, concurring), is perhaps as vital in the investigation the Independent Counsel is presently conducting as it has ever been in any investigation. If the proposed congressional hearings are held, many people may have their names unfairly dragged through the mud, to the detriment not only of those people, but of the nation as well.)

(2) One of the principal reasons for the proposed congressional hearings is the fact that the Treasury Department had contact with the White House regarding various RTC criminal referrals. A fundamental problem with the proposed hearings, however, is that they would result in the very thing that caused the uproar in the first place -- disclosure of the contents of strictly confidential criminal referrals.

II. Specific Problems Caused By Having Any Particular Witness Testify

(3) Causing Mr. Witness to testify at a public (and possibly televised) hearing will almost certainly inhibit Mr. Witness and cause Mr. Witness to be less frank and willing to volunteer information than he would be in the private and strictly confidential setting of a grand jury. (Such inhibited, and thus incomplete and possibly untruthful, testimony will surely be used against Mr. Witness if he eventually ends up testifying in a complete and truthful manner at a trial down the road. We can alleviate the pressure on Mr. Witness to a great degree by keeping everything in the grand jury, where things are secret.)

Also, causing Mr. Witness to testify now, before we have had an opportunity to try to obtain his cooperation, may result in Mr. Witness deciding to perjure himself before Congress. Such action by Mr. Witness would render him virtually useless as a witness at a later trial.

(4) Causing Mr. Witness to testify at a public (and possibly televised) hearing will inform all other potential witnesses/subjects/targets of Mr. Witness's story (thus letting the others know whether Mr. Witness is, for example (a) cooperating fully and telling the whole truth; (b) cooperating only partially and lying in certain areas; (c) lying in virtually every material respect; or (d) not cooperating at all and taking the Fifth)

-- This will quite possibly result in some of the other potential witnesses/subjects/targets tailoring their story's to conform to Mr. Witness's story. (Clearly, many of the witnesses on the proposed list are central and critical to the Independent Counsel's investigation. It would be a dream come true for many potential witnesses/subjects/targets to hear the testimony of these critical witnesses before committing themselves under oath to a particular story or producing documents.)

-- This could also lead to others (depending on their particular position):

(a) destroying evidence that supports or

contradicts Mr. Witness's testimony;

(b) fabricating evidence that supports or contradicts Mr. Witness's testimony;

(c) attempting to intimidate Mr. Witness; and

(d) attempting to intimidate other potential witnesses;

(5) It is absolutely critical that the Government be able to keep strictly confidential who is cooperating and who isn't; causing crucial witnesses to testify at congressional hearings will make that information public and will result in the Government losing an essential tactical advantage in a criminal investigation

(6) Some of the witnesses at the proposed hearings might have political axes to grind. (Such witnesses might be more likely to grind those axes if they had a public televised forum than if they were confined to a sealed confidential setting in a grand jury room.)

(7) Needless to say, immunity to any witness would be disastrous.

III. Miscellaneous Other Points

(8) The timing and order in which the Government interviews witnesses and obtains documentary and other evidence is also critical in any criminal investigation. These factors weigh heavily in the Government's ability to effectively obtain cooperation from witnesses and collect evidence (before any intimidating, tampering or destruction can occur). Congressional hearings at this time would deprive the Government of the control over the timing and order of witness interviews and document collection and analysis, and thus substantially impair our ability to conduct an effective and thorough criminal investigation.

(9) Obviously, questioning at this time by Congress will be based on incomplete information because you do not

have the documents we have. You will largely be fishing blindly and you will be creating a very sketchy, incomplete, and likely inaccurate record on the basis of unrefreshed recollections.

(10) Many of the witnesses you propose to call are absolutely central to everything we are investigating. If you are serious about wanting a thorough, expeditious, and fair criminal investigation, let us do our jobs.

We do not think it is really possible, or a good idea, to get into specifics on the various proposed witnesses. I am sure they would love for you to give an explanation for why each witness is critical to your investigation and how their premature testimony before Congress would impact on the investigation. It would be a very slippery slope, however, which might result in our tipping our hand too much with respect to where we are in our investigation and where we are headed. Moreover, there are really very few particularized comments that would be appropriate to make with respect to these witnesses. That being said, here is the list of witnesses they want to call, and any thoughts we have specifically on them:

WITNESSES PROPOSED FOR HEARINGS

WITNESS	CONCERNS
McDougal, James	absolutely central to everything we are investigating
McDougal, Susan	absolutely central to everything we are investigating
Hale, David	absolutely central to everything we are investigating indicted trial set for 3/28 unfair to Hale to force him to take Fifth
Nelson, Sheffield	what he says will certainly influence others might have political ax to grind; ran for Governor against Clinton in 1990
Breslaw, April (FDIC)	(She went to bat for Hubbel on retaining Rose in the litigation against Frost)
Dudine, James (RTC)	
Ausen, Lee (RTC)	whole reason for the uproar in the first place is the possible disclosure of the contents of the referrals! every single referral is being examined by this Office would be like having the FBI Case agent testify at these hearings akin to taking the FBI reports and publishing them
Iorio, L. Richard (RTC)	[Same]
Lewis, Jean (RTC)	[Same]

