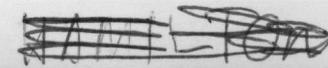


KENDALL LETTER - SPEECHES



Screened by NARA (RD-F) 07-25-2018  
FOIA RD 56806 (URTS 16302) DOCID:  
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To: Judge Starr  
John Bates

1/29/97

From: Stephen Bates

re: propriety of speeches by prosecutors

John asked about public speeches by prosecutors and independent counsels. Here's what I've found.

### Justice Department Policy

Regulations and the U.S. Attorney's Manual govern federal prosecutors' public comments. The Manual speaks of the need to balance the public's right to know, the individual's right to a fair trial, and the government's ability to enforce the laws effectively. U.S. Attys. Man. § 1-7.110. It adds:

Likewise, careful weight must be given in each case to . . . the right of the people in a constitutional democracy to have access to information about the conduct of law enforcement officers, prosecutors and courts, consistent with the individual rights of the accused. Further, recognition should be given to . . . the rights of the public to be informed on matters that can affect enactment or enforcement of public laws or the development or change of public policy.

Id., § 1-7.112. One provision governs comments on a current investigation:

In matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, . . . comments about or confirmation of an ongoing investigation may need to be made.

The U.S. Attorney or the responsible Department Division must authorize the release of information "[i]n these unusual circumstances." Id., § 1-7.530; see id., §§ 1-7.111 ("limited confidentiality" is necessary concerning on-going investigations and grand jury matters), 9-2.211 ("no statements should be made concerning the subject matter of a grand jury").

### Ethics Rules

Rule 3.6(a) of the ABA's Model Rules of Professional Conduct proscribes public statements that "the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

(The U.S. Attorney's Manual, at sec. 1-7.510, contains a similar prohibition.) The commentary following the rule notes that otherwise-impermissible statements may be permissible to rebut prejudicial statements made by others, which might apply here in light of the President's CNN interview, Susan McDougal's TV appearances, and Carville's activities. "Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others."

I haven't delved into the literature on free press/fair trial issues, or researched the Arkansas and District of Columbia ethics and court rules on this subject. Let me know if you'd like more.

### Watergate Special Prosecutors

I haven't found evidence that any of the Watergate special prosecutors gave speeches about the investigation. Leon Jaworski gave several speeches during his tenure, but the only one whose text I've found did not concern Watergate. If you wish, I can look for information on his other speeches.

Though he apparently gave no speeches, Archibald Cox held at least five news conferences during his tenure, and his deputy, Henry Ruth, held one. Cox also appeared on the CBS Evening News after his firing. Jaworski, so far as I can tell, held no news conferences, but he did appear on Issues and Answers, Today, and Meet the Press, among others.

The initial report of the Watergate special prosecutors says that "Cox was mindful of the national concern over Watergate and of the public's right to be kept as fully informed as possible about the work of his office," and that he and Jaworski sought, through their dealings with the press, "to give the public as much information as possible about the Special Prosecutor's office in the early stages of their work." Watergate Special Prosecution Force, Report 227, 229 (1975). According to his press secretary, Cox believed that he had an obligation to keep public opinion on his side, both to reassure the public that justice was being pursued impartially and to help persuade the White House to cooperate. See James Doyle, Not Above the Law 45 (1977). Because of these concerns, Cox asked for and received the authority to "from time to time make public such statements or reports as he deems appropriate." Nomination of Elliot L. Richardson to be Attorney General: Hearings before the Senate Judiciary Comm., 93d Cong., 1st Sess. 146 (1973).

## Iran-contra Independent Counsel

Lawrence Walsh gave a number of speeches about Iran-contra. A 1988 news article in the Wall Street Journal reported that "Mr. Walsh has used strategically timed speeches, status reports and announcements of guilty pleas by lower-level targets to demonstrate progress and emphasize his independence." Among the speeches, according to a database search, were the following:

Walsh addressed an ABA prayer breakfast in San Francisco on August 9, 1987. Walsh said that his investigators had interviewed more than a thousand witnesses, and that the grand jury handling the case had met several times each week for more than six months. He outlined his efforts to insulate his staff from the recent congressional hearings. And he stressed, in unspoken reference to Oliver North, that in deciding whether to prosecute, he would pay no attention to the popularity of the potential defendant.

On April 20, 1990, Walsh spoke at the University of Oklahoma about Iran-contra. Some in the Reagan administration, he said, had behaved like "simple-minded conspirators" when word of their secret dealings had emerged. "First some lied separately. Then some lied in concert. Then some destroyed documents and notes." At this point in the investigation, the convictions of John Poindexter and Oliver North were still standing.

On September 27, 1990, Walsh spoke at Washburn University in Topeka, Kansas. In his prepared remarks, Walsh said that his office had recently obtained new evidence and that additional indictments were possible.

Before the New York City Bar Association on April 18, 1991, he said that the growth of the executive branch had created "fertile ground for politically motivated misconduct." He talked about the need for independent counsels, with reference to Attorney General Meese's conflicts of interest in Iran-contra. He also spoke of the problems of prosecuting cases related to national security, with reference to the North case. This was reported to be Walsh's sixth speech since his appointment.

On February 9, 1993, after President Bush's pardons, Walsh again addressed the ABA. "It is a disparagement of the rule of law for a president to use his pardon power to prevent the trial of a personal colleague," he said.

Finally, Walsh criticized the pardon again the following month in a speech at Yale.

The Iran-contra files in the National Archives may contain additional material on Walsh's speeches. Let me know if you want me to check.

[[levin letter / speech section / s. bates draft / 4/8/97]]

[[this covers some but not all issues raised in Qs 7, 14, & 15]]

You also ask about the speeches I have delivered since my appointment as Independent Counsel. None of them has addressed electoral matters. In most cases, the sponsoring organization has made my travel arrangements or reimbursed out-of-pocket expenses. I have accepted no honoraria for speeches arranged since my appointment.

Perhaps it will be helpful for me to outline the two goals that have animated my speeches as Independent Counsel. First, I have sought to inform the public about the Ethics in Government Act, its history, its purpose, and its operation. I have tried to demarcate the narrow category of cases in which the Act requires appointment of an Independent Counsel. I have also tried to dispel widely held misconceptions about the law. For instance, a number of people expect an Independent Counsel to issue a comprehensive final report, one that addresses each and every unsolved mystery laid before his office. In several speeches, I have stressed that the Independent Counsel's principal role is not to provide final answers to all questions of fact, but rather to enforce the criminal law.

Second, I have tried to fulfill every official's duty to account for the exercise of governmental power, a duty I consider particularly crucial in the realm of law enforcement. Prior Independent Counsels, especially those investigating Presidents, have recognized and heeded this obligation. Archibald Cox held a number of news conferences during the Watergate investigation. His successor, Leon Jaworski, discussed the investigation on Issues and Answers, Today, Meet the Press, and other news programs. Judge Lawrence Walsh spoke about Iran-contra before an American Bar Association prayer breakfast, a New York City Bar Association meeting, and several university audiences, as well as holding at least ten news conferences and appearing on, among other programs, Nightline, This Week with David Brinkley, Good Morning America, and MacNeil/Lehrer NewsHour. Likewise, Attorneys General frequently appear on news programs, hold press conferences, and make speeches. Indeed, Attorney General Reno addressed the Detroit Economic Club a few months before I did so.

