Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Jamie S. Gorelick to John M. Quinn; RE: William H. Kennedy (2 pages)	n.d.	P5 483
002. letter	Janet Reno to Abner J. Mikva (3 pages)	06/14/1995	P5 484
003. form	RE: Copy of a canceled check (1 page)	12/24/1992	P6/b(6)
004. note	Loretta Lynch; RE: Telephone number [partial] (1 page)	n.d.	P6/b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 23483

FOLDER TITLE:
Kennedy Notes - Nov. 5 Meeting [1]

Debbie Bush
2006-0320-F
db784

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Office of the Deputy Attorney General
Washington, D.C. 20530

The Honorable John M. Quinn
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Quinn:

You have asked whether the Department of Justice can represent former Associate Counsel to the President William H. Kennedy III, from whom information is sought by a congressional subpoena. If not, you ask whether other government counsel may be retained to represent him.

As set forth in the Attorney General's June 14, 1995 letter to Judge Mikva (copy attached), information requests to the Executive Office of the President may implicate important institutional interests of the United States. Those interests may also be implicated when information requests to a former official concern actions taken by him in his official capacity while employed by the Executive Office of the President. You have informed us of sufficient facts for us to conclude that the subpoena in question concerns actions undertaken by Mr. Kennedy in his official capacity.

Normally, representation of such interests would be undertaken by the Department of Justice. In this case, however, it is our understanding that an Independent Counsel, over whom the Attorney General has some supervisory authority, has sought or may seek production of the documents that are the subject of the congressional subpoena. Although the subpoena at issue was not promulgated by or upon the request of the Independent Counsel, it is foreseeable that proceedings relating to the subpoena may affect the Independent Counsel's investigation. For reasons similar to those set forth in the Attorney General's June 14, 1995 letter to Judge Mikva, we believe that in these circumstances it would be inappropriate for the Department to assume direct representation.

As in that case, we believe it would be appropriate and in the public interest to appoint a special attorney to represent Mr. Kennedy, in his official capacity, thereby ensuring that the interests of the United States are represented and avoiding any potential conflict of interest. Under the circumstances, we also believe it prudent for the Department not to exercise control over the representation by the special attorney.

Two other points made by the Attorney General in her June 14, 1995 letter pertain here as well. First, the Department retains responsibility for representing broad institutional interests of the United States in regard to this matter. Second, the Department retains the expertise of the Executive Branch on issues like executive privilege. We would expect to consult with any special attorney retained in this matter without constraining his legal advice or representation and without requiring the discussion of information that should otherwise remain confidential.

If you have questions about the mechanics or requirements for retaining special counsel, please address them to Helene M. Goldberg at 202-616-4140.

Sincerely,

Jamie S. Gorelick
Deputy Attorney General

Enclosure

Office of the Attorney General
Washington, D. C. 20530

June 14, 1995

The Honorable Abner J. Mikva
Counsel to the President
The White House
Washington, D.C. 20500

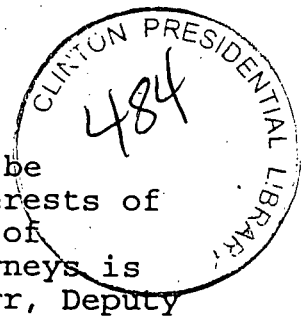
Dear Judge Mikva:

You have asked whether the Department of Justice can represent an Executive Branch officer from whom information is sought by an Office of Independent Counsel. Specifically, you have asked whether officers of the Executive Office of the President, in their official capacity, may be represented in litigation in this matter by the Department of Justice; if not, you ask whether other counsel may be retained. We believe that this situation raises an issue of first impression.

Information requests to the Executive Office of the President may implicate important institutional interests of the United States, and representation of such interests in court is normally undertaken by the Department of Justice. In this unique situation, however, where an information request has been made through judicial proceedings by an Independent Counsel, over whom the Attorney General has some supervisory authority, we believe it would be inappropriate for the Department to assume direct representation.

Except as otherwise provided by statute, litigation in which the United States, an agency or officer thereof is a party or is interested is reserved to the Attorney General. See 28 U.S.C. § 516. The Department has the obligation to represent the United States, its agencies and officers when sued in their official capacities. The Department's representation guidelines govern the legal representation of government officials when sued, subpoenaed or charged in their individual capacities. The guidelines permit representation by private counsel at government expense when it is determined that direct representation by the Justice Department is inappropriate because of a conflict of interest.

The Department's representation guidelines do not address the issue whether counsel may be retained to represent an officer in his official capacity when the Department of Justice may have a conflict in doing so. However, the use of private counsel in this situation is consistent with the principles underlying the guidelines. The Office of Legal Counsel (OLC) has determined



that the Attorney General may allow private counsel to be retained in special circumstances to represent the interests of the United States where, because of possible conflicts of interest, representation by Department of Justice attorneys is not feasible. See, e.g., Memorandum For William P. Barr, Deputy Attorney General, From John O. McGinnis, Deputy Assistant Attorney General, Re Reimbursing Department Employees For Private Counsel Fees (dated September 27, 1990). Generally, these opinions reflect that where Department representation would ordinarily be provided in a congressional investigation but is inappropriate under the specific circumstances, private counsel may be retained with Department reimbursement.

The principles underlying the Department's representation guidelines and the analysis of OLC support the conclusion that representation by private counsel is appropriate here. However, because this matter involves litigation rather than a congressional investigation, 28 U.S.C. § 516 may preclude contractual retention of private counsel. The Attorney General has the statutory authority to appoint special attorneys to represent the United States in litigation. See 28 U.S.C. § 543. In this case, we believe it would be appropriate and in the public interest to appoint a special attorney to handle a representation of individual officers in the Executive Office of the President, thereby avoiding any potential conflict of interest. Under the circumstances, we believe it prudent for the Department not to exercise control over the representation by the special attorney.

There are two additional points that should be made clear. First, the Department retains responsibility for representing broad institutional interests of the United States, even in connection with Independent Counsel matters. For example, the Department has appeared in court to address issues such as the proper protection of classified information, the scope of the President's foreign affairs powers, the constitutionality of the Independent Counsel Act, and executive privilege issues and related issues raised by a subpoena to a former President.

Second, the Department retains the expertise of the Executive Branch on issues like executive privilege. Just as the Department shares its expertise with an Independent Counsel without binding him in his decisionmaking, so would we expect to consult with any special attorney retained in this matter without constraining his legal advice in this matter and without requiring the discussion of information that should otherwise remain confidential.

If you have questions about the mechanics or requirements for retaining special counsel under 28 U.S.C. § 543, please address them to Helene M. Goldberg at 202-616-4140.