WITNESS	CONCERNS
Caron, Mike (RTC)	[Same]
Mackay, Donald	<p>He was principally concerned with preparing the prosecution of Hale; calling him wrt anything regarding his investigation would be improper on the eve of Hale's trial</p> <p>(if just going to ask him if Nussbaum called him to try to influence things, or find out information, that would probably be OK)</p>
Casey, Paula	<p>Same as with Mackay</p> <p>If going to ask about Plea Negotiations, totally inadmissible (F.R.C.R.P. 11(e)(6)) and unfair and prejudicial to Hale, especially on the eve of trial!</p>
Patten, Leslie	(One of the CPA's on the Lyons Report?)
Lyons, James	What Lyons looked at and how they got it is central to our inquiry
Tate, Stanley	
Roelle, William (FDIC)	
McLarty, Mack	<p>If relevant to anything, relevant to obstruction of justice, which is a criminal grand jury inquiry, not a congressional inquiry</p> <p>(General problems that his testimony may result in disclosing contents of RTC referrals -- obviously, however, this is much less of a concern with the White House witnesses than with the Treasury witnesses)</p>
Nussbaum, Bernard	[Same]
Ickes, Harold	[Same]
Williams, Margaret	[Same]

WITNESS	CONCERNS
Gearan, Mark	[Same]
Lindsey, Bruce	[Same]
Caputo, Lisa	[Same]
Hanson, Jean	[Same]
Steiner, Josh	[Same]
DeVore, Jack	[Same]
Bassett- Schaffer, Beverly	Crucial witness A number of other people at the Securities Department who will be key witnesses
Lasater, Dan	(Rose represented the FDIC in suing Lasater's firm -- Hillary conflict) Yes, Congress, as with everything else that you are considering holding hearings in, we are looking into this also.
Young, Greg	(CFO of Madison Guaranty) Critical witness
Denton, Don	(Chief Loan Officer of Madison Guaranty) Critical Witness
Aunspaugh , Lisa	(Affiliated with a number of Susan McDougal Companies, including Masters Marketing) Critical Witness
Bowles, Erskine (SBA)	
James, Charles	(Accountant for Whitewater) Witness

WITNESS	CONCERNS
Strayhorn , Sue	(McDougal's secretary) Key witness
Kulka, Ellen (RTC)	
Hedges, Jeremy	He is in the middle of an investigation that we are actively pursuing
Lindsey, Clayton	He is in the middle of an investigation that we are actively pursuing
Stacy, Ricki	(Remote Storage Clerk at the Rose Firm)
Altman, Roger	They are asking for all documents of RTC relating to Madison! This would obviously include the referrals!
Fiechter, Jonathan	(Acting Director of the Office of Thrift Supervision) They are asking for all documents of OTS relating to Madison!

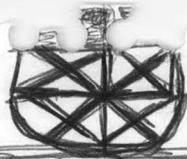
DASH 9/23/94

- must follow DOT Guidelines except when contrary to purposes of Act
- more fiscal constraints
- ~~2~~-year sunset provision in new Act
- must be concerned about results, - see Walsh
- must demonstrate sensitivity to power we have
- defense counsel will pick up on anything

Congress

- congressional investigations
- no rules of evidence
- they have all powers of prosecutor except indictment + prosecution

- powers of contempt
- Congress has power of immunity \Rightarrow 90 days' notice for immunity
- $\frac{2}{3}$ vote of committee for immunity
- Congress can call all witnesses
- targets can be called before Congress
- witnesses can always plead 5th
- Liman
- North case scared Congress re: granting immunity



- only if individual Congressman
- individual Congressmen don't have powers
- copy of resolution, rules
- no power of subpoena from individual Congressman
or groups of Congress
- obligation of Congress to provide evidence

Memorandum

Office of the Independent Counsel

TO: Judge Starr

FROM: Brett M. Kavanaugh
Alex M. Azar II

DATE: September 28, 1994

SUBJECT: Talking points regarding past congressional accommodation of ongoing criminal investigations and prosecutions

At this point, we have been able to study the following sources of historical information: Hirschberg, et al., Congressional Oversight Investigations (1984); Jaworski, The Right and the Power (1976); Hamilton, The Power to Probe (1976). By far, the Hamilton book has proved the most useful source of information, primarily about the practices during Watergate. We are attempting to acquire other sources, and will update this memorandum as they become available.

From the sources we have been able to review, we have learned the following information:

- Senator Ervin's Watergate committee made significant attempts to accommodate the interests of Congress and the courts:
 - When Mitchell and Stans testified in televised session soon after their indictments were returned in the Vesco case, they were asked no questions concerning that case.
 - The committee postponed its early 1974 public hearings so as not to interfere with the Mitchell and Stans trial.
 - The committee cancelled these 1974 public hearings altogether to avoid impairing the upcoming Watergate trials and the impeachment inquiry.
 - The committee delayed release of its final report for several weeks to wait until the Ellsberg jury was chosen and sequestered.
- Judge Gesell refused to enforce the subpoena of Senator Ervin's committee for Nixon's tapes on the grounds that the resultant publicity would prevent a fair trial with unbiased jurors and run contrary to the "priority to the integrity of criminal justice." (Jaworski had, however, denied this claim

in argument before the court.)