Unlike some other Independent Counsels and Special Prosecutors, I have chosen to rely principally on speeches to inform the public. I have held only a single scheduled news conference since my appointment. With the exception of a C-SPAN interview focusing on my personal background, I have turned down all requests for on-air television interviews, including an invitation to appear on CBN on the day of my remarks at Regent University.

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June 4, 1997

DAVID E. KENDALL  
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RECEIVED  
JUN -4 P 12:33  
EDWARD BENNETT WILLIAMS (1920-1988)  
PAUL R. CONNOLLY (1922-1978)  
OFFICE OF  
INDEPENDENT COUNSEL

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

BY HAND

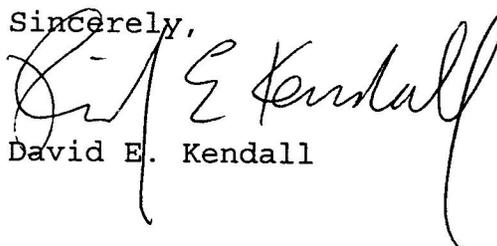
Dear Judge Starr:

Thank you for your response to the letter I sent you yesterday.

I appreciate that there are times when it may be appropriate for you or your staff to speak to the press regarding matters of public record or to correct errors in the media. The complaint I expressed yesterday, which is un rebutted by your letter, concerns commentary by you and your staff about the substance of pending grand jury investigative matters. I am aware of no precedent in "similar past investigations," and you have cited none, for the kind of commentary and speculation on grand jury evidence and witnesses which was contained in the New York Times magazine article. Nor is there a syllable in the independent counsel statute about any general public education function of your office, apart from your statutory reporting obligations. Public confidence in your investigation will ensue not from the speeches you give and the public statements you make but rather by your following the traditional prosecutorial rules and bringing this lengthy, expensive, and burdensome investigation to closure.

Because you have mischaracterized my proposal regarding the two sets of White House attorney's notes and asserted legal barriers where there are none, I am publicly releasing our exchange on this matter.

Sincerely,



David E. Kendall

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EDWARD BENNETT WILLIAMS (1920-1988)  
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April 28, 1997

Hon. Kenneth W. Starr  
Independent Counsel  
Office of the Independent Counsel  
1001 Pennsylvania Avenue, N.W.  
Suite 490-North  
Washington, D.C. 20004

BY HAND

Dear Judge Starr:

As you are aware, on behalf of Mrs. Clinton personally, we intervened to participate in the briefing and argument of the sealed case, In re Grand Jury Subpoena Duces Tecum, in the United States Court of Appeals for the Eighth Circuit. Before a petition for writ of certiorari is filed seeking review of the Eighth Circuit's decision, I want to assure that every possible avenue has been explored to determine whether there is an outcome that would preserve both the interests identified by you and the vital institutional interests of both the White House and the Executive Branch more generally.

Andy Frey emphasized to you at our meeting on April 18 that the White House has challenged the right of the Independent Counsel to obtain the White House Counsel's Office attorney notes at issue not because the White House has any concern about their content but because no government law office (including the White House Counsel's Office) can carry out its professional responsibilities without the protections afforded by the attorney-client privilege and the attorney work product doctrine. We agree with that assessment.

I believe that the Supreme Court will endorse the White House position. This will, of course, take time. You have expressed the view recently in your motion to extend the term of the grand jury that assertions of privilege are delaying the completion of your investigation. I do not know what assertions you may be referencing, but, as you know, the district court in

Hon. Kenneth W. Starr  
April 28, 1997  
Page 2

this case agreed with the assertions of privilege made and denied your motion to compel. Likewise, Judge Kopf, who dissented from the panel ruling, would have denied your motion to compel. In any event, if your concern here is to secure the two sets of White House attorney notes that you have subpoenaed rather than to seek to establish what appears to me to be an unprecedented and unwise new principle of law, I suggest an alternative solution, which is similar to a mechanism used to resolve a similar dispute with the Senate Whitewater Committee in 1995.

As you will recall, that Committee had demanded a set of notes taken by a member of the White House Counsel's Office (Bill Kennedy) at a November 5, 1993, meeting of White House and private attorneys. It was both our belief and that of the White House that an important principle was at stake which we did not want to see waived or dishonored, but it was also our joint view that protecting the notes qua notes was not the critical issue. The White House Counsel's Office and we ultimately arranged with the Senate Committee, and with other interested parties including your Office, to obtain non-waiver agreements, whereby the White House produced the notes but with all parties agreeing that the act of production would not in any way affect any party's legal position. I think you would have to agree that the Kennedy notes at issue contained nothing of substantive value.

In a similar fashion, I would propose to initiate discussions with the White House Counsel's Office with a view toward settling this litigation by providing you with the two sets of notes that are the subject of the motion to compel on the following conditions: (1) the White House is able to obtain non-waiver agreements from your Office, the Congress, and other interested parties, to the effect that such production would not affect either the White House's or our ability to assert attorney-client privilege or work product protection with respect to other notes and their subject matter in the future; (2) your Office will agree that the White House Counsel's Office continues to have the right to assert the attorney-client privilege and work product protection in the future (as would we), subject, of course, to the factual and legal constraints that would govern the assertion of such protection by any person or entity; and (3) the Court of Appeals is agreeable, on the basis of a joint motion, to withdrawing its opinion.

If your purpose in pursuing this litigation is to obtain information that you believe to be important to your investigation, this proposal should enable the matter to be settled and for you speedily to acquire the information. Indeed, if you can devise some other approach that would both meet your

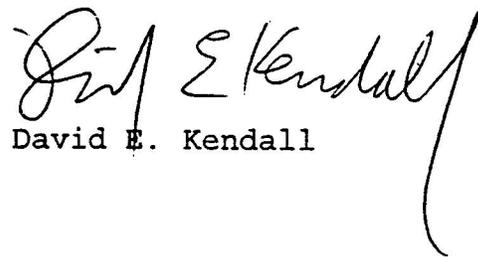
WILLIAMS & CONNOLLY

Hon. Kenneth W. Starr  
April 28, 1997  
Page 3

investigative needs and allow the White House and us to preserve our position, I would be happy to consider it. If, instead, you wish to continue this litigation in order to establish some new precedent permitting the ongoing invasion of confidential attorney-client communications, then review in the Supreme Court is entirely appropriate.

Given the severe time constraints involved, I request at least a preliminary response as soon as possible.

Sincerely,

A handwritten signature in cursive script that reads "David E. Kendall". The signature is written in black ink and is positioned above the typed name.

