

Box 425

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# Memorandum

# Office of the Independent Counsel

To: All Attorneys

Date: 10/16/98

From: Brett M. Kavanaugh

Subject: Status

As we prepare for Ken's possible appearance before the Judiciary Committee as well as further indictment/referral decisions, it seems to me that we need to take bold but reasoned steps to bring things to a close. Our critics and even supporters of our mission complain, with at least some justification, that we have not proceeded with sufficient expedition and/or that we have not adequately informed the public of where things stand. In my view, we cannot responsibly enter 1999 without fishing or cutting bait on most matters within our jurisdiction.

In order to seize the offensive and to satisfy our statutory obligations, I would do all of the following **ON THE SAME DAY** -- presumably in early November. These are simply my thoughts; I recognize that some may disagree with one or more of these.

1. Ken holds a press conference (without answering questions) to outline and explain all of the following steps.

2. Refer the Willey matter to Congress.

3. Tell Congress we do not anticipate any other referrals on the President -- at least, unless Susan McDougal provides us with new information or information corroborative of David Hale and Jim McDougal. Explain the Susan indictment and background to it, Clinton's public statements about Susan, and information she refused to provide.

4.  - - - - -  FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

5. Announce that our criminal investigations of the President's statements in the 825 trial will remain open pending the Susan trial, that our investigation of Mrs. Clinton's statements and actions regarding her Madison representation will remain open pending the Hubbell trial(s), and that our investigation of Willey-related matters is open. In so doing, however, try to make clear to the extent allowable that Susan and Hubbell warranted indictment for their crimes regardless whether they have other relevant information to provide.

6. Announce that everything else is closed, including Travel Office, FBI files, Foster documents, and Treasury contacts. Explain briefly the background and history of those matters.

7. Announce that our final report to the Court will not follow the Walsh model (full description of the facts), but will follow the Watergate model. Explain why we are doing that -- fairness to unindicted persons, restraint, etc.

To: All Attorneys

Date: 12/24/98

From: Brett Kavanaugh

Subject: Overall Plan

I am on the way out and will not be able to participate in most future meetings. I have some thoughts on a broad range of issues.

1. I am opposed to any indictments before the Senate proceedings are concluded. I gather that is not a controversial observation.

2. At some point, this Office has to close. There needs to be a plan for how to get from here to there. With that in mind:

a.

[Redacted]

The case is almost certainly leading to no one else, so at this point in our 4.33-year-old investigation, I would either let it go or give it to DOJ, as the statute seems to direct.

b.

[Redacted]

Therefore, I would neither bring this case nor send it back to DOJ. [Redacted] That should not be viewed as a failure. We did a thorough and professional investigation. The fact that there have been no indictments is irrelevant.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

c. If the D.C. Circuit reverses in the Hubbell tax case, as we hope, I would explore alternative dispositions with Hubbell on both cases. I would think that misdemeanors (?) for the other three defendants in the tax case, combined with some prison time for Hubbell, would be adequate and in the interests of the United States. I would not necessarily rest a deal on a proffer, although that is a close question. The balance is of several issues: (i) whether we truly believe he has information that he would provide after trial convictions; (ii) the cost of pursuing both cases to trial; and (iii) the risk of acquittal, which seems high in both cases and would be a huge stain on this Office, particularly if acquittal occurred in both cases.

d. As to Susan, I fear nullification and acquittal, so I would not stop thinking

about alternatives. The bottom line: If she would agree to testify -- even to prosecutors not now affiliated with our Office -- then I would drop the case. If she does not, then we have to go forward, however unpleasant it might be.

e. We have to get the FBI files matter closed soon. It is simply not wise to keep it sitting out there as long as it has.

f. On the final report, I have long been a proponent of a short-form, non-Walsh final report for reasons explained in many lengthy memos that by now are deep in the archives. The bottom line: I do not think a final report under Section 594(h) can (or at least should) describe the evidence gathered during the investigation. If we choose to go this course, which at one time virtually everyone then in the Office agreed with, we must prepare the public well in advance. We cannot simply drop a short-form final report without explaining well in advance how and why we are doing so.

3. The biggest issue: WJC. I would do nothing until the Senate proceedings have concluded, although that may be a trickier issue than I think. In any event, after the Senate has concluded, I would send a letter to the Attorney General explaining that we believe an indictment should not be pursued while the President is in Office (and that we also do not believe that we should keep our Office open while we wait). Rather, I would explain that we believe that the next President (and Attorney General) should make the decision whether to indict Mr. Clinton. Therefore, I would refer the Clinton perjury/obstruction case to the Attorney General for her to hold in abeyance until the President leaves office and the next President can decide what to do. I also would publicly announce our letter at the time it is sent.