Sincerely,

Janet Reno

Janet Reno

Enclosure

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Miriam R. Nemetz to the File; RE: Meeting with Independent Counsel (6 pages)	03/31/1995	P5 486
002. memo	Christopher D. Cerf to File; RE: Magaziner Document Review and Production (3 pages)	03/15/1995	P5 487
003. letter	Jane Sherburne to David E. Mills; RE: Deborah Gorham (1 page)	03/15/1995	P5 488
~~004. list~~	~~RE: Privilege Log for Kevin O'Keefe (1 page)~~	~~03/02/1995~~	~~P6/b(6)~~
~~005. list~~	~~RE: Privilege Log for William H. Kennedy (1 page)~~	~~03/02/1995~~	~~P6/b(6)~~
006. letter	Jane Sherburne to Francis P. Barron; RE: Stephen R. Neuwirth (1 page)	02/24/1995	P5 489
007. letter	Jane Sherburne to Stuart F. Pierson; RE: Marsha Scott (1 page)	02/22/1995	P5 490
~~008. list~~	~~RE: Privilege Log for Bruce Lindsey (4 pages)~~	~~02/16/1995~~	~~P6/b(6)~~
~~009. list~~	~~Privilege Log for Margaret A. Williams (1 page)~~	~~02/16/1995~~	~~P6/b(6)~~

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 23483

FOLDER TITLE:
Sherburne Correspondence 1995 [2]

Debbie Bush
2006-0320-F
db2034

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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~~CONFIDENTIAL~~ LAWYER WORK PRODUCT

March 31, 1995

MEMORANDUM FOR THE FILE

FROM: Miriam R. Nemetz
Associate Counsel to the President

RE: Meeting with Independent Counsel on March 28, 1995

On March 28, 1995, Jane Sherburne and I met with Mark Tuohey, Brett Kavanaugh, John Bates and Alex Azar at the Office of the Independent Counsel. The meeting was a follow-up to the meeting on March 22, 1995, to discuss the document subpoena relating to Foster.

1. Travel Office

Sherburne started the discussion by describing the steps that had previously been taken by the White House to collect documents relating to the Travel Office. Sherburne stated that there had been extensive efforts to collect documents in connection with the White House Management Review, the GAO inquiry, and the OPR inquiry, and that the Public Integrity Section had issued a limited document subpoena. Sherburne said that documents were collected from all staff members who were interviewed in connection with these inquiries, and that a memorandum seeking documents may also have been sent to all White House employees. She said that we would determine whether such a general request had been made and/or identify the individuals from whom documents had been collected. She also said we would begin to process the Travel Office documents and prepare to produce those that were responsive to Paragraphs 1 and 2 of the subpoena.

2. Documents in Foster's Office

We next turned to paragraphs 3 through 10 of the subpoena, which generally seek all documents in Foster's possession. Sherburne asked Tuohey and Bates for their further thoughts on the suggestion, raised at last week's meeting, that they narrow their request by identifying specific categories of documents they had determined should be among Foster's documents. Bates said he was unfamiliar with the proposal. He said they needed to know everything that was in the office and were not prepared to back off on the request. He added, however, that they were willing to explore whether there was any process short

of reviewing every piece of paper in Foster's office to which they could agree.

Tuohey attempted to explain why a review of all documents in Foster's possession was necessary. He said that, in connection with the OIC's investigation of the President's connections to McDougal and Madison Guaranty, they have to look at allegations that Foster's death was related to Whitewater. He later said that they are investigating whether criminal activity other than in connection with Whitewater, CMS, or Madison contributed to Foster's suicide -- if it was a suicide. Tuohey said they have to look at all the documents in Foster's office, because the circumstances surrounding his death may relate to the files in Foster's office. According to Tuohey, a partial review of the files would not be satisfactory because they do not know what they will find there. At the end of the day, the OIC wants to be able to say that they reviewed every document that the White House Counsel's Office represented was in Foster's office at the time of his death.

Sherburne pointed out that files in Foster's office that related to active matters had been distributed to others in the office, and that the office had been open between July and November of 1993. Therefore, although an effort had been made to gather the documents that were in Foster's office, we would never be able to represent that we had gathered everything that had been there. She continued to press Tuohey for a clearer explanation of what they hoped to learn from their review of all of Foster's files.

Bates responded to Sherburne's questions by stating that this is a criminal grand jury investigation. Bates said that we have much more information about the contours of the investigation than most people ever learn. Bates said that, in engaging in a discussion and debate about the relevance of the information they are seeking, we are engaged in a process that is foreign to a criminal investigation. Bates said that they have a free hand to investigate any number of crimes that relate to their mandate, and characterized his discussion with us as "a courtesy."

Sherburne said she recognized that the OIC was the "nine hundred pound gorilla" in this discussion. She pointed out, however, that the material the OIC is seeking is highly protected, and that we have an obligation to make sure access to such material is not granted without a showing of need. She stated that we appreciate their courtesy in engaging in these discussions with us, but observed that the courtesy operates in two directions. She said we have to balance their need for the information against our need to protect it. Bates finally said simply that they may have multiple reasons for wanting to review the files in Foster's office.

Sherburne asked whether they had considered the other approach we had proposed, whereby they would review all documents except those protected by the attorney-client and work product privileges, and we would provide a privilege log or otherwise describe the documents withheld. There was some discussion about the types of document we would regard as covered by the attorney-client privilege. Bates observed that, if Foster was troubled by anything, any reflection of his troubled state would likely be contained in the kind of documents that we would claim are subject to attorney-client privilege. He asked how they could reasonably agree to carve out from their review a category of documents that is likely to be most useful to them. Sherburne said she shared Bates's instinct that the most "interesting" documents would be ones protected by the attorney-client privilege.

Tuohey suggested that we sit down with them and go through each file, permitting them to review all documents in each file except those as to which we assert an attorney-client privilege, and describing the documents withheld in sufficient detail so that they would be able to determine whether to litigate over them. Bates expressed reservations about such a procedure, stating that to fall into any process that approaches what Nussbaum did would be "intolerable" for them.

Bates tried to address our concern that allowing the OIC to review the documents would weaken our arguments for withholding them from third parties, including Congress. He said that the fact they are proceeding pursuant to a grand jury subpoena, are part of the executive branch, and would be conducting an "in camera review" rather than making copies of the documents would protect us from third parties seeking disclosure. He added that the fact that the OIC's interest in the documents relates primarily to the issue of Foster's death -- a subject which, he said, neither the House nor the Senate intends to investigate -- should help us resist requests from Congress to review the same information. Sherburne noted that the OIC's request to review the documents in Foster's office also related to an aspect of their investigation -- Foster document handling -- that the Congress intends to pursue vigorously.

Tuohey reiterated his proposal, which in his view would allow us to narrow down substantially the documents in dispute. He said he thought most of the documents, even under our view of applicable privileges, would be protected by executive privilege and not attorney-client privilege. Bates then said that agreeing with us voluntarily to limit their review of the documents in Foster's office would cause problems for the OIC. He also pointed out that litigation over the privileged documents would not be conducted in secret, and noted that the subject matter of the documents we withhold, if not their substance, would become known to the public. In the end, he said, anything short of an

actual "eyes" review of a document would be "very tough for us." Alex Azar repeated Bates's earlier point that they "don't want anyone to associate this procedure with Bernie Nussbaum's procedure."

Sherburne observed that it might be a waste of time to embark on Tuohey's proposed procedure to narrow the documents in dispute if we were inevitably heading toward litigation. She said we would have to consider the matter further and discuss it with Judge Mikva.