David E. Kendall



Office of the Independent Counsel

Redding Building  
1701 Centerview Drive, Suite 203  
Little Rock, Arkansas 72211  
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April 29, 1997

David E. Kendall, Esq.  
Williams & Connolly  
725 Twelfth Street, NW  
Washington, DC 20005-5901

Dear Mr. Kendall:

We received your letter late last evening. You requested a preliminary response as soon as possible. This letter sets forth that response.

The linchpin to your proposal is that the Court of Appeals (or the Supreme Court) would agree, upon motion of the parties, to vacate the judgment of the Court of Appeals and withdraw the Court's opinion. The fundamental flaw is that the proposed action by the Court, which is the sine qua non of your entire proposal, is not lawfully authorized, regardless of what the parties agree to do.

The Supreme Court has held that appellate courts do not possess general authority to vacate judgments upon settlement. As the Court has unanimously stated, "Where mootness results from settlement,...the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.... In these respects the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all." Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994). The Court elaborated:

Judicial precedents are presumptively correct and valuable to the legal community as a whole.... Congress has prescribed a primary route...through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would -- quite apart from any considerations of fairness to the parties -- disturb the orderly operation of the federal judicial system.... [S]ome litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.

David E. Kendall, Esq.  
April 29, 1997  
Page Two

Id. at 392-93; see also Nahrebeshi v. Cincinnati Milacron Marketing Co., 41 F.3d 1221, 1222 (8th Cir. 1994)(applying Bancorp); In re Memorial Hospital, 862 F.2d 1299, 1302 (7th Cir. 1988)(Easterbrook, J.)("History cannot be rewritten. There is no common law writ of erasure.... If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision.").

Because the law, as clearly set forth by the Supreme Court, mandates that the judgment and opinion of the Court of Appeals cannot be vacated by action of the parties, your proposal does not appear practicable.

Sincerely,

A handwritten signature in cursive script that reads "Kenneth W. Starr". The signature is written in dark ink and is positioned above the typed name.

Kenneth W. Starr  
Independent Counsel

LAW OFFICES  
**WILLIAMS & CONNOLLY**

725 TWELFTH STREET, N.W.  
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PAUL R. CONNOLLY (1922-1978)

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May 5, 1997

VIA HAND DELIVERY

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

Dear Judge Starr:

This letter responds to your letter of April 29, 1997.

I explicitly stated my willingness to explore alternatives to my proposal, so I am perplexed by your characterization of the third element of my proposal as the "linchpin" and the "sine que non" of any negotiated resolution. In any event, you appear to have misunderstood the governing law. The Supreme Court has not held, as you suggest, that appellate courts are without authority to vacate judgments upon settlement. Indeed, the Supreme Court begins its analysis in *Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), by recognizing the general authority of a federal appellate court to vacate decisions in such circumstances. *Id.* at 21. Congress has explicitly provided that, "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ." 28 U.S.C. § 2106.

The appellee in *Bancorp*, of course, opposed the appellant's motion to vacate -- a situation quite different from my proposal where all the parties would support vacatur. The Supreme Court's limited decision was, as you correctly quoted, that "[w]here mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim

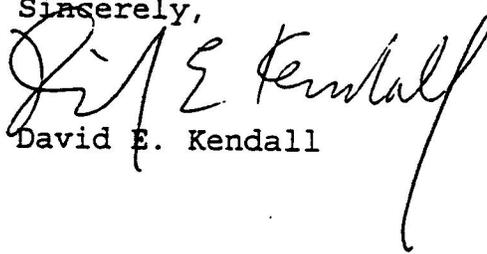
WILLIAMS & CONNOLLY

The Honorable Kenneth W. Starr  
May 5, 1997  
Page 2

to the equitable remedy of vacatur." *Bancorp Mortgage Co.*, 513 U.S. at 25 (emphasis added). Federal appellate courts continue to have the authority to vacate decisions according to principles of equity even where mootness is caused by settlement. As the Supreme Court expressly noted in *Bancorp*, "[t]his is not to say that vacatur can never be granted when mootness is produced [by reason of settlement]." *Id.* at 29.

You have, however, elected to litigate the matter rather than resolve it in a way that would speedily afford you the notes. *Jacta alea est.*

Sincerely,

A handwritten signature in cursive script, appearing to read "David E. Kendall". The signature is written in dark ink and is positioned above the typed name.

David E. Kendall

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June 4, 1997

DAVID E. KENDALL  
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RECEIVED  
JUN -4 P 12:33  
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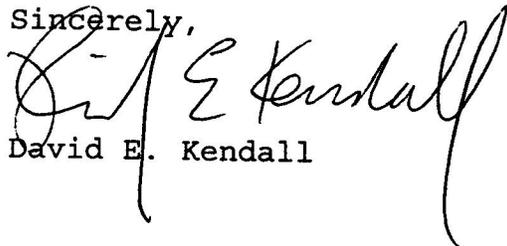
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April 28, 1997

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BY HAND

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As you are aware, on behalf of Mrs. Clinton personally, we intervened to participate in the briefing and argument of the sealed case, In re Grand Jury Subpoena Duces Tecum, in the United States Court of Appeals for the Eighth Circuit. Before a petition for writ of certiorari is filed seeking review of the Eighth Circuit's decision, I want to assure that every possible avenue has been explored to determine whether there is an outcome that would preserve both the interests identified by you and the vital institutional interests of both the White House and the Executive Branch more generally.

Andy Frey emphasized to you at our meeting on April 18 that the White House has challenged the right of the Independent Counsel to obtain the White House Counsel's Office attorney notes at issue not because the White House has any concern about their content but because no government law office (including the White House Counsel's Office) can carry out its professional responsibilities without the protections afforded by the attorney-client privilege and the attorney work product doctrine. We agree with that assessment.

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Hon. Kenneth W. Starr  
April 28, 1997  
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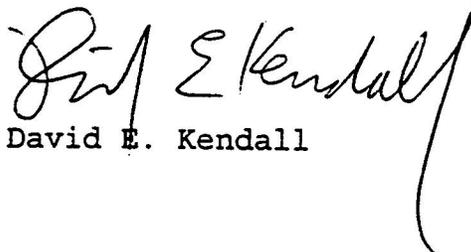
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Hon. Kenneth W. Starr  
April 28, 1997  
Page 3

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Sincerely,



David E. Kendall



Office of the Independent Counsel

Redding Building  
1701 Centerview Drive, Suite 203  
Little Rock, Arkansas 72211  
(501) 221-8700  
Fax (501) 221-8707

April 29, 1997

David E. Kendall, Esq.  
Williams & Connolly  
725 Twelfth Street, NW  
Washington, DC 20005-5901

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Because the law, as clearly set forth by the Supreme Court, mandates that the judgment and opinion of the Court of Appeals cannot be vacated by action of the parties, your proposal does not appear practicable.

Sincerely,

A handwritten signature in cursive script that reads "Kenneth W. Starr". The signature is written in dark ink and is positioned above the printed name.

Kenneth W. Starr  
Independent Counsel

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DAVID E. KENDALL  
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May 5, 1997

VIA HAND DELIVERY

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

Dear Judge Starr:

This letter responds to your letter of April 29, 1997.