- When Senator Ervin's committee applied to the court for immunity powers respecting Dean and Magruder, Cox implored Ervin to postpone the public hearings temporarily on the grounds that the testimony would result in pretrial publicity preventing fair trials. When the committee denied the request, Cox asked Judge Sirica to prohibit radio and television coverage of the testimony. (The court denied the request.)
- James Hamilton (assistant chief counsel to Senator Ervin's committee) has emphasized: "[I]t is important to recognize that beyond doubt congressional hearings are capable of producing damaging publicity that can prejudice criminal trials." "Congress . . . must recognize the problems its activities pose for the criminal process and its concomitant obligation for self-regulation."
- Senator Ervin has stressed that "where criminal conduct is involved and criminal trials which could be prejudiced are imminent, the informing function [of Congress] must be exercised with prudence."
- Criminal prosecutions have been impaired by congressional hearings.
 - Oliver North's conviction was overturned because of problems relating to Congress's grant to him of limited use immunity for his testimony.
 - Denis Delaney's (internal revenue collector) conviction (1952) for bribery was overturned because of prejudicial publicity surrounding the King Committee's hearings regarding his conduct just 3 months before his trial.
 - On the other hand, the Teapot Dome prosecutions came long after Congress conducted its probe into the scandal.

**UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
SUBPART A-GENERAL PROVISIONS
CHAPTER 29-COMMISSIONS, OATHS, RECORDS, AND REPORTS
SUBCHAPTER II-REPORTS**

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Current through P.L. 103-321, approved 8-26-94

§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

1977 Main Volume Credit(s)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.)

HISTORICAL AND STATUTORY NOTES

Derivation: United States Code Revised Statutes and Statutes at Large
5 U.S.C. 105a May 29, 1928, ch. 901, s 2, 45 Stat. 996.

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in § 105.

The words "Committee on Government Operations of the House of Representatives" are substituted for "Committee on Expenditures in the Executive Departments of the House of Representatives" on authority of H.Res. 647 of the 82d Congress, adopted July 3, 1952.

The words "Committee on Government Operations of the Senate" are substituted for "Committee on Expenditures in the Executive Departments of the Senate" on authority of S.Res. 280 of the 82d Congress, adopted Mar. 3, 1952.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

5 U.S.C.A. § 2954

5 USCA § 2954

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103^D CONGRESS
2^D SESSION

S. RES. 229

Authorizing oversight hearings by the Committee on Banking, Housing, and
Urban Affairs.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JUNE 7), 1994

Mr. MITCHELL submitted the following resolution; which was ordered to be
placed on the calendar

JUNE 21 (legislative day, JUNE 7), 1994

Considered and agreed to

RESOLUTION

Authorizing oversight hearings by the Committee on
Banking, Housing, and Urban Affairs.

1 *Resolved,*

2 **SECTION 1. SCOPE OF THE HEARINGS.**

3 The Committee on Banking, Housing, and Urban Af-
4 fairs (referred to as the "committee") shall—

5 (1) conduct hearings into whether improper
6 conduct occurred regarding—

7 (A) communications between officials of
8 the White House and the Department of the
9 Treasury or the Resolution Trust Corporation

1 relating to the Whitewater Development Cor-
2 poration and the Madison Guaranty Savings
3 and Loan Association;

4 (B) the Park Service Police investigation
5 into the death of White House Deputy Counsel
6 Vincent Foster; and

7 (C) the way in which White House officials
8 handled documents in the office of White House
9 Deputy Counsel Vincent Foster at the time of
10 his death; and

11 (2)(A) make such findings of fact as are war-
12 ranted and appropriate;

13 (B) make such recommendations, including rec-
14 ommendations for new legislation and amendments
15 to existing laws and any administrative or other ac-
16 tions, as the committee may determine to be nec-
17 essary or desirable; and

18 (C) fulfill the Constitutional oversight and in-
19 forming function of the Congress with respect to the
20 matters described in this section.

21 The hearings authorized by this resolution shall begin on
22 a date determined by the Majority Leader, in consultation
23 with the Minority Leader, but no later than the earlier
24 of July 29, 1994, or within 30 days after the conclusion

1 of the first phase of the independent counsel's investiga-
2 tion.

3 **SEC. 2. MEMBERSHIP, ORGANIZATION, AND JURISDICTION**
4 **OF THE COMMITTEE FOR PURPOSES OF THE**
5 **HEARINGS.**

6 (a)(1) For the sole purpose of conducting the hear-
7 ings authorized by this resolution, the committee shall
8 consist of—

9 (A) the members of the Committee on Banking,
10 Housing, and Urban Affairs, who shall, in serving as
11 members of the committee, reflect the legislative and
12 oversight interests of other committees of the Senate
13 with a jurisdictional interest (if any) in the hearings
14 authorized in paragraph (1) of section 1 as provided
15 in subparagraph (B);

16 (B)(i) Senator Kerry and Senator Bond from
17 the Committee on Small Business;

18 (ii) Senator Riegle and Senator Roth from the
19 Committee on Finance;

20 (iii) Senator Shelby and Senator Domenici from
21 the Subcommittee on Public Lands, Parks, and For-
22 ests of the Committee on Energy and Natural Re-
23 sources;

24 (iv) Senator Moseley-Braun from the Commit-
25 tee on the Judiciary; and

1 (v) Senator Sasser and Senator Roth from the
2 Permanent Subcommittee on Investigations; and

3 (C) the ranking member of the Committee on
4 the Judiciary who shall serve for purposes of consid-
5 ering matters within the jurisdiction of the Commit-
6 tee on the Judiciary, but shall not serve as a voting
7 member of the committee.