3. Documents Relating to Foster Created After His Death

We then discussed paragraph 11 of the subpoena, which calls for all documents created after July 20, 1993, referring or relating to Foster. Bates said that paragraph 11 raised the larger question regarding whether interview notes were privileged, but suggested we reserve discussion of that subject for the end of the meeting. Kavanaugh said he had reviewed the memorandum circulated to White House staff seeking certain categories of such documents last summer, and said he was concerned that it was less specific than the language in paragraph 11 and might not have captured all documents relating to the content -- as opposed to the "disposition" -- of the note found in Foster's office. Sherburne and I said we believed all such documents would have been collected by the Counsel's Office, but surmised that some material that was not within the language of the request negotiated with Fiske may not have been produced. Bates said it is our responsibility to satisfy ourselves that all the responsive documents are collected and provided.

4. Documents Reflecting the Communications of Specified Individuals From July 20-27, 1993

We next discussed paragraph 12 of the subpoena, which calls for records reflecting all communications of 27 named individuals for the period from July 20, 1993 through July 27, 1993. Kavanaugh said they wanted all calendars, datebook, messages and message logs for the individuals named. He said that substantive information wholly unrelated to Foster, but not names and telephone numbers, could be redacted. To find other records that could reveal the fact of a communication that week, he agreed that not every subject file would have to be searched. He proposed that, instead, each person (1) search their chronological files for all records that refer or relate to Foster or reveal the fact of a conversation or meeting with some other person during that time frame; and (2) search all files relating to subjects listed in one of the other documents or that they recall was active that week. Kavanaugh, who appeared to have these instructions in writing, agreed to send us his language.

5. Availability of Records

We next discussed the availability of certain categories of records sought by the subpoena.

I stated my understanding that pager messages sent out over the OASIS computer system were retrievable, as were pages sent out through the WHCA operator beginning in mid-July of 1993. I also said that I believed all pager messages for Foster had been collected and provided to Fiske. Kavanaugh said he was familiar with the material provided to Fiske, but could not believe it included all of Foster's messages. I said I would check to make sure the records already provided were complete. With respect to their request for records of pages for other individuals during a defined period, I said I assumed those were also retrievable to some degree, although it may be extremely burdensome to track down the messages of 27 individuals. As for pager bills, I said I understood they reflected a flat user fee only, and would contain no information about specific communications.

With respect to the request for telephone records, I said I understood the only records were monthly telephone bills for the White House, which would have itemized only commercially placed long-distance telephone calls. I said I did not believe we had any system-generated records of local calls, internal calls, incoming calls, or calls placed over the FTS system. Azar said that the Department of Justice had itemized records of all calls. I said I would reconfirm my understanding that no such records exist for the White House. With respect to mobile phone records, I said I believed the bills would reflect itemized calls and that we would try to track them down.

With respect to the request for e-mail messages, I said that back-up tapes containing data for the relevant time period existed, but that we did not currently have the capacity to retrieve them. I explained that such a system was being set up in the aftermath of the Armstrong litigation but did not currently exist. One of the OIC lawyers requested that we provide a technical person to talk to one of their technical people about the retrievability of the data. We agreed to arrange for a person with technical expertise to prepare a writing that sets forth the relevant information.

6. Request for Interview Notes

Bates next turned the discussion back to their request for White House attorney's notes reflecting meetings with witnesses in connection with hearings last summer and in connection with grand jury or other testimony. Bates said they were interested in all such notes, in connection with both the Foster and the White House-Treasury contacts matters. Bates said

that they viewed Paragraph 11 of the subpoena as seeking all such materials relating to Foster.

Sherburne said she thought there had been mutual recognition last week that we were going to disagree on this subject, and that the OIC would seek to narrow their request substantially so that we could reach an accommodation. Bates looked at us blankly and said he recalled suggesting only that they might narrow their requests by excluding our analysis of facts, but that they wanted all factual information. I asked whether they viewed their request as having any cutoff date, or if it continued to the present. Bates said he had not considered a cutoff date, but said that they would see if they could give us any comfort on that. Sherburne said that a broad demand for interview notes would have ramifications that reverberate throughout the Counsel's Office and would affect the way the White House functions. Therefore, she said, unless we can establish a satisfactory cutoff date, we will have a problem with their request.

Bates suggested that we give additional thought to the fact/analysis distinction. Tuohey said that where the Counsel's Office is seeking factual information from witnesses, we and the OIC are not necessarily adversaries. I responded that, even if the White House and the OIC had a mutual interest in getting at the truth, the White House may have an overriding interest in protecting the confidentiality of certain types of communications which the OIC clearly does not share. This, I said, does create adverseness in this context. Sherburne said the effect of turning over such information to them would be to disable the President's lawyers from being able to represent him, and communicated her dismay that they were approaching this issue with a broad brush.

In response to questions from Sherburne, OIC lawyers made some attempts to explain their need for the materials in the absence of specific allegations of perjurious or inconsistent statements. Azar said they would be in a position to detect whether, after Fiske announced that there would be no prosecutions in connection with White House-Treasury contacts, a high-ranking government official had told us something inconsistent with what he told Fiske. Tuohey said generally that if someone testified before the grand jury, they had an interest in all other statements the person had made regarding the same facts. Sherburne said that these justifications for getting all the notes were unsatisfactory, and said we may wind up litigating the matter unless we can reach a meaningful cutoff date. Tuohey said they were interested in interview notes for a finite number of people and that they were willing to talk about a cutoff date.

Chris — This looks consistent with our discussion. I have a few additional comments as noted.

Jane 3/18

THE WHITE HOUSE
WASHINGTON
3/15/95

MEMORANDUM TO FILE

FROM: CHRISTOPHER D. CERF

RE: Magaziner Document Review and Production

Document review and production will proceed as follows:

1. We will go through all of the boxes again and remove three categories of documents:

a) Documents we have previously identified as non-responsive;

b) Documents to or from the President, Vice President, First Lady, the Chief of Staff or Deputy Chief of Staff and documents taken from Room 511.

c) Material that is protected by the attorney client privilege, i.e., (i) ~~legal~~ memoranda reflecting communications prepared by a member of the White House Counsel's Office and sent to a member of the White House staff or (ii) ~~confidential information~~ communications from a member of the White House staff and sent to a member of the Counsel's Office.

For purposes of instructing legal assistants we may want to describe these more generally?

2. Documents that are removed pursuant to paragraph 1 above should be treated as follows:

a) Non-responsive documents should be maintained in folders that identify the box and folder from which it was pulled: e.g., Neuwirth Box 1, "HCTF Misc." Folder.

b) Documents in category (1)(b) also should be maintained in folders that identify the box and folder from which it was pulled. In addition, each such folder should be labelled: "Possible Ex.Priv."

I thought you were going to review those documents called by the legal assistants on the assumption that their "pulls" would be over inclusive,

c) Documents in category (1)(c) also should be maintained in folders that identify the box and folder from which it was pulled. In addition, each such folder should be labelled "Attorney/Client."

3. While going through the above process, remove all of the Post-its that we have put on. Ones that were given to us as part of the production should, of course, stay.