4. I believe that Ken's future needs to be openly discussed as it relates to closure, indictments, trials, and final reports. I do not relish raising this, but there is enough scuttlebutt and speculation within the Office that I would encourage an open discussion -- lest a repeat of Feb. 1997 occur. For my part, I do not believe that trials of Hubbell or Susan should be pursued if Ken would no longer be here at the time of verdict. But I may be wrong. In any event, I encourage those who have talked about this in hushed voices to raise it openly at some point.

MEMORANDUM

TO: All Present and Former Attorneys and Consultants Involved in  
Lewinsky Investigation

FROM: Brett Kavanaugh

DATE: February 5, 1999

RE: Public Statements re: Referral

This memo is prompted by statements Tom Bienert apparently made at a symposium on the independent counsel statute (Tom's statements were reported on the Internet today). Tom made some statements about the referral that continue our Office's self-defeating pattern of failing to put the best face -- which also happens to be the truth -- on the referral's inclusion of detail.

I believe that our point should be this: We submitted the referral to the House of Representatives -- not to the public -- and we did not intend or have reason to know that Congress would simply dump the referral onto the Internet without even reviewing it (I did not intend as much, as I unsuccessfully tried to have Ken send an emergency warning letter to Congress on September 11, after our Office learned of Congress' absurd plan and a few hours before the referral was publicly released by Congress). Thus, if people from this Office are going to talk about the referral publicly, they need to explain that it was a report to Congress, and that we expected Congress to treat the referral like it ultimately treated all of the backup material -- namely, to review it and then release whatever it thought was appropriate. This is important for Ken's reputation, for that of the Office, and for all of us individually.

On the other hand, we definitely can and should express public regret over how Congress handled the referral, for it would have been far better for Congress to review it and release only appropriate sections. I personally anticipated (and hoped, notwithstanding the brilliant work done on the narrative) that Congress would release only the introduction and grounds sections with redactions to grounds one and two and never release anything else (transcripts or otherwise) until it became part of a Schippers' presentation. I also anticipated that the House would conduct its own depositions and fact-gathering, which would have gradually lessened the central importance of the work we had done. In any event, as I recall, everyone had different predictions about how Congress would handle the referral. But I recall no one thinking or saying on or before September 9 that Congress was likely to simply dump the whole thing into the public domain without even reviewing it beforehand.

For these reasons, I believe we should never express any regret over the contents of the referral itself, as the referral simply summarized, organized, and analyzed the relevant evidence.

We instead should emphasize the critical distinction between (i) the contents of the referral and (ii) Congress' handling of the referral. Ken made this point well in his testimony on November 19 (although not as well in the Time article or the Diane Sawyer interview). As an Office, in general, I believe we have done a very poor job of communicating to the public on this issue.

For those who do not know, Ken testified as follows on November 19: "public disclosure or non-disclosure of the referral and the backup materials was a decision our Office did not make -- and lawfully could not make. We had no way of knowing in advance of submitting the referral, and we did not know, whether the House would publicly release both the report and the backup materials; would release portions of one or both; would release redacted versions of the report and backup documents; would prepare and release a summary akin to Mr. Schipper's oral presentation; or would simply keep the referral and backup materials under seal just as Special Prosecutor Jaworski's submission in 1974 remained under seal. As a result, we respectfully but firmly reject the notion that our Office was trying to inflame the public. We are professionals, and we were trying to get the relevant facts, the full story, to the House of Representatives. That was our task. And that is what we did."

Also, for those who do not know, it is perhaps relevant that the Report of the House Judiciary Committee explains that both Chairman Hyde and Representative Conyers were opposed to immediate public release of the referral without reviewing the referral beforehand. They sought to have the Committee review the referral and backup materials before any materials were publicly released. H.R. Rep. 105-830, at 124-25. However, during a bipartisan House leadership meeting held on September 9 or 10, "Rep. Conyers and Minority Leader Gephardt argued about the advisability of releasing the material to the public for several minutes," with Leader Gephardt favoring immediate and unreviewed release of the referral while Representative Conyers opposed such a procedure. Id. at 125. Ultimately, on September 11, the full House adopted the position that, according to the Judiciary Committee report, had been advocated in the leadership meeting by Leader Gephardt. The House decided on September 11 to publicly release the referral that same day.

In sum, I personally believe it unfortunate (for Ken, the Office, all of us individually, the case, the Presidency, and the public) that the entire body of the referral was publicly released before it had been reviewed and redacted by the House of Representatives. Therefore, while I believe we should stand by the referral itself as a wholly appropriate submission to the House of Representatives, we can and should express regret over how Congress handled the referral. We can safely also express regret that we did not do more at the time to jump in front of the train and to try to prevent the House from immediately and publicly releasing all of the details of the referral before first reviewing it and then making appropriate decisions. (Ken said as much on the Diane Sawyer interview.)

**QUERY WHETHER KEN OR CHARLES SHOULD DO AN OP-ED MAKING THESE PRECISE POINTS ONCE AND FOR ALL FOR THE HISTORICAL RECORD AND FOR THE BOOKS AND ARTICLES THAT NO DOUBT WILL BE WRITTEN.**