8 (2) For the purpose of paragraph 4 of rule XXV of
9 the Standing Rules of the Senate, service of the ranking
10 member of the Committee on the Judiciary as a member
11 of the committee shall not be taken into account.

12 (b) The jurisdiction of the committee shall encompass
13 the jurisdiction of the committees and subcommittees list-
14 ed in subsection (a)(1)(B), to the extent, if any, pertinent
15 to the hearings authorized by this resolution.

16 (c) A majority of the members of the committee shall
17 constitute a quorum for reporting a matter or rec-
18 ommendation to the Senate, except that the committee
19 may fix a lesser number as a quorum for the purpose of
20 taking testimony before the committee or for conducting
21 the other business of the committee as provided in para-
22 graph 7 of rule XXVI of the Standing Rules of the Senate.

23 **SEC. 3. ADDITIONAL STAFF FOR THE COMMITTEE.**

24 (a) The committee, through the chairman, may re-
25 quest and use, with the prior consent of the chairman of

1 any committee or subcommittee listed in section
2 2(a)(1)(B), the services of members of the staff of such
3 committee or subcommittee.

4 (b) In addition to staff provided pursuant to sub-
5 section (a) and to assist the committee in its hearings,
6 the chairman may appoint and fix the compensation of
7 additional staff.

8 **SEC. 4. PUBLIC ACTIVITIES OF THE COMMITTEE.**

9 (a) Consistent with the rights of persons subject to
10 investigation and inquiry, the committee shall make every
11 effort to fulfill the right of the public and the Congress
12 to know the essential facts and implications of the activi-
13 ties of officials of the United States Government with re-
14 spect to the matters covered by the hearings as described
15 in section 1.

16 (b) In furtherance of the public's and Congress' right
17 to know, the committee—

18 (1) shall hold, as the chairman (in consultation
19 with the ranking member) considers appropriate and
20 in accordance with paragraph 5(b) of rule XXVI of
21 the Standing Rules of the Senate, open hearings
22 subject to consultation and coordination with the
23 independent counsel appointed pursuant to title 28,
24 parts 600 and 603, of the Code of Federal Regula-
25 tions (referred to as the "independent counsel");

1 (2) may make interim reports to the Senate as
2 it considers appropriate; and

3 (3) shall, in order to accomplish the purposes
4 set forth in subsection (a), make a final comprehen-
5 sive public report to the Senate of the findings of
6 fact and any recommendations specified in para-
7 graph (2) of section 1.

8 **SEC. 5. POWERS OF THE COMMITTEE.**

9 (a) The committee shall do everything necessary and
10 appropriate under the laws and Constitution of the United
11 States to conduct the hearings specified in section 1.

12 (b) The committee is authorized to exercise all of the
13 powers and responsibilities of a committee under rule
14 XXVI of the Standing Rules of the Senate and section
15 705 of the Ethics in Government Act of 1978 (2 U.S.C.
16 288d), including the following:

17 (1) To issue subpoenas or orders for the attend-
18 ance of witnesses or for the production of documen-
19 tary or physical evidence before the committee. A
20 subpoena may be authorized by the committee or by
21 the chairman with the agreement of the ranking
22 member and may be issued by the chairman or any
23 other member designated by the chairman, and may
24 be served by any person designated by the chairman
25 or the authorized member anywhere within or with-
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1 out the borders of the United States to the full ex-
2 tent permitted by law. The chairman of the commit-
3 tee, or any other member thereof, is authorized to
4 administer oaths to any witnesses appearing before
5 the committee.

6 (2) Except that the committee shall have no au-
7 thority to exercise the powers of a committee under
8 section 6005 of title 18, United States Code for im-
9 munizing witnesses.

10 (3) To procure the temporary or intermittent
11 services of individual consultants, or organizations
12 thereof.

13 (4) To use on a reimbursable basis, with the
14 prior consent of the Government department or
15 agency concerned, the services of personnel of such
16 department or agency.

17 (5) To report violations of any law to the ap-
18 propriate Federal, State, or local authorities.

19 (6) To expend, to the extent the committee de-
20 termines necessary and appropriate, any money
21 made available to such committee by the Senate to
22 conduct the hearings and to make the reports au-
23 thorized by this resolution.

24 (7) To require by subpoena or order the attend-
25 ance, as witnesses, before the committee or at depo-

1 sitions, any person who may have knowledge or in-
2 formation concerning matters specified in section
3 1(1).

4 (8) To take depositions under oath anywhere
5 within the United States, to issue orders by the
6 chairman or his designee which require witnesses to
7 answer written interrogatories under oath, and to
8 make application for issuance of letters rogatory.

9 (9) To issue commissions and to notice deposi-
10 tions for staff members to examine witnesses and to
11 receive evidence under oath administered by an indi-
12 vidual authorized by law to administer oaths. The
13 committee, acting through the chairman, may dele-
14 gate to designated staff members the power to au-
15 thorize and issue commissions and deposition no-
16 tices.