, although from a work product or executive privilege may still attach

4. It might be useful to enumerate some of the categories of documents we will not be removing:

a) Documents for which the only basis for non-production is that they are work product;

b) Draft pleadings and affidavits, including those with attorneys' annotations on them;

c) Correspondence to and from DOJ or another executive branch department and a member of the White House Counsel's office;

d) documents memorializing internal deliberations pertaining to ethics issues, e.g., whether to allow a particular individual to participate in the Working Group and under what conditions.

e) Draft responses to inquiries from the GAO

f) Documents memorializing administrative matters, e.g., membership lists, paperwork associated with bringing people on board, etc.

g) Draft and final "Talking Points."

5. Once we have completed the above steps, we will attempt to secure an agreement with the U.S. Attorney pursuant to which:

a) He would be permitted to review all of the documents with the exception of those culled pursuant to Paragraph 1 above

b) on the express condition that that, by making these documents available, the White House would not be waiving any privilege it might have.

6. After the U.S. Attorney has identified the documents he wishes to have copied, we will review them to determine if we wish to assert any privilege. As of this moment, we have made no firm decision to assert or not assert privilege on any document. Presumably, however, we would not end up asserting privilege on any document reviewed pursuant to paragraph 5. These procedures, however, would allow us to consider asserting privilege on documents that should have been culled pursuant to Paragraph 1, but were not.

Haven't we decided that we are not claiming that privileges attach to anything other than the #1 documents? Is this paragraph referring to

7. With respect to the documents described in Paragraph 1(b) and 1(c), we will identify the nature of the document to the U.S. Attorney, but not permit him to review it. In other words, we would divulge roughly the same quantum of information as we would on a privilege log.

8. If, on the basis of the discussions described in paragraph 7, the U.S. Attorney offers a compelling reason why the document is important to his investigation, we would take that into account in making any final privilege decisions.

THE WHITE HOUSE

WASHINGTON

March 15, 1995

BY TELECOPY

David E. Mills, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037-1194

Re: Deborah Gorham

Dear David:

We understand that Deborah Gorham will be interviewed tomorrow by the Office of Independent Counsel. This letter provides guidance to you with respect to whether, in her interview, Ms. Gorham should decline to answer any questions in order to avoid waiving any of the privileges that may apply to official communications to which she may have been privy as an Assistant in the White House Counsel's Office.

We expect that Ms. Gorham will be questioned about the death of Vincent W. Foster, Jr., and the handling of documents in Mr. Foster's office after his death. Because we have waived privileges that may apply in these areas, Ms. Gorham may answer all questions relating to Mr. Foster's death, including questions relating to the motivation for his suicide, and the handling of documents in Mr. Foster's office. Ms. Gorham should not testify about the substance of potentially privileged official communications that do not relate to Mr. Foster's death or the handling of documents in Mr. Foster's office.

Please feel free to call me if you need clarification of this guidance.

Sincerely yours,

Jane C. Sherburne
Special Counsel to the
President

THE WHITE HOUSE

WASHINGTON

February 24, 1995

BY TELECOPY

Francis P. Barron, Esq.
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

Re: Stephen R. Neuwirth

Dear Frank:

We understand that Stephen Neuwirth has been subpoenaed to appear before a grand jury of the United States District Court for the District of Columbia next week. This letter provides guidance to you with respect to whether, in his appearance before the grand jury, Mr. Neuwirth should decline to answer any questions in order to avoid waiving any of the privileges that may apply to his communications as an Associate Counsel in the White House Counsel's Office.

We expect that Mr. Neuwirth will be questioned about the death of Vincent W. Foster, Jr., and the handling of documents in Mr. Foster's office after his death. Because we have waived privileges that may apply in these areas, Mr. Neuwirth may answer all questions relating to Mr. Foster's death and the handling of documents in Mr. Foster's office (including the discovery of the note in Mr. Foster's briefcase), except that Mr. Neuwirth should not testify about the substance of potentially privileged official communications that do not relate to Mr. Foster's death or the handling of documents in Mr. Foster's office. In addition, Mr. Neuwirth should not answer questions that relate to legal work by the White House Counsel's Office in preparation for congressional hearings on these matters or in connection with the Independent Counsel investigation of these matters.

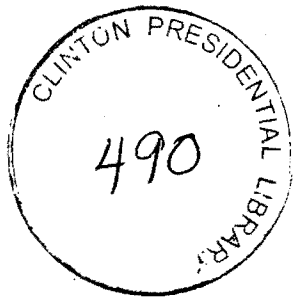
Please feel free to call me if you need clarification of this guidance.

Sincerely yours,

Jane C. Sherburne
Special Counsel to the
President

THE WHITE HOUSE

WASHINGTON



February 22, 1995

BY TELECOPY

Stuart F. Pierson, Esq.
Davis Wright Tremaine
Suite 700
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Marsha Scott

Dear Stuart:

We understand that Marsha Scott has received a subpoena to appear and produce documents to a grand jury of the United States District Court for the District of Columbia on February 23, 1995. This letter provides guidance to you with respect to whether, in her appearance before the grand jury, Ms. Scott should decline to answer any questions in order to avoid waiving any of the privileges that may apply to her communications as an employee of the Executive Office of the President.

Based on the nature of the documents requested by the subpoena, we expect that Ms. Scott will be questioned about the death of Vincent W. Foster, Jr., and the handling of documents in Mr. Foster's office after his death. Because we have waived privileges that may apply in these areas, Ms. Scott may answer all questions relating to Mr. Foster's death and the handling of documents in Mr. Foster's office. However, Ms. Scott should not testify as to the substance of official communications that do not relate to those topics, including requests for legal advice to Mr. Foster in his capacity as Deputy Counsel to the President.

Please feel free to call me if you need clarification of these instructions.

Sincerely,

Jane C. Sherburne
Special Counsel to the
President

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001. report~~	~~United States District Court of Eastern District of Arkansas; RE: United States of America v. James B. McDougal, et al. [18 U.S.C. 6] (6 pages)~~	~~03/27/1996~~	~~P3/b(3)~~
~~002a. letter~~	~~Dan Guthrie to David Kendall; RE: Subpoena to President William Jefferson Clinton (1 page)~~	~~05/13/1996~~	~~P6/b(6)~~
~~002b. form~~	~~Dan Guthrie; RE: Copy of a Check (1 page)~~	~~05/13/1996~~	~~P6/b(6)~~
003. draft	Jane Sherburne to James J. Hastings; RE: White House Travel Office (1 page)	04/1996	P5 491
004. paper	Jane Sherburne to White House Counsel (1 page)	06/06/1996	P5 492
005. memo	Terry Good to Jack Quinn; RE: Travel Office Files (2 pages)	12/27/1995	P5 493

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 23483

FOLDER TITLE:
POTUS Testimony 1996 [2]

Debbie Bush
2006-0320-F
db786

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Cathy -- does this square with our practice? i.e. are TO Records sent to ORM or the Federal Records Center? Also

A F T

April __, 1996

James J. Hastings
Director
Records Appraisal and Disposition Division
National Archives at College Park
8601 Adelphi Road
College Park, MD 20740-6001

Dear Mr. Hastings:

I am writing in response to your letter of December 15, 1995, addressed to Terry Good, regarding an article appearing in the Washington Times on November 3, 1995, alleging that White House Travel Office documents were missing and had possibly been removed. In the letter, you express a concern about the possible alienation of these documents and you advise that if the documents were determined to be Federal Records, the White House would need to report any possible alienation to your office in accordance with 36 CFR 1228.104.