I explicitly stated my willingness to explore alternatives to my proposal, so I am perplexed by your characterization of the third element of my proposal as the "linchpin" and the "sine que non" of any negotiated resolution. In any event, you appear to have misunderstood the governing law. The Supreme Court has not held, as you suggest, that appellate courts are without authority to vacate judgments upon settlement. Indeed, the Supreme Court begins its analysis in *Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), by recognizing the general authority of a federal appellate court to vacate decisions in such circumstances. *Id.* at 21. Congress has explicitly provided that, "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ." 28 U.S.C. § 2106.

The appellee in *Bancorp*, of course, opposed the appellant's motion to vacate -- a situation quite different from my proposal where all the parties would support vacatur. The Supreme Court's limited decision was, as you correctly quoted, that "[w]here mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim

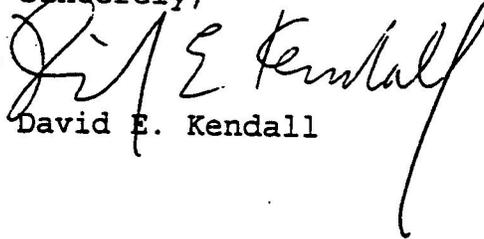
WILLIAMS & CONNOLLY

The Honorable Kenneth W. Starr  
May 5, 1997  
Page 2

to the equitable remedy of vacatur." *Bancorp Mortgage Co.*, 513 U.S. at 25 (emphasis added). Federal appellate courts continue to have the authority to vacate decisions according to principles of equity even where mootness is caused by settlement. As the Supreme Court expressly noted in *Bancorp*, "[t]his is not to say that vacatur can never be granted when mootness is produced [by reason of settlement]." *Id.* at 29.

You have, however, elected to litigate the matter rather than resolve it in a way that would speedily afford you the notes. *Jacta alea est.*

Sincerely,

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David E. Kendall

abs. minimum

June 3, 1997

purpose of publicity rather than to communicate

⊗ b(e) response  
⊗ vacates  
⊗ pub info.

David E. Kendall, Esq.  
Williams & Connolly  
725 Twelfth St., N.W.  
Washington, DC 20005-5901

Dear Mr. Kendall:

I have received your letter of this morning, which warrants immediate response.

To begin with, this Office has been the subject of an ~~unprecedented smear~~ <sup>unfortunate</sup> campaign orchestrated and conducted by White House officials and surrogates. (Even today, we have been informed, for example, that the White House -- rather than you as the Clintons' personal lawyer -- has been faxing your letter to various news organizations.) The ~~smear~~ campaign is both well-known and undeniable.

[THIS PARAGRAPH FOR VETTING] This campaign has included, inter alia, unfounded statements by your client challenging the basic integrity of this Office and agreeing with the statements of a felon (Susan McDougal) who is continuing to flout federal law by refusing to obey a court order to testify before the grand jury. The President has refused to rule out a pardon of Susan McDougal, or even to say that Ms. McDougal should obey the law and testify. The smear campaign has included a wild, scattershot offensive by James Carville, formerly a close advisor to the President -- yet the President has chosen not to distance himself from Mr. Carville's comments. To the contrary, a spokesman for the President's campaign called Mr. Carville a "surrogate" and a "valuable asset." Weekly Standard, Aug. 26, 1996. [END OF ¶ FOR VETTING]

<sup>unfortunate</sup> There, of course, has been repeated and extensive criticism of these ~~unprecedented~~ attacks, ranging from the Washington Post to the New York Times to Senator Wyden to Senator Hatch. The Post stated, for example, that the President "should make clear that . . . he will not subvert the judicial process through attacks on the special prosecutor's office or by abusing his pardon power. That much should be obvious." Sept. 27, 1996, at A24. Senator Hatch added that the President "should call off his attack dogs trying to impugn the integrity" of this Office. Post-Globe, Nov. 16, 1996, at A7. Senator Wyden stated that "[s]pecial prosecutors ought to be allowed to do their work and

make their calls on the merits." San. Fran. Examiner, Dec. 5, 1996, at A16. The New York Times noted that "[t]he taxpayers deserve to examine the outcome . . . in an atmosphere unpolluted by pre-emptive political static." Dec. 5, 1996, at A34. ~~See also San Fran. Examiner, Dec. 5, 1996, at A18 for the president to let Carville attack Starr is plain sleazy."~~ But the urgings of the commentators and officials of all stripes have apparently had no effect on the ~~juggernaut attempting~~ *efforts* to undermine this Office's legitimacy. *character assassination.*

Prosecutors are, of course, accustomed to harsh and unfounded public attacks by subjects and witnesses in the investigation, particularly in public corruption investigations. In all cases, the initial question is whether to respond. Your apparent theory is that prosecutors should sit there and take it -- no matter what the circumstances, no matter how inaccurate or unfair the slur. Fortunately, no federal prosecutor must acquiesce in that kind of ~~public massacre~~. The interests of the United States in a thorough and proper criminal investigation require more. ~~Thus, as Archibald Cox has said, not only is it appropriate to respond, there is a duty to respond.~~ The question is how.

*designed to derail the public's attention*

The easiest method would be to resort to the below-the-belt tactics of the attackers and engage in a behind-the-scenes, off-the-record leakage of facts unknown to the public that have been gathered in the investigation. We have never engaged in such tactics, which are improper no matter how much those being investigated have attempted to tar the investigators. Indeed, your letter implicitly concedes as much, as it is strikingly empty of reference to any particular witness statement or document that this Office has inappropriately revealed.

We instead have been guided in our public posture by the model ~~of Archibald Cox~~ who attempted to comply with what was referred to as "the public's right to be as fully informed as possible about the work of his office." Watergate Special Prosecution Task Force Report 227, 229 (1975). ~~Mr. Cox believed that he had an obligation to reassure the public that justice was being pursued impartially (and also to persuade the White House to cooperate).~~ Boyle, Not Above the Law 45 (1977). We agree.

The question for a prosecutor, then, is the manner in which to fulfill this public information function. Mr. Cox held several news conferences during his brief tenure. His successor Mr. Jaworski appeared on Issues and Answers, Today, Meet the Press, and other news programs. Lawrence Walsh appeared on Nightline, This Week with David Brinkley, Good Morning America, and McNeil/Lehrer Newshour. Despite these precedents and numerous entreaties to appear on similar programs, I have frowned on such appearances because the questions and answers can quickly hurtle out of control and cross the line between the appropriate and the inappropriate. During my tenure, therefore, I have sat for only one televised interview, by Brian Lamb of C-Span, and

have conducted very few press conferences.

*We will continue in appropriate ways on that function*

This Office instead has preferred a more orderly process to fulfill the proactive prong of the traditional and well-recognized public information function. I thus occasionally give speeches at law schools and other neutral public fora primarily to summarize the procedures and policies our Office follows and to emphasize important attributes of my staff prosecutors -- in particular, their vast experience in the Department of Justice. These speeches fulfill an important function because the public must be confident at the end of the day that our ultimate decisions, whatever they may be, have resulted from a careful and thorough process conducted by dedicated and experienced professional prosecutors.