17 (c)(1) Subject to the provisions of paragraph (2), the
18 committee shall be governed by the rules of the Committee
19 on Banking, Housing, and Urban Affairs, except that the
20 committee may modify its rules for purposes of the hear-
21 ings conducted under this resolution. The committee shall
22 cause any such amendments to be published in the Con-
23 gressional Record.

24 (2) The committee's rules shall be consistent with the
25 Standing Rules of the Senate and this resolution.

1 **SEC. 6. RELATION TO OTHER INVESTIGATIONS.**

2 In order to—

3 (1) expedite the thorough conduct of the hear-
4 ings authorized by this resolution;

5 (2) promote efficiency among all the various in-
6 vestigations underway in all branches of the United
7 States Government; and

8 (3) engender a high degree of confidence on the
9 part of the public regarding the conduct of such
10 hearing,

11 the committee is encouraged—

12 (A) to obtain relevant information concerning
13 the status of the independent counsel's investigation
14 to assist in establishing a hearing schedule for the
15 committee; and

16 (B) to coordinate, to the extent practicable, its
17 activities with the investigation of the independent
18 counsel.

19 **SEC. 7. SALARIES AND EXPENSES.**

20 Senate Resolution 71 (103d Congress) is amended—

21 (1) in section 2(a) by striking "\$56,428,119"
22 and inserting "\$56,828,119"; and

23 (2) in section 6(c) by striking "\$3,220,767"
24 and inserting "\$3,620,767".

1 **SEC. 8. REPORTS; TERMINATION.**

2 (a) The committee shall make the final public report
3 to the Senate required by section 4(b) not later than the
4 end of the 103d Congress.

5 (b) The final report of the committee may be accom-
6 panied by whatever confidential annexes are necessary to
7 protect confidential information.

8 (c) The authorities granted by this resolution shall
9 terminate 30 days after submission of the committee's
10 final report. All records, files, documents, and other mate-
11 rials in the possession, custody, or control of the commit-
12 tee shall remain under the control of the regularly con-
13 stituted Committee on Banking, Housing, and Urban Af-
14 fairs.

15 **SEC. 9. COMMITTEE JURISDICTION AND RULE XXV.**

16 The jurisdiction of the committee is granted pursuant
17 to this resolution notwithstanding the provisions of para-
18 graph 1 of rule XXV of the Standing Rules of the Senate
19 relating to the jurisdiction of the standing committees of
20 the Senate.

21 **SEC. 10. COMMITTEE FUNDING AND RULE XXVI.**

22 The supplemental authorization for the committee is
23 granted pursuant to this resolution notwithstanding the
24 provisions of paragraph 9 of rule XXVI of the Standing
25 Rules of the Senate.

1 **SEC. 11. ADDITIONAL HEARINGS.**

2 (a) In the fulfillment of the Senate's constitutional
3 oversight role, additional hearings on the matters identi-
4 fied in the resolution passed by the Senate by a vote of
5 98-0 on March 17, 1994, should be authorized as appro-
6 priate under, and in accordance with, the provisions of
7 that resolution.

8 (b) Any additional hearings should be structured and
9 sequenced in such a manner that in the judgment of the
10 two leaders they would not interfere with the ongoing in-
11 vestigation of Special Counsel Robert B. Fiske, Jr.

○

Monday next week SAM DASH Mtg 10/12

MCELHANEY

Dash → 2 passport photos

→ Habbell

① leaving on Foster documents - we're going to come to a point

Patsy Thomasson

didn't

abstention case

② Abbott

7:00

2d floor

Craig Livingstone → don't know 8:04

very inappropriate

Glendening

Larry Jones - 1:00 here

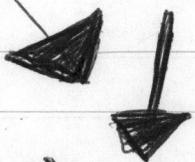
* conflict

interfere w/ Congress

no right to be here

IG's office

Washington



DASH: "NO, we're not done"

DASH: why do we have to do it?

learn something in hearing

if congressional hearing will help

- big dramatization → SMELL SOMETHING

① not provide information

↓
deposition testimony

- got to feed them information

↓
not staffed that well

- at worst

- justification

- CANNOT create 6(e)
protection by running
it through grand jury

DASH could have subpoenaed
President ⇒ extension
of GJ in unique situation
involving President

RTC + OTS

↓
civil investigation - Jay Stephens

DASH: under law, we can instruct
them not to turn it over
- if agency conducted
investigation + made
referral, AG refuse to turn
over what they had

political power ⇒ discretion
of prosecutor

- DOJ has power to withhold
from Cong
↓
must incorporate power
to instruct

↓
inherent power

↓
stand on res

↓
like investigative exemption
under FOIA

- under tent of referral,
under appt of IC and
integral
we "urge + recommend"
that you do not turn over
...

federal criminal law is
of utmost urgency

- any other aid
- offer to speak for them

[IC has "advised"]

Dash: - ~~IC~~ have any standing?
→ yes, lose on it so look good anyway

- circumvent

- great move to show that
KWS is not in minority

⇓
CAN MINORITY
TRUMP MAJORITY ?