~~It appears to us that~~ White House Travel Office documents, ~~as they~~ are created by employees of the White House ~~and have an effect upon the~~ carrying out of constitutional, statutory, or other official or ceremonial duties of the President ~~should be categorized as Presidential Records, in accordance with~~ 44 U.S.C. § 2201(2). ~~Accordingly, we believe these materials are~~

With respect to the allegation in the newspaper article, numerous investigations have been conducted and certain of these are currently pending. Nothing in the White House Travel Office Management Review, the GAO Report to Congress, ~~or any of the other investigations,~~ gives credence to the allegation.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Jane C. Sherburne
Special Counsel to the President

The Travel Office matter has been the subject of several investigations, some of them currently pending. Under these circumstances, we are not in a position to undertake a review of the allegations reported in the Washington T

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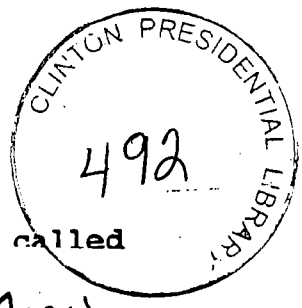
WASHINGTON

COPY



DATE: 3/6/96

TO: Jane Sherburne

FROM: White House Counsel Marvin Krislov
Room 130, OEOB, x6-7903

- [X] FYI
- [X] Appropriate Action
- [ ] Let's Discuss
- [ ] Per Our Conversation
- [ ] Per Your Request
- [ ] Please Return
- [ ] Other

The Archives people are again requesting a response to this inquiry. Please send a copy when completed. Thanks

cc: Jack Quinn

n
n
o
is
hi

... particular) called

Kathy, Jane, Marv:- the

where are we
on this? Gotta
get it done -
Jack
3/25/96

Jane, Jack would like to
have a decision on how to respond.
Can Sally or Waverly handle?
Can we have decision by next Wed., 3/13?
Thanks
KW

cc: JQ, Marvin

To JQ:

Kathy Hart:

As I mentioned to Kathy on Thursday, we are making the necessary inquiries and expect to prepare a response sometime this week.

Jane
3-10-96

4/1
After making the necessary inquiries and undertaking the required analyses, we are preparing a response. Cathy Mozzatelli will have a draft to me in a day or two. If it looks more complicated, I will send an "interim" response.

Jane

THE WHITE HOUSE
WASHINGTON

December 27, 1995

2.14.96 MARVIN 5 pts? JQ

MARVIN JQ 1-29 Skill 1-4-96

TO: JACK QUINN
COUNSEL TO THE PRESIDENT

FROM: TERRY GOOD
DIRECTOR
OFFICE OF RECORDS MANAGEMENT

SUBJECT: REPLY TO NATIONAL ARCHIVES LETTER REGARDING DISPOSITION OF TRAVEL OFFICE FILES

Marvin Krislov talked briefly with my Deputy, Lee Johnson, regarding the attached letter. Marvin suggested that we forward it to you directly for reply.

For your information, Lee and I both consider Travel Office files to be Presidential, not Federal.

We are aware of the allegations regarding theses files, but, despite our being on record expressing concern over their disposition, we have no knowledge of the alienation or destruction of any of these files.

Lee or I can be reached on 62240.

Kim —
I thought I sent this back to Marvin with a note. Do you remember?
J

I did recently send Marvin material with a note from you, but cannot say for sure it was this document —
K

THE WHITE HOUSE

WASHINGTON

December 27, 1995

TO: JACK QUINN
COUNSEL TO THE PRESIDENT

FROM: TERRY GOOD [signature: TGood]
DIRECTOR
OFFICE OF RECORDS MANAGEMENT

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We are aware of the allegation... despite our being on record ex... disposition, we have no knowle... destruction of any of these fi...

Lee or I can be reached on 6224...

Done 2/14/96

Pls. send to
Jane Sherburne
Natalie Williams

I understood that you all will be preparing a response to this. Thanks
cc: Jack Quinn

12/27

2.14.96 Marvin Status JQ

To Marvin
Re reply
Rx JQ

1-29 Still pending

1-4-96

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Clinton Library

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~~001b. form~~	~~Dan Guthrie; RE: Copy of a check (1 page)~~	~~05/13/1996~~	~~P6/b(6)~~
002. memo	Jack Quinn to The President; RE: Testimony by videotape (1 page)	03/20/1996	P5 494
003. memo	Robert S. Bennett to Jack Quinn and David Kendall; RE: Subpoena to the President (11 pages)	02/06/1996	P5 495
~~004. draft~~	~~United States District Court Eastern District of Arkansas; RE: Stipulation (4 pages)~~	~~03/22/1996~~	~~P6/b(6)~~
~~005. report~~	~~United States Court of Appeals; RE: Madison Guaranty [18 U.S.C. 6] (6 pages)~~	~~03/08/1996~~	~~P3/b(3)~~

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Debbie Bush
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db787

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE
WASHINGTON

March 20, 1996

MEMORANDUM FOR THE PRESIDENT

FROM JACK QUINN

FYI -- The judge will allow your testimony by videotape. And, he reportedly agreed to every other one of our requests for staging the taping, save one: he denied our request to be provided the questions in advance.

Kendall believes he will know (from the defense) what the questions will be anyway. And, we think that, on balance, videotape is still the better way to go because that is the only method that will allow us to keep prejudicial and scurrilous questioning by Starr from the public eye. Although there is admittedly no guarantee that we'll succeed in that effort, our objections made during the videotaping, if successful, will result in the questions being edited out of the public version of the videotape. We would not, of course, be able to bury impertinent or politically motivated questions if they take place in open court.

The contrary argument is made in the attached New York Times clip.

Jack

cc Jane Kathy

ATTORNEY WORK PRODUCT
PRIVILEGED AND ~~CONFIDENTIAL~~

M E M O R A N D U M

February 6, 1996

TO: Jack Quinn, Esq., Counsel to the President
David Kendall, Esq., Personal Counsel to the President

FROM: Robert S. Bennett, Esq.

Re: Subpoena to the President

I. Background.

- On February 5, 1996, a federal district court decided to issue a subpoena to President William Clinton commanding him to testify in a bank fraud and conspiracy trial involving Susan McDougal, James B. McDougal, and Arkansas Gov. Jim Guy Tucker. Both McDougals want the President's testimony to help rebut allegations by one of the principal witnesses against them, former municipal judge David Hale, who also owned a government-backed finance company.

- Hale has alleged that in 1986 he made a fraudulent loan of $300,000 to an advertising company owned by Susan McDougal after being pressured to do so by then-Gov. Clinton. Hale said that Clinton was trying to help James McDougal clean up the books at Madison Guaranty, a now-defunct savings and loan. The President has denied Hale's allegations.

- Susan McDougal's lawyer, Bobby R. McDaniel, filed a request for a subpoena with the court on Thursday, February 1. James McDougal's lawyer, Sam Heuer, did not join in this request, but said he has also been trying to get Mr. Clinton to testify.

cc: JANE & KATHY

II. The Court's Ruling.

- On February 5, 1996, Judge George Howard, Jr., a District Judge in the Eastern District of Arkansas, authorized the Clerk of the Court to issue a witness subpoena for President Clinton to appear and give testimony during the trial, which is scheduled to commence on March 4.