Similarly, when print organizations inform us that they intend to write about this Office, we have a duty to ensure that the procedures and policies of this Office are set forth accurately so that the public can have confidence -- despite attacks by White House officials and surrogates -- that the investigation is being conducted fairly and thoroughly. That is completely appropriate and explains our response when we were informed by Jeffrey Rosen that he planned to write an article on this Office.

As to your specific allegations stemming from the Rosen piece, we totally reject the suggestion of impropriety. To begin with, the extant Supreme Court litigation (and the release of accompanying documents) has again publicly confirmed various aspects of our investigation, including the billing records and the Madison issues. In addition, although we do not believe that the portions of the Rosen article quoted at the bottom of page 2 of your letter reflect statements made by prosecutors in this Office, the information is substantially similar to information contained in filings in the now-public litigation. ~~For example, the idea that the concealment and discovery of the billing records may involve "possible obstruction of justice" is a legal fiction. Also, it is appropriate for us to point out what Susan McDougal has publicly said and not said -- especially given her repeated unfounded attacks, which are supported, we might add, by no evidence.~~

Your comments on page 4 require separate response. Neither you nor the White House ever offered unconditionally to produce the Sherburne or Nemetz notes on a non-waiver basis. Rather, only after the Eighth Circuit ruled in our favor did you offer to attempt to produce the notes on a non-waiver basis -- and even then, only if the parties could successfully persuade the Eighth Circuit to withdraw its opinion. As we have previously informed you, however, your suggestion reflected a basic misunderstanding of the Supreme Court's vacatur jurisprudence. The parties do not have the power to erase a court of appeals precedent from the case books. See Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994) (rejecting procedure by which

?

litigants can "roll the dice rather than settle" in the hope that "an unfavorable outcome can be washed away by a settlement-related vacatur"). Offers of compromise thus should be made before a district court decision, not after the resources of the courts have been expended. See In re Memorial Hospital, 862 F.2d 1299, 1299, 1302 (7th Cir. 1988) (Easterbrook, J.) ("History cannot be rewritten. There is no common law writ of erasure. . . . If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision."). Neither you nor the White House ever tendered a non-waiver proposal in 1996, however, when it would have allowed us to avoid litigation entirely.

In sum, this Office possesses reams of sensitive factual information, which as you well know has remained confidential. There was, in addition, no improper leak of the Arkansas litigation. At certain times during that litigation, of course, even a suggestion that the White House was not cooperating could have become a substantial political issue. This Office's record of confidentiality compares well, I submit, to congressional investigations, to high-profile criminal investigations conducted by the Department of Justice, and to criminal investigations of the conduct of past Presidents.

I thus reject the tone and substance of your letter. This Office has been placed in an extremely awkward and difficult position because of statements and accusations by White House officials and surrogates. We nonetheless keep our heads down, do our work, and make our decisions without regard to such hyperbolic attacks. When those final decisions are made, however, the public must be assured that they have resulted from a fair and thorough process. Therefore, when we are the subject of harsh and false public attacks, we are duty-bound to publicly defend ourselves. And so we have. And so we will.

Sincerely,

Kenneth W. Starr  
Independent Counsel

LAW OFFICES  
WILLIAMS & CONNOLLY

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WASHINGTON, D. C. 20005-5901

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FAX (202) 434-5029

June 4, 1997

DAVID E. KENDALL  
(202) 434-5145

RECEIVED  
JUN 4 1997 P 12:33  
EDWARD BENNETT WILLIAMS (1920-1988)  
PAUL R. CONNOLLY (1922-1978)  
OFFICE OF  
INDEPENDENT COUNSEL

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

BY HAND

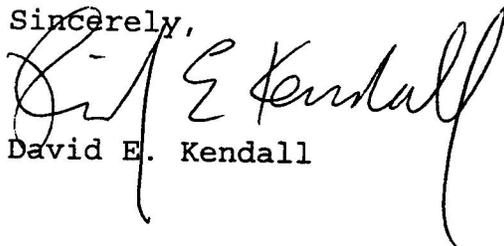
Dear Judge Starr:

Thank you for your response to the letter I sent you yesterday.

I appreciate that there are times when it may be appropriate for you or your staff to speak to the press regarding matters of public record or to correct errors in the media. The complaint I expressed yesterday, which is un rebutted by your letter, concerns commentary by you and your staff about the substance of pending grand jury investigative matters. I am aware of no precedent in "similar past investigations," and you have cited none, for the kind of commentary and speculation on grand jury evidence and witnesses which was contained in the New York Times magazine article. Nor is there a syllable in the independent counsel statute about any general public education function of your office, apart from your statutory reporting obligations. Public confidence in your investigation will ensue not from the speeches you give and the public statements you make but rather by your following the traditional prosecutorial rules and bringing this lengthy, expensive, and burdensome investigation to closure.

Because you have mischaracterized my proposal regarding the two sets of White House attorney's notes and asserted legal barriers where there are none, I am publicly releasing our exchange on this matter.

Sincerely,

  
David E. Kendall

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EDWARD BENNETT WILLIAMS (1920-1988)  
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April 28, 1997

Hon. Kenneth W. Starr  
Independent Counsel  
Office of the Independent Counsel  
1001 Pennsylvania Avenue, N.W.  
Suite 490-North  
Washington, D.C. 20004

BY HAND

Dear Judge Starr:

As you are aware, on behalf of Mrs. Clinton personally, we intervened to participate in the briefing and argument of the sealed case, In re Grand Jury Subpoena Duces Tecum, in the United States Court of Appeals for the Eighth Circuit. Before a petition for writ of certiorari is filed seeking review of the Eighth Circuit's decision, I want to assure that every possible avenue has been explored to determine whether there is an outcome that would preserve both the interests identified by you and the vital institutional interests of both the White House and the Executive Branch more generally.

Andy Frey emphasized to you at our meeting on April 18 that the White House has challenged the right of the Independent Counsel to obtain the White House Counsel's Office attorney notes at issue not because the White House has any concern about their content but because no government law office (including the White House Counsel's Office) can carry out its professional responsibilities without the protections afforded by the attorney-client privilege and the attorney work product doctrine. We agree with that assessment.

I believe that the Supreme Court will endorse the White House position. This will, of course, take time. You have expressed the view recently in your motion to extend the term of the grand jury that assertions of privilege are delaying the completion of your investigation. I do not know what assertions you may be referencing, but, as you know, the district court in

Hon. Kenneth W. Starr  
April 28, 1997  
Page 2

this case agreed with the assertions of privilege made and denied your motion to compel. Likewise, Judge Kopf, who dissented from the panel ruling, would have denied your motion to compel. In any event, if your concern here is to secure the two sets of White House attorney notes that you have subpoenaed rather than to seek to establish what appears to me to be an unprecedented and unwise new principle of law, I suggest an alternative solution, which is similar to a mechanism used to resolve a similar dispute with the Senate Whitewater Committee in 1995.