~~agency~~
- court has no jurisdiction
to tell Congress it can't
do this

- only way really to challenge
this → agency not do it

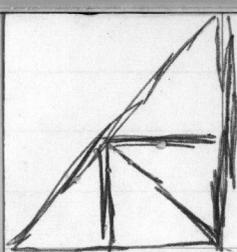
↙
amicus participation in ^{contempt} proceedings

- agency itself does not have
an concern

- CAN'T PREVENT

- ask for right of committee

BE IN A BIND



⊗ Congress' power is separate ⇒
left has fair power

Cox

⊗ not US Atty, but AG
→ Atty General

⇓
more negotiations +
politics

more KWS stands up
as IC against Cong,
better he is

⊗ building of bridges
how do we do it
members of Cong
staff members
Is it profitable?
What are perils?

Memorandum

Office of the Independent Counsel

TO: Judge Starr

FROM: Brett M. Kavanaugh
Alex M. Azar II

DATE: September 28, 1994

SUBJECT: Talking points regarding past congressional accommodation of ongoing criminal investigations and prosecutions

At this point, we have been able to study the following sources of historical information: Hirschberg, et al., Congressional Oversight Investigations (1984); Jaworski, The Right and the Power (1976); Hamilton, The Power to Probe (1976). By far, the Hamilton book has proved the most useful source of information, primarily about the practices during Watergate. We are attempting to acquire other sources, and will update this memorandum as they become available.

From the sources we have been able to review, we have learned the following information:

- Senator Ervin's Watergate committee made significant attempts to accommodate the interests of Congress and the courts:
 - When Mitchell and Stans testified in televised session soon after their indictments were returned in the Vesco case, they were asked no questions concerning that case.
 - The committee postponed its early 1974 public hearings so as not to interfere with the Mitchell and Stans trial.
 - The committee cancelled these 1974 public hearings altogether to avoid impairing the upcoming Watergate trials and the impeachment inquiry.
 - The committee delayed release of its final report for several weeks to wait until the Ellsberg jury was chosen and sequestered.
- Judge Gesell refused to enforce the subpoena of Senator Ervin's committee for Nixon's tapes on the grounds that the resultant publicity would prevent a fair trial with unbiased jurors and run contrary to the "priority to the integrity of criminal justice." (Jaworski had, however, denied this claim

in argument before the court.)

- When Senator Ervin's committee applied to the court for immunity powers respecting Dean and Magruder, Cox implored Ervin to postpone the public hearings temporarily on the grounds that the testimony would result in pretrial publicity preventing fair trials. When the committee denied the request, Cox asked Judge Sirica to prohibit radio and television coverage of the testimony. (The court denied the request.)
- James Hamilton (assistant chief counsel to Senator Ervin's committee) has emphasized: "[I]t is important to recognize that beyond doubt congressional hearings are capable of producing damaging publicity that can prejudice criminal trials." "Congress . . . must recognize the problems its activities pose for the criminal process and its concomitant obligation for self-regulation."
- Senator Ervin has stressed that "where criminal conduct is involved and criminal trials which could be prejudiced are imminent, the informing function [of Congress] must be exercised with prudence."
- Criminal prosecutions have been impaired by congressional hearings.
 - Oliver North's conviction was overturned because of problems relating to Congress's grant to him of limited use immunity for his testimony.
 - Denis Delaney's (internal revenue collector) conviction (1952) for bribery was overturned because of prejudicial publicity surrounding the King Committee's hearings regarding his conduct just 3 months before his trial.
 - On the other hand, the Teapot Dome prosecutions came long after Congress conducted its probe into the scandal.



Office of the Independent Counsel

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July 19, 1995

The Honorable Alfonse M. D'Amato
The Honorable Paul S. Sarbanes
United States Senate
Committee on Banking, Housing and Urban Affairs
Washington, DC 20510

Dear Chairman D'Amato and Senator Sarbanes:

We have received your letter of July 18, which incorporates by reference the letter of July 11 sent to this Office by Mr. Chertoff and Mr. Ben-Veniste on behalf of the Committee. We have given your request considerable thought in view of the importance of our respective obligations.

In connection with the Committee's investigation into the handling of documents of former Deputy Counsel to the President Vincent W. Foster, Jr., the Committee has requested that this Office provide the Committee with reports of interviews of Henry O'Neill and Margaret Williams that were conducted by this Office and by Mr. Fiske's Office. In addition, the Committee has requested a copy of a particular polygraph report, or at least of questions asked during a particular polygraph examination. Finally, the Committee has requested permission to ask an individual employed by the FBI Laboratory questions about the work he has performed for the Independent Counsel.

We respectfully decline these requests. As we have informed the Committee on this and previous occasions, we will not disclose to the Congress any investigative work product from this active and ongoing investigation. As you know, we must abide by the strictures of grand jury secrecy contained in Federal Rule of Criminal Procedure 6(e). In addition, our position that we will not disclose to the Congress any investigative work product from an open investigation represents sound policy that is deeply rooted in the history and tradition of this Nation. See generally Memorandum for Oliver B. Revell Re: Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations, Op. Off. Legal Counsel, at 5 (March 24, 1989) ("the policy and practice of the executive branch throughout our Nation's history has been to decline, except in extraordinary circumstances, to provide committees of Congress with access to, or copies of, open law enforcement files. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files"). We will adhere to this deeply rooted tradition, and therefore we are constrained, with respect, to decline each of the above requests.