- However, the Court directed defense counsel to communicate with counsel for the President and coordinate a schedule for the President's appearance.

- If it is concluded that the President's personal appearance is not tenable, the Court directed counsel to consider other options for presenting the President's testimony. As examples, the Court noted that the President could testify via video tape or satellite.

- Several questions are left unanswered by the Court's order. First, the Court does not explain who will determine whether the President's personal appearance is "not tenable." Is this decision entirely left to the President? To the Court? To both? The Court also provides no authority for the proposition that it can issue such a subpoena to the President.

III. The North and Poindexter Cases.

- "[T]here is an absence of a direct precedent in two hundred years of American history for the compelled testimony in a courtroom by an incumbent or former President." United States v. Poindexter, 732 F. Supp. 142, 157 (D.D.C. 1990).

- The Court's order is inconsistent with recent case law concerning the question of when Presidents may be called as witnesses in criminal proceedings.

A. United States v. North

- In United States v. North, 713 F. Supp. 1448 (D.D.C. 1989), Judge Gerhard A. Gesell had to rule upon the legitimacy of a subpoena ad testificandum that defendant Oliver North served upon President Ronald

Reagan while the President was in office. Gesell noted that he could require the appearance of a former President at a criminal trial provided that "a sufficient showing has been made that the former President's testimony is essential to assure the defendant a fair trial." 713 F. Supp. at 1449 (emphasis added).

- Judge Gesell held the subpoena in abeyance until after the prosecution had completed its case-in-chief. He then noted that voluminous materials, classified and nonclassified, had been made available to both parties by the White House. Further materials were available to North's lawyers pursuant to the Classified Information Procedures Act ("CIPA"). The Court also examined President Reagan's responses to extensive interrogatories furnished by him under oath to the grand jury as well as references to portions of Mr. Reagan's personal diary.

- After reviewing these materials, as well as pleadings from North, Judge Gesell concluded that North could not "demonstrate with requisite specificity in concrete terms what further information only President Reagan could supply that would be material and essential to the defense." 713 F. Supp. at 1449 (emphasis added). Accordingly, Judge Gesell quashed the subpoena ad testificandum.

B. United States v. Poindexter

- Approximately one year after North, Judge Harold H. Greene addressed the issue of presidential testimony in United States v. Poindexter, 732 F. Supp. 142 (D.D.C. 1990). Defendant Poindexter petitioned the Court to allow him to serve former President Reagan with a subpoena to compel his attendance and testimony at trial. The former President and the Department of Justice (representing the incumbent President) filed papers opposing service of the subpoena.

- After a hearing, Judge Greene directed Poindexter to file with the Court and to serve on counsel for Presidents Reagan and Bush a statement of the precise questions he proposed to ask President Reagan,

and both Presidents Reagan and Bush were given the opportunity to respond to that statement.

- Judge Greene noted that "courts may and have required former as well as incumbent Presidents to testify in appropriate cases, but that these courts have also sought to exercise this power in a way that would be least damaging to the President or onerous to the individual occupying the Office, to the extent that this was possible and consistent with the rights of the litigant who was in need of such testimony." 732 F. Supp. at 146 (emphasis added).

- Judge Greene concluded that although former President Reagan had not claimed executive privilege, "he will only be compelled to testify at the trial of this case if the Court is satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested." 732 F. Supp. at 147 (footnotes omitted) (emphasis added).

- Judge Greene distinguished this case from North on the grounds that since Oliver North "never or hardly ever conferred with the President on a one-to-one basis as did Poindexter with regularity, the likelihood of President Reagan's testimony being compelled was always remote, and nothing was lost by a delay." 732 F. Supp. at 153 n.44. Accordingly, he refused to postpone his review of this issue until the prosecution had completed its case-in-chief.

- In accordance with the Court's directions for specificity, Poindexter submitted 183 questions which he proposed to ask the former President. The Court then found that many of these questions sought material evidence, but struck 29 questions after considering challenges from President Reagan's lawyers. 732 F. Supp. at 150.

- After imposing upon the defendant the burden to make a "stringent and detailed showing" of the materiality of and his need for the former President's testimony, and after "meticulously" evaluating that

testimony, Judge Greene concluded that Poindexter was entitled to serve the subpoena on former President Reagan. 732 F. Supp. at 154.

- Judge Greene then addressed the issue of how President Reagan's evidence was to be provided. He concluded that written interrogatories would be insufficient to protect Poindexter's interest. 732 F. Supp. at 155. However, in order to protect former President Reagan's ability to claim executive privilege, Judge Greene ordered that his testimony be taken by videotaped deposition.

- Judge Greene expected to consult with all counsel regarding place, time, and logistics of the deposition. The Court noted that "President Reagan's convenience will be given substantial consideration, both as to the area where the deposition will be conducted and as to the date." 732 F. Supp. at 158 n.63.

- Judge Greene further noted that the deposition would be restricted to the 154 "primary questions" approved by the Court, as well as "legitimate follow-up questions in the same area of inquiry." 732 F. Supp. at 158. Judge Greene would attend the deposition personally to rule on the questions themselves, as well as any objections related to executive privilege issues and CIPA questions.

- Judge Greene subsequently ruled that the news media had no First Amendment right to attend the pretrial deposition of former President Reagan. United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990). He also agreed to release the tape to the press only after the Court and the parties had edited out of the videotape those portions that contained sensitive material relating to national security. Id. Judge Greene agreed to allow the media to see the tape in advance of trial only after he concluded that this would not injure the defendant. In fact, Poindexter supported broad access of the press to the testimony of former President Reagan.

- Judge Greene also ruled that while the media was entitled to view the videotape, it was not entitled

to copies of the tape just before trial. United States v. Poindexter, 732 F. Supp. 173 (D.D.C. 1990).

IV. Previous Examples of Presidential Testimony.

- In Poindexter, Judge Greene noted that "[h]istory records less than a dozen instances of testimony of Presidents of the United States in judicial or congressional proceedings in two hundred years of American history." He divided this history into three segments.

A. Events Early in our History.

- In 1807, former Vice President Aaron Burr attempted to compel President Thomas Jefferson to provide him with certain documents that he required to defend himself. The subpoena was eventually issued, but Chief Justice Marshall concluded that he would not compel the President to produce a document if he gave sufficient reasons for declining to produce it. United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807 (No. 14,694).

- In 1818, President James Monroe claimed administrative inconvenience when he was summoned to testify at a court-martial on behalf of the defendant. President Monroe suggested the alternative of a deposition, but the parties ultimately agreed to answers to written interrogatories.

B. Testimony Before Congressional Bodies between 1846 and 1912.

- Former President John Tyler was subpoenaed by and testified before a congressional committee in connection with its investigation of disbursements by then-Secretary of State Daniel Webster for clandestine operations relating to foreign affairs. Former President John Quincy Adams filed a deposition in the same matter.

- President Abraham Lincoln testified voluntarily at a congressional hearing that was investigating alleged leaks to the press by Mrs. Lincoln.