As you will recall, that Committee had demanded a set of notes taken by a member of the White House Counsel's Office (Bill Kennedy) at a November 5, 1993, meeting of White House and private attorneys. It was both our belief and that of the White House that an important principle was at stake which we did not want to see waived or dishonored, but it was also our joint view that protecting the notes qua notes was not the critical issue. The White House Counsel's Office and we ultimately arranged with the Senate Committee, and with other interested parties including your Office, to obtain non-waiver agreements, whereby the White House produced the notes but with all parties agreeing that the act of production would not in any way affect any party's legal position. I think you would have to agree that the Kennedy notes at issue contained nothing of substantive value.

In a similar fashion, I would propose to initiate discussions with the White House Counsel's Office with a view toward settling this litigation by providing you with the two sets of notes that are the subject of the motion to compel on the following conditions: (1) the White House is able to obtain non-waiver agreements from your Office, the Congress, and other interested parties, to the effect that such production would not affect either the White House's or our ability to assert attorney-client privilege or work product protection with respect to other notes and their subject matter in the future; (2) your Office will agree that the White House Counsel's Office continues to have the right to assert the attorney-client privilege and work production protection in the future (as would we), subject, of course, to the factual and legal constraints that would govern the assertion of such protection by any person or entity; and (3) the Court of Appeals is agreeable, on the basis of a joint motion, to withdrawing its opinion.

If your purpose in pursuing this litigation is to obtain information that you believe to be important to your investigation, this proposal should enable the matter to be settled and for you speedily to acquire the information. Indeed, if you can devise some other approach that would both meet your

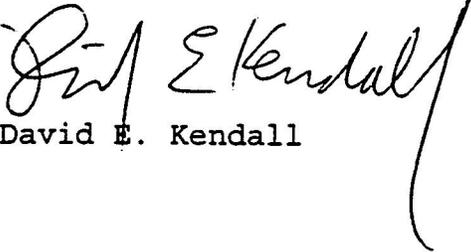
WILLIAMS & CONNOLLY

Hon. Kenneth W. Starr  
April 28, 1997  
Page 3

investigative needs and allow the White House and us to preserve our position, I would be happy to consider it. If, instead, you wish to continue this litigation in order to establish some new precedent permitting the ongoing invasion of confidential attorney-client communications, then review in the Supreme Court is entirely appropriate.

Given the severe time constraints involved, I request at least a preliminary response as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Kendall". The signature is written in a cursive style with a long, sweeping tail that extends downwards and to the right.

David E. Kendall



Office of the Independent Counsel

Redding Building  
1701 Centerview Drive, Suite 203  
Little Rock, Arkansas 72211  
(501) 221-8700  
Fax (501) 221-8707

April 29, 1997

David E. Kendall, Esq.  
Williams & Connolly  
725 Twelfth Street, NW  
Washington, DC 20005-5901

Dear Mr. Kendall:

We received your letter late last evening. You requested a preliminary response as soon as possible. This letter sets forth that response.

The linchpin to your proposal is that the Court of Appeals (or the Supreme Court) would agree, upon motion of the parties, to vacate the judgment of the Court of Appeals and withdraw the Court's opinion. The fundamental flaw is that the proposed action by the Court, which is the sine qua non of your entire proposal, is not lawfully authorized, regardless of what the parties agree to do.

The Supreme Court has held that appellate courts do not possess general authority to vacate judgments upon settlement. As the Court has unanimously stated, "Where mootness results from settlement,...the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.... In these respects the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all." Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994). The Court elaborated:

Judicial precedents are presumptively correct and valuable to the legal community as a whole.... Congress has prescribed a primary route...through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would -- quite apart from any considerations of fairness to the parties -- disturb the orderly operation of the federal judicial system.... [S]ome litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.

David E. Kendall, Esq.  
April 29, 1997  
Page Two

Id. at 392-93; see also Nahrebeshi v. Cincinnati Milacron Marketing Co., 41 F.3d 1221, 1222 (8th Cir. 1994)(applying Bancorp); In re Memorial Hospital, 862 F.2d 1299, 1302 (7th Cir. 1988)(Easterbrook, J.)("History cannot be rewritten. There is no common law writ of erasure.... If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision.").

Because the law, as clearly set forth by the Supreme Court, mandates that the judgment and opinion of the Court of Appeals cannot be vacated by action of the parties, your proposal does not appear practicable.

Sincerely,

A handwritten signature in cursive script that reads "Kenneth W. Starr". The signature is written in dark ink and is positioned above the printed name.

Kenneth W. Starr  
Independent Counsel

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EDWARD BENNETT WILLIAMS (1920-1988)  
PAUL R. CONNOLLY (1922-1978)

DAVID E. KENDALL  
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May 5, 1997

VIA HAND DELIVERY

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

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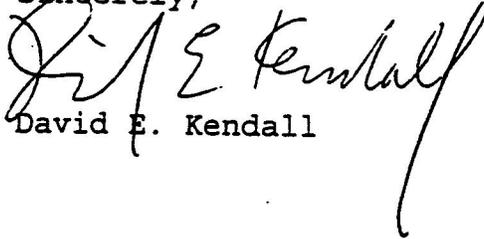
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The Honorable Kenneth W. Starr  
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June 4, 1997

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1997 JUN -4 P 12:33  
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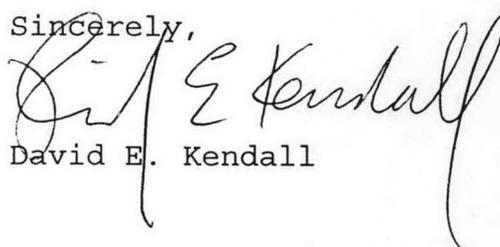
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Sincerely,

  
David E. Kendall

internal archives - memo  
global response to Kendall  
BY HAND  
4th letter in series

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April 28, 1997

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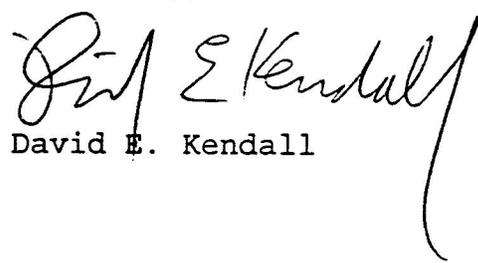
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Sincerely,

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April 29, 1997

David E. Kendall, Esq.  
Williams & Connolly  
725 Twelfth Street, NW  
Washington, DC 20005-5901

Dear Mr. Kendall:

We received your letter late last evening. You requested a preliminary response as soon as possible. This letter sets forth that response.

The linchpin to your proposal is that the Court of Appeals (or the Supreme Court) would agree, upon motion of the parties, to vacate the judgment of the Court of Appeals and withdraw the Court's opinion. The fundamental flaw is that the proposed action by the Court, which is the sine qua non of your entire proposal, is not lawfully authorized, regardless of what the parties agree to do.