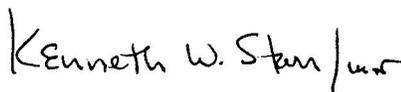
We note, moreover, that our policy on these issues is not based on whether the requested information is exculpatory or incriminating, but rather is made in accordance with long-standing Department of Justice policy to protect the internal work of this Office with respect to an active and ongoing investigation and to protect the privacy of individuals.

Separately, through Mr. Chertoff and Mr. Ben-Veniste, the Committee had also requested the use of Mr. Foster's briefcase. As an accommodation to the Committee's investigative needs, we provided the briefcase to the Committee. Such pre-existing material, which was neither created nor modified by this Office or Mr. Fiske's office, is in our view readily distinguished from investigative work product. Moreover, in circumstances where such material cannot be obtained from any other source and where disclosure of it would not hinder or impede our ongoing investigation, we believe it appropriate to disclose such material to the Committee upon its joint request.

In sum, the question whether and under what conditions a law enforcement agency such as this Office can and should provide information to Congress relating to an open criminal investigation entails a delicate balancing of numerous competing concerns. With respect to the Foster documents investigation, we have balanced the competing concerns and formulated the above policy. In so doing, we have been advised by Ethics Counsel Samuel Dash. We have adhered to this policy thus far, and we intend to continue to do so. We do not believe, moreover, that there has been any inconsistency in our responses to the Committee's joint requests.

Thank you for your cooperation. Please do not hesitate to contact me if you have any questions.

Respectfully yours,

A handwritten signature in black ink that reads "Kenneth W. Starr" followed by a small flourish.

Kenneth W. Starr
Independent Counsel



Office of the Independent Counsel

Two Financial Centre
10825 Financial Centre Parkway, Suite 134
Little Rock, Arkansas 72211
(501) 221-8700
Fax (501) 221-8707

July 18, 1995

FOR IMMEDIATE RELEASE

The following statement was issued by Independent Counsel Kenneth W. Starr today from his office in Little Rock, Arkansas:

The statement of Mark D. Fabiani on behalf of the White House is wrong. The Office of the Independent Counsel has not and will not disclose matters occurring before the grand jury to anyone. In response to a joint request made by counsel for both the Chairman and Ranking Member of the Senate Banking Committee well in advance of the hearing, the Office of the Independent Counsel agreed to provide Mr. Foster's briefcase for inspection and use in the course of the Committee's investigation. The briefcase was provided last night to a representative acting on behalf of the entire Committee. The briefcase is neither a matter occurring before the grand jury nor investigative work product created by this or Mr. Fiske's office. In circumstances where such pre-existing material cannot be obtained from any other source and where disclosure of it would not hinder or impede our investigation, it is not inappropriate to disclose such material to the Committee upon its joint, bipartisan request.



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February 8, 1996

The Honorable Alfonse M. D'Amato, Chairman
The Honorable Paul S. Sarbanes, Ranking Member
United States Senate
Special Committee on Whitewater and Related Matters
Washington, DC 20510

Dear Chairman D'Amato and Senator Sarbanes:

We write to respond to questions raised at this morning's hearing during discussion of the handling of Rose Law Firm billing records on January 4 and 5, 1996, before production of those records. That discussion raised questions about the policy of this Office with respect to documents that have been produced to this Office or the grand jury.

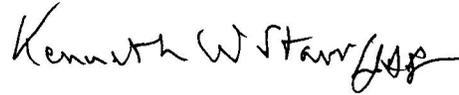
As we stated in our letter to you of July 19, 1995, there is a considerable difference between (a) investigative work product of this Office (for example, notes of attorneys of this Office, interview reports prepared by investigators assigned to this Office, or forensic reports prepared by persons retained by this Office) and (b) documents produced to this Office or the grand jury voluntarily or pursuant to grand jury subpoena by an outside individual or entity. As you know, consistent with long-standing history and tradition, we have declined to disclose to the Committee investigative work product of this Office related to an ongoing investigation.

As explained in our July 19 letter, however, the issue is quite different with respect to documents produced to this Office or the grand jury by an outside individual or entity. Consistent with Justice Department practice, this Office allows an individual or entity to obtain copies of any documents they have produced to this Office or the grand jury. See, e.g., U.S. Department of Justice, Federal Grand Jury Practice 124 (January 1993). (In cases of voluminous documents, there of course may be issues of cost and burden associated with the actual copying.) The individual or entity is then free to use the copies of the documents for any purpose, including production to the Congress or to other investigative bodies. Disclosure of copies of such documents by the individual or entity is not prohibited either by policy of this Office or by Rule 6(e) of the Federal Rules of Criminal Procedure. See Senate of Puerto Rico v. U.S. Department of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987) (internal quotation and citation omitted) ("Rule 6(e)'s purpose is not to foreclose from all future revelation to proper authorities the same

information or documents which were presented to the grand jury"); S.E.C. v. Dresser Industries, Inc., 628 F.2d 1368, 1383 (D.C. Cir. 1981) ("The fact that a grand jury has subpoenaed documents concerning a particular matter does not insulate that matter from investigation in another forum.").

Please do not hesitate to contact us if you have any questions.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Kenneth W. Starr" with a stylized flourish at the end.