- Former President Theodore Roosevelt twice testified without compulsion before congressional committees regarding his campaign finances and a steel company acquisition. This testimony occurred after he left office, but concerned events that occurred during his Presidency.

C. Post-Watergate Issues.

- Former President Richard Nixon was subpoenaed both by the prosecution and the defense in the Watergate trial of some of his appointees, but was ultimately excused on account of his ill health. United States v. Mitchell, 385 F. Supp. 1190 (D.D.C. 1974), aff'd sub nom Maryland v. Haldeman, 559 F.2d 31, 80-81 (D.C. Cir. 1976) (en banc).

- However, former President Nixon was deposed pursuant to judicial process in connection with several civil actions. Nixon v. Fitzgerald, 457 U.S. 731, 735 n.5 (1982); Halperin v. Kissinger, 401 F. Supp. 272, 274 n.1 (D.D.C. 1975).

- President Gerald Ford testified under compulsion by videotaped deposition in the criminal trial of Lynnette Fromme, his would-be assassin. United States v. Fromme, 405 F. Supp. 578 (E.D. Cal. 1975).

- President Jimmy Carter voluntarily provided videotaped depositions in the criminal trial of State Senator Culver Kidd and Sheriff Buford T. Lingold on gambling conspiracy charges, and for a grand jury investigation of an alleged White House attempt to quash extradition proceedings against an international fugitive.

V. Comparisons of Past Precedents to this Case.

- The North and Poindexter cases clearly indicate that the order issued by Judge Howard in this case does not adequately protect President Clinton.

- Judge Howard simply concluded that "the request is made in good faith and is reasonable; that the expected testimony of the President is relevant to some of the issues to be litigated in this action; and that the anticipated testimony of the President

is vital in affording defendants a fair trial and an adequate defense." This standard is significantly different from Judge Greene's insistence that the President must be a "more necessary" and "more logical" source of evidence than alternatives that might be suggested.

- Furthermore, Judge Howard did not hold the request in abeyance until the government had put forward its case, as did Judge Gesell in North. Nor did Judge Howard force the defendants to submit a specific list of questions, and provide the President with an opportunity to respond, as did Judge Greene in Poindexter.

- Rather than the fully-developed record of North and Poindexter, Judge Howard based his ruling upon a brief ex parte motion filed by Susan McDougal. He failed to give the President or the Department of Justice an adequate opportunity to respond to this motion.

- Moreover, it should be noted that Poindexter and North both involved testimony from a former President who was no longer burdened with the cares of office. President Clinton, on the other hand, is a sitting President, who should be entitled to even more deference by courts. Note, however, the McDougal's lawyers will claim that the opposite is true, because North and Poindexter sought testimony relating to Presidential actions, while the McDougals are concerned about what President Clinton did before he became President.

- The Court's order in the McDougal case is unprecedented and fails to demonstrate the deference to the Presidency found in the North and Poindexter cases.

- In over 200 years, there are only a handful of examples of Presidents or former Presidents testifying before courts or congressional committees. No sitting President has ever been forced to testify in person at a criminal trial.

VI. Recommended Actions.

- Goal: The President will cooperate. The President will testify at a videotaped deposition but constitutional precedent will be protected and the President will be protected by specific procedures such as those used by Judge Greene in Poindexter.

- The President should move to hold the subpoena in abeyance until the parties can negotiate a procedure for his testimony that will protect the constitutional interests of both the Presidency and the defendants in this case.

- The President should try to persuade the Court to approve a procedure similar to that followed by Judge Greene in the Poindexter case. Such a procedure would mean that:

    - The defendants would file their precise questions for the President with the Court and serve them on the President as well as the Justice Department.

    - The President and the Department of Justice would then have the opportunity to file challenges to any questions they considered to be improper.

    - The Court would then rule on the objections, striking any questions he found to be improper.

    - President Clinton would then submit to a videotaped deposition, scheduled at a time and place convenient to him. He could then be asked the approved questions, as well as any legitimate follow-up questions.

    - The Judge would personally attend the deposition to rule on the legitimacy of follow-up questions, as well as any claims of executive privilege that might arise. Having the Judge present would ensure that the deposition could be completed in one sitting.

- The Judge would ultimately rule on which parts of the deposition could actually be shown to the jury.

- The media would be given access to the videotape only after the Court and the parties met to edit out of the videotape any classified information. Any media access to the tape would be handled in a manner designed to protect the interests of the defendants and the Presidency. No copies of the tape would be provided to the media in advance of the trial.

- In his motion to hold the subpoena in abeyance, the President should make clear that he intends to cooperate with the Court, but that he must protect the institutional interests of the Presidency.

- I believe that the ultimate result of this subpoena will be a videotaped deposition of the President. However, if the President fails to protect his interests by filing a motion of some sort and simply agrees to cooperate, he risks undermining his position in several ways.

  - The President must be protected against any unreasonable demands the McDougals' lawyers may make. Requiring him to appear at trial or allowing the defense or the Independent Counsel to conduct a broad interrogation is unacceptable.

  - In the Paula Jones matter, the President has cited the North and Poindexter cases as examples of deference shown to the Presidency by courts. Clearly his position could be weakened if it now appears that any district court may hale a President to testify on the simple basis of an ex parte motion by a criminal defendant.

  - In every conflict over a President's responsibility to courts, both sides look to historical precedent to see how much deference should be granted to the President. Over 200 years of precedent strongly indicate that even a former president is entitled to special treatment from courts. If, however, the President fails to

defend those precedents, their value would be seriously weakened.

- The President's response to this subpoena will undoubtedly set a precedent for any future subpoenas he may receive. He must be careful that the procedure to which he ultimately agrees will adequately protect his interests in future circumstances.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. draft	Memorandum of Counsel for President (20 pages)	04/19/1996	P5	496
002. draft	Memorandum of Counsel for President (20 pages)	04/19/1996	P5	497

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 23483

FOLDER TITLE:
Whitewater - President's Testimony 1996

Debbie Bush
2006-0320-F
db2036

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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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UNDER SEAL

MEMORANDUM OF COUNSEL FOR PRESIDENT CONCERNING PUBLIC ACCESS TO VIDEOTAPE OF PRESIDENT'S TRIAL TESTIMONY IN THIS CASE

Counsel for the President respectfully submit this memorandum to ~~invite~~ request the Court to consider a proposal for affording public access to the videotaped trial testimony of President Clinton while preventing abuse of the Court's processes. The Court's March 20, 1996, Order provides:

> "The original of the videotape will be held by the Court with copies provided only to the parties and counsel to the President. Copies may not be provided to others unless and until the tape is played at trial and then only in the form presented at trial."

We understand that the parties have agreed and will present to the Court a stipulation ~~extending~~ seeking to this portion of the Order until a verdict is reached in this case, in order to avoid any possible prejudice to either the prosecution or the defendants.

Our suggestion concerns access to the videotape after a verdict is reached. ~~We believe that~~ this Court has inherent authority to control future access to the videotape, as a necessary concomitant of its supervisory power over the proceedings before it. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984); Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). While it is settled that a court should not allow its own processes to be used improperly "to gratify

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private spite or promote public scandal," Nixon, 435 U.S. at 603 (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893)), we believe, as we demonstrate later in this memorandum, that there is a likelihood that if unlimited copying of the videotape is permitted, the videotape will be distorted and used, inter alia, in political "attack ads".