The Supreme Court has held that appellate courts do not possess general authority to vacate judgments upon settlement. As the Court has unanimously stated, "Where mootness results from settlement,...the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.... In these respects the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all." Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994). The Court elaborated:

Judicial precedents are presumptively correct and valuable to the legal community as a whole.... Congress has prescribed a primary route...through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would -- quite apart from any considerations of fairness to the parties -- disturb the orderly operation of the federal judicial system.... [S]ome litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.

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Id. at 392-93; see also Nahrebeshi v. Cincinnati Milacron Marketing Co., 41 F.3d 1221, 1222 (8th Cir. 1994)(applying Bancorp); In re Memorial Hospital, 862 F.2d 1299, 1302 (7th Cir. 1988)(Easterbrook, J.)("History cannot be rewritten. There is no common law writ of erasure.... If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision.").

Because the law, as clearly set forth by the Supreme Court, mandates that the judgment and opinion of the Court of Appeals cannot be vacated by action of the parties, your proposal does not appear practicable.

Sincerely,

A handwritten signature in cursive script that reads "Kenneth W. Starr". The signature is written in dark ink and is positioned above the printed name.

Kenneth W. Starr  
Independent Counsel

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May 5, 1997

VIA HAND DELIVERY

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

Dear Judge Starr:

This letter responds to your letter of April 29, 1997.

I explicitly stated my willingness to explore alternatives to my proposal, so I am perplexed by your characterization of the third element of my proposal as the "linchpin" and the "sine que non" of any negotiated resolution. In any event, you appear to have misunderstood the governing law. The Supreme Court has not held, as you suggest, that appellate courts are without authority to vacate judgments upon settlement. Indeed, the Supreme Court begins its analysis in *Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), by recognizing the general authority of a federal appellate court to vacate decisions in such circumstances. *Id.* at 21. Congress has explicitly provided that, "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ." 28 U.S.C. § 2106.

The appellee in *Bancorp*, of course, opposed the appellant's motion to vacate -- a situation quite different from my proposal where all the parties would support vacatur. The Supreme Court's limited decision was, as you correctly quoted, that "[w]here mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim

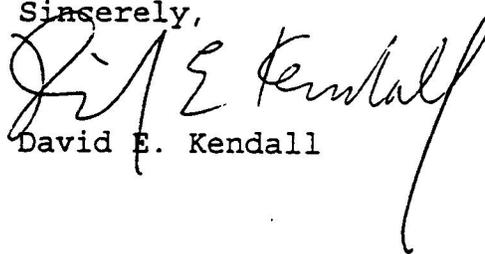
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to the equitable remedy of vacatur." *Bancorp Mortgage Co.*, 513 U.S. at 25 (emphasis added). Federal appellate courts continue to have the authority to vacate decisions according to principles of equity even where mootness is caused by settlement. As the Supreme Court expressly noted in *Bancorp*, "[t]his is not to say that vacatur can never be granted when mootness is produced [by reason of settlement]." *Id.* at 29.

You have, however, elected to litigate the matter rather than resolve it in a way that would speedily afford you the notes. *Jacta alea est.*

Sincerely,

A handwritten signature in cursive script, appearing to read "David E. Kendall". The signature is written in dark ink and is positioned above the printed name.

David E. Kendall

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June 3, 1997

The Honorable Kenneth W. Starr  
Independent Counsel  
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1001 Pennsylvania Avenue, N.W.  
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**BY HAND**

Dear Judge Starr:

My correspondence with you concerning various issues relating to the so-called "Whitewater" investigation has previously been conducted privately. Your public relations offensive in Sunday's New York Times magazine ("Kenneth Starr, Trapped," by Jeffrey Rosen), however, leaves me no choice but to respond publicly.

The course you have chosen is unprecedented and profoundly ill-advised for a number of different but mutually reinforcing reasons. First, the conduct exemplified in the magazine article is wholly inconsistent with your professional obligations as a prosecutor. You have behind you the truly awesome might of the federal government: the power to subpoena evidence and testimony, the power to conduct grand jury investigations anywhere in the United States, an unlimited budget, unrestricted utilization of the full resources of the FBI, the IRS, and other investigative agencies, and (finally) the power to threaten and prosecute criminal charges. This awesome might carries with it the responsibility to conduct grand jury investigations fairly so that the reputations of those investigated but not charged will not be besmirched.

To this end, legal and ethical obligations of silence are imposed upon you and your staff. These obligations are set forth in ethical rules (the Rules of Professional Conduct of Arkansas and the District of Columbia, which govern prosecutors in both jurisdictions; the ABA Standards for Criminal Justice Relating to Prosecution Function and Fair Trials; the National

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Prosecution Standards, published by the National District Attorneys Association), Department of Justice guidelines, the Federal Rules of Criminal Procedure (particularly Rule 6(e)), and the general prosecutorial traditions of the Department of Justice. Rule 6(e) explicitly prohibits government attorneys from disclosing "matters occurring before the grand jury," and this phrase is construed by the courts very broadly to encompass "events which have already occurred before the grand jury," In re Grand Jury Investigation, 610 F.2d 202, 216-217 (5th Cir. 1980), as well as "matters which will occur," id. at 217, including "the strategy or direction of the investigation," Fund for Constitutional Government v. National Archives & Records Service, 656 F.2d 8546, 869 (D.C. Cir. 1981). Former Watergate Special Prosecutor Archibald Cox has stated the general understanding that "'it would be a good rule'" if independent counsels "did not make statements on a case under investigation before indictments. 'I held two or three press conferences,' Cox said, 'I don't think I made any speeches or lectures or gave any individual . . . interviews. And I don't think I ever went out to explain the strength of the case.'" (USA Today, Dec. 3, 1996, p.8A).

The comments of you and persons in your office, directly and indirectly quoted in the magazine article, flout all these obligations. Mr. Rosen notes that you "provided background assistance for this article but declined to be quoted directly" (emphasis added). I am hard pressed to discern what this meaningless formal fig leaf really signifies in the context of an article that frequently quotes members of your staff by name, refers authoritatively to your own personal beliefs, emotions and prosecutorial strategy, and attributes statements and explanations to "prosecutors" in your office. Perhaps most troubling are the plain violations of grand jury secrecy. For example, the article discloses the following:

"What about Hillary Clinton? When Starr alluded, during the McDougal sentencing, to newly discovered documents and witnesses, 'previously unknown to us [and] known to very few people,' he was referring, according to prosecutors, to documents from Arkansas that might cast light on her representation of Madison Guaranty and the truthfulness of her statements to federal investigators. By contrast, on April 22, when Starr asked for a six-month extension of the Whitewater grand jury in Arkansas, he noted that the jury had heard 'extensive evidence of possible obstruction of the administration of justice.' Here, prosecutors say, he was referring to events in Washington relating to the disappearance of Hillary Clinton's billing records." (Emphasis added.)