Kenneth W. Starr
Independent Counsel

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
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Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: 2/8/96

Michael Chertoff, Special Counsel
Richard Ben-Veniste, Democratic Special Counsel

TO:

Company Name: Senate Special Committee on Whitewater and Related Matters
202-224-5137 (Chertoff) 202-224-7391 (Chertoff)
Fax Number: 202-228-0017 (Ben-Veniste) Telephone Number: 202-224-8077 (Ben-Veniste)

FROM: Brett Kavanaugh

Number of Pages: 3 (including this cover sheet)

Message: _____

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TELECOPY COVER SHEET

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Message: _____

*** TX REPORT ***

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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: 2/8/96

Michael Chertoff, Special Counsel
Richard Ben-Veniste, Democratic Special Counsel

TO:

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 Fax Number: 202-228-0017 (Ben-Veniste) Telephone Number: 202-224-8077 (Ben-Veniste)

FROM: Brett Kavanaugh

Number of Pages: 3 (including this cover sheet)

Message: _____

4/14

Brett.

Burton has never seen the
billing records before today

I will prepare a 302 re
interview

Loay

To: John Bates
Brett Kavanaugh
From: Craig Lerner
Re: 2 U.S.C. § 192
Date: July 31, 1997

Should be referred to DOT - DOJ's decision to seek a new IC, expand our jurisdiction, or decline to prosecute

Congress has an inherent power to punish individuals for contempt committed against it. See McGrain v. Daugherty, 273 U.S. 135 (1927) ("penetrating and far-reaching" investigatory powers implied from its legislative function under Article I). The direct adjudication of contempt by Congress proved to be a cumbersome process, and in 1857 Congress enacted legislation that instructed the executive branch to prosecute contumacious congressional witnesses in the courts. The Act of 1857 has since been codified as 2 U.S.C. § 192;¹ and the prosecution of individuals for this offense, like all federal crimes, falls within the responsibility of the Department of Justice.

Section 192 provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers . . . or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor

2 U.S.C. § 192. The procedural mechanism for enforcement of this provision is codified at 2 U.S.C. § 194, which provides that:

[w]henever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any [documents] . . . and the fact of such failure or failures is reported to either House . . . , a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

¹ That statute "does not speak of contempt but its tenor and proscription render it closely analogous to a contempt statute." United States v. Johnson, 736 F.2d 358, 364 n.8 (6th Cir. 1984).

The Burford Crisis

In 1982 the Administrator of the EPA, Anne Burford, refused to produce certain documents covered by a House subpoena. The House passed a resolution citing the Administrator for contempt, and the Speaker of the House, pursuant to Section 194, certified the contempt, whereupon a copy of the certification was delivered to the U.S. Attorney in the District of Columbia. Immediately after the House vote, but prior to the delivery of the contempt citation, the Justice Department filed a complaint in the name of the United States seeking declaratory and injunctive relief against several House defendants. The House defendants moved to dismiss the complaint, citing jurisdictional and constitutional defects in the Justice Department complaint. The District Court granted the motion to dismiss, stating that "constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution." United States v. House of Representatives, 556 F.Supp. 150, 152 (D.D.C. 1983). It added that resolution of an executive privilege claim would only become necessary if the Administrator of the EPA became a defendant in a criminal contempt or other proceeding. The Justice Department did not appeal, and the disputed documents were eventually turned over pursuant to an agreement between the two branches.

During the pendency of the lawsuit and the subsequent settlement negotiations, the U.S. Attorney for the District of Columbia refrained from referring the contempt citation to the grand jury. He took the position that Section 194 left him with the discretion to withhold a referral.

Legislative Reaction to the Burford Crisis

Representative Frank and others introduced a bill in the 98th Congress that would have amended the Ethics in Government Act to require that the Attorney General

apply to the division of the court for appointment of an independent counsel within five days after the Speaker of the House of Representatives, acting pursuant to section 194 of title 2 of the United States Code, has certified to the appropriate United States attorney that any [high-ranking executive branch official] has been found in contempt of Congress.

H.R. 2684, § 2, 98th Cong., 1st Sess. (1983). A similar bill was introduced in the 99th Congress. H.R. 3836, 99th Cong., 1st Sess. (1985). A separate bill was introduced in the 98th Congress that would have amended the congressional contempt statute to clarify that "[t]he duty of the United States attorney

[under s U.S.C. § 192] is nondiscretionary. . . " H.R. 3456, 98th Cong., 1st Sess. (1983).

Executive Branch Reaction to the Burford Crisis

In an OLC opinion Ted Olson argued that (1) Section 194 left a U.S. Attorney with the discretion not to prosecute referrals of contempt from Congress, and (2) the contempt of Congress statute does not apply to executive branch officials who assert Executive privilege. Prosecution for Contempt of Congress of An Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. Off. Legal Counsel 101 (1984). This view was repeated in 1986 by Charles Cooper. Response to Congressional Requests for Information Made Under the Independent Counsel Act, 10 Op. Off. Legal Counsel 68, 68 (1986) ("Congress may not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure against the head of an Executive agency."). William Barr may have retreated from this position in 1989. Congressional Requests for Confidential Executive Branch Information, 13 Op. Off. Legal Counsel, 153, 162 (1989).