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Grand jury secrecy rules are aimed at preventing precisely this kind of leak-and-smear damage. You well know that you have no evidence whatsoever that Mrs. Clinton had anything to do with any "disappearance" of the Madison Guaranty billing records, yet you've chosen to comment publicly on her "truthfulness." To make sure the slur is not missed, the article reports that "lawyers in Starr's office make no attempt to squelch speculation that they have weighed the possibility of indicting her." True, the sentence is not technically accusatory (your staff might have "weighed the possibility of indicting" you, for all I know), but in context, the derogatory intimation is clear, particularly because "a lawyer close to Starr's investigation" (and in context, the reader knows who this must be!) ominously states that "'If notes from the White House counsel's office indicate that a person's story changed over time, you could have countless issues of possible false statements to the grand jury.'" This sort of public musing about the thinking of the grand jury is exactly what Rule 6(e) is designed to prohibit. This Rule leaves no discretion to a prosecutor to decide, as you apparently have, that the public interest somehow warrants public (although unattributed) airing of the grand jury's deliberative process, or of the evidence it may or may not have gathered about the conduct of any particular individual.

And again, Mr. Bates is quoted with regard to your stated desire that all you want from Ms. Susan McDougal is "the truth": "Bates . . . added that when Susan McDougal says that the President and the First Lady didn't break the law, 'she could be referring to the underlying banking events' and dodging the question of whether Bill and Hillary Clinton lied in their statements to Whitewater investigators. 'I'm not sure she has ever publicly said he testified truthfully,' said Bates." What conceivable right do representatives of the IC have to speculate like this? This is a gross breach of prosecutorial ethics and betrays an appalling ignorance of constitutional procedures. As Archibald Cox has written, "[i]n the end, independent counsels must see their function not as pursuit of a target to be wounded or destroyed, but as an impartial inquiry with as much concern for public exoneration of the innocent as for indictment of the guilty." (New York Times, Dec. 12, 1996, p.21). The perception that your investigation has proceeded not in pursuit of a target but even-handedly in search of the "truth" might not be shared by some of those who have been in contact with it, such as Ms. Sarah Worsham Hawkins, Ms. Rosalie Wade, Mr. Steve Smith, Ms. Betty Tucker, Mr. Bruce Lindsey, the children of Mr. Herbie Branscum and Mr. Rob Hill, and others. In any event, it's both fundamentally unfair and inconsistent with normal prosecutorial

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practice to impugn a witness by unsupported and insupportable innuendo.

Second, your PR offensive is deceptive. The article's reported suggestion by you that the President and Mrs. Clinton have not cooperated with your investigation is, as you must know, unfounded and false. Their cooperation has been unprecedented. They have each voluntarily given testimony you have requested under oath at the White House three times in the past three years. They have answered written interrogatories from you. Mrs. Clinton appeared before your now-disbanded Washington, D.C., grand jury to give several hours of testimony in January, 1996. The Clintons have produced more than 90,000 pages of documents to you, and on many different occasions we have provided you information informally on the clients' behalf. As you well know, the President and Mrs. Clinton have waived attorney-client, work product, and any accountant's privilege over all documents and testimony with respect to the Whitewater investment and other historical matters which you have been investigating.

The suggestion in the article that the present litigation over your demand for two sets of interview notes taken by White House Counsel is an attempt to hide evidence or slow your investigation rather than a serious and good faith disagreement over principle is wholly and demonstrably false. As you know, the claims of attorney-client and work product privilege here do not arise from the underlying transactions you are investigating but rather from legal relationships arising out of and necessitated by this investigation itself. The notes would never have been generated unless there had been a good-faith belief in the existence of the privileges. Two judges have declined to enforce your request for the notes, and two judges on the Court of Appeals panel have ordered the notes produced. The matter is now before the Supreme Court, and it is by no means my intention to argue the matter in this letter. But the "spin" on these events set out in the article is simply wrong. As you well know, this fight is about principle, not the notes. I offered to you to try to work out with the White House a non-disclosure agreement similar to the one your office signed in December, 1995 (with respect to the notes Bill Kennedy took of a 1993 meeting) whereby you would be given the two sets of notes but the parties would agree to maintain their respective legal positions. You rejected that overture, and now the Supreme Court will decide the matter.



Finally, a public relations campaign, whether open, as in Sunday's magazine article, or more indirect, as in the making of public speeches in controversial forums using code words,

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subverts the very institution you and your office embody. The purpose of creating an "independent" counsel was not only to separate that prosecutor from the Department of Justice but also to insulate the person so appointed from a public perception of partisan involvement. As you know, the first Whitewater independent counsel was removed by the Special Division because (as the Court stated) the Act "contemplates an apparent as well as the actual independence on the part of the Counsel" and Mr. Fiske had been appointed by General Reno. It is truly baffling how you can fail to appreciate the fundamental need to keep your profile low, your public comments discreet, and every appearance nonpartisan.

The magazine article portrays you as engaging in considerable hand-wringing over the delays in the investigation, as it crawls into its fourth year. I, of course, completely agree that the interests of the country, your office, and all those who may be under investigation are best served by a comprehensive but prompt investigation. Indeed, Sec. 593(b)(2) of the independent counsel statute provides that the Special Division will only appoint as independent counsel someone who "will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner." The law further requires that the individual appointed IC "will serve to the extent necessary to complete the investigation and any prosecution without undue delay." Ibid. Some delay, of course, is inherent in every criminal investigation. (This is hardly the first time privilege has been claimed in response to a grand jury subpoena -- such litigation is a frequent occurrence and a well-established check on prosecutorial power.) What is needed is a whole-hearted commitment to winding up this investigation in an appropriate way. This means not chasing every rainbow or every partisan rumor, whether in the hope of wounding or destroying a target, or for any other reason. This investigation will not have been a failure if it does not result in the indictment of particular individuals. Mature, fair, and independent judgment is the very essence of what is called for, and thus it is hardly reassuring to read that "Starr seems to have decided that if a zealous prosecutor is what his critics want, that is what his critics shall have." The present public posturing on your part suggests to me a total loss of perspective: I don't believe that there's ever been a jugular here for you to go for, but in the last several months, you've demonstrated an unerring instinct for the capillary.

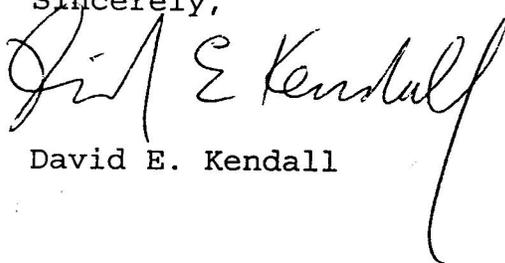
The magazine article asks whether the "most sympathetic person" in this whole investigation might be you yourself because you cannot "disentangle" yourself from the investigation. With

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all respect, I don't believe your situation is either intolerable or irremediable. The solution is to abandon your public relations offensive, get on with your investigation in the manner of previous independent counsels, and bring it to a speedy conclusion. Neither the legal process nor the country is well or properly served by Sunday's magazine article.

Sincerely,

A handwritten signature in cursive script that reads "David E. Kendall". The signature is written in dark ink and is positioned to the right of the typed name.

David E. Kendall

DEK/bb