We also believe, ~~however~~, that there is a way to afford public access but prevent such abuse. Accordingly, we suggest that the Court enter an order authorizing the National Archives to exhibit the tape after ~~the~~ verdict but prohibiting all copying or public dissemination of the tape. Such a plan would, in fact, afford greater public access than has heretofore occurred when sitting Presidents have testified in videotaped depositions.

Only twice have sitting Presidents testified on videotape in criminal proceedings. On. In 1975, President Ford ~~was subpoenaed by the defense to~~ testify ~~at the trial of the President's would-be assassin,~~ Lynette Fromme. On April 14, 1978, President Carter testified ~~by videotape~~ in the prosecution of state senator Culver Kidd. In each case, custody of the videotapes was closely guarded by the Court; the public was not allowed access to them, and it could not copy them.[1/] The district courts' observations

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[1/] The Court and parties took a different approach toward the deposition of former President Reagan in United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990), which was released, in edited form, to the news media. Factually, that case is quite different from the present one. First, the deposition of President Reagan occurred after he had left office. Accordingly, concerns about misuse of the tape by political adversaries were not presented in that situation. Second, the defendant's right (continued...)

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in restricting public access are instructive [DEVELOP]; because of the difficulty of obtaining the transcripts and orders, we attach the relevant portions to this memorandum as Exhibits 1 through 4.

As the Supreme Court held in Nixon, the Constitution provides the press and the public no right, under either the First or Sixth Amendment, to inspect or copy a tape introduced into evidence, as long as the Court provides access to the information contained on the tape by other means. That condition is easily satisfied here, as the press and public will have access to the courtroom while the tape is shown, written transcripts of the President's testimony will be available to the public, and the public will be able to view the tape at the National Archives.

1/ (...continued)
to a fair trial was not at issue in Poindexter, because the defendant supported the media's claim of access to the tape. Id. at 169-70 ("it now appears that defendant supports broad access of the press to the testimony of President Reagan. In view of that position by the defendant, there would seem to be no legitimate legal obstacle to early access of the public to the videotaped testimony"). That is not the case here, since, as we demonstrate infra Governor Tucker could be prejudiced by unlimited copying of the videotape. Nor does the Poindexter opinion indicate that President Reagan himself opposed public copying of the tape, and his individual interests, while represented, were not discussed in the opinion. Instead, the court appears to have been primarily concerned with the potential risks to national security from the testimony if the press were allowed to attend the actual videotaping; by contrast, no one seems to have opposed copying the edited tape of the former President's deposition. See id. at 169 ("the issue here is not whether, but rather when, the press will have access to President Reagan's testimony").

not for us to demonstrate

Nor is there a common law right to copy the tape ~~when the incremental benefit to the public is outweighed by the significant harms that would arise from such copying.~~ In this case, unlimited public copying would compromise the dignity of the Presidency and the integrity of this Court's processes.

I. The Proposal Satisfies The First And Sixth Amendments.

It is settled that the press has no constitutional right to copy tapes admitted into evidence at trial, as long as a trial court allows press access to the trial itself and provides written transcripts of the tapes. Nixon, 435 U.S. at 608-610. Thus, in United States v. Webbe, 791 F.2d 103 (8th Cir. 1986), CBS had claimed a constitutional right to copy and publish audiotapes of conversations admitted as evidence against a criminal defendant, a public official accused of vote fraud and obstruction of justice. Following the mandate of Nixon, the Eighth Circuit unequivocally held that no such right exists under the Constitution, noting that "neither the First Amendment guarantee of freedom of the press nor the Sixth Amendment guarantee of a public trial supported [the media's] claim to the audiotapes, when the press had unrestricted access to all of the information in the public domain, including the tape transcripts." Webbe, 791 F.2d at 105.[2/]

[2/] The First Amendment right to know is no broader for the press than for the general public, Nixon, 435 U.S. at 609, and the provision of tape transcripts and press access to the courtroom satisfies that right to know. Valley Broadcasting Co. v. United States District Court, 798 F.2d 1289, 1292 (9th Cir. 1986) ("Any first amendment rights to which existing case law

(continued...)

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Nor does the Sixth Amendment require that the press be afforded copying privileges. In Nixon, the Supreme Court squarely rejected the media's Sixth Amendment argument, holding that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." 435 U.S. at 610. As in Nixon, "[t]hat opportunity abundantly exist[s] here." Id.

II. The Common Law Right Of Access To Public Records Does Not Provide A Right To Copy Or Publish This Videotaped Deposition.

Although there is no constitutional right to copy trial evidence, the public does enjoy a limited, common-law right to inspect and copy "public records." For numerous reasons, the common law right does not extend to copying the videotaped testimony of the President at issue in this case.[3/]

[2/](...continued)
entitled [the media] were amply satisfied by the district court's provision for media access to the trial itself.") Allowing the media to copy and publish the tape would provide no more information than is already available through attending the trial and reading the transcripts. Accordingly, "there is no such first amendment right" to copy the videotape. Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 426 (5th Cir. 1981).

[3/] In this memorandum, we treat only those portions of the videotape admitted into evidence at trial. Obviously, those portions of the tape not shown to the jury are not "public records" and thus are not subject to any right of public access.

By stipulation of the parties, and with the Court's permission, the videotaped deposition in this case will not be admitted into evidence in its entirety. Instead, any questions deemed to be improper will be redacted from the tape shown to the jury. This procedure is designed to avoid the unseemly spectacle of subjecting a sitting President to harassing, irrelevant or otherwise improper questions in public view. This rationale for (continued...)

A. Start with Hinckley - no real balancing - b/c not evidence

B. Balancing - Webbe - 2d part of Hinckley - even if it was evidence.

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In Nixon v. Warner Communications, the Supreme Court observed that "the common law right to inspect and copy judicial records is not absolute." 435 U.S. at 598. Instead, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the case." 435 U.S. at 599.

In United States v. Webbe, the Eighth Circuit held, in accordance with the reasoning in Nixon, that any right of access to tapes under the common law is a matter committed to the

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3/(...continued)
redacting the videotape would be completely undermined if the public were permitted to copy the redacted portions.

There is no common law right of access to the redacted portions of the tape. Documents not admitted into evidence at trial are not "public records," and so they do not trigger the common law right of access to such records. See, e.g., United States v. Beckham, 789 F.2d 401, 411 (6th Cir. 1986) ("the common law right is stated as a right to inspect and copy public records, and the transcripts here were not public records. They were not admitted into evidence, as were the tapes."); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977), cert. denied sub nom. Miami Herald Pub. Co. v. Krentzman, 435 U.S. 968 (1978) ("The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain."); United States v. Miller, 579 F. Supp. 862, 865 (S.D. Fla. 1984) (allowing access to tapes admitted into evidence but refusing access to tapes not admitted); Newsday, Inc. v. Sise, 518 N.E.2d 930, 933, n.4 (N.Y. 1987), cert. denied, 486 U.S. 1056 (1988); People v. Glogowski, 517 N.Y.S.2d 403, 405-06 (Co. Ct. 1987), aff'd, 565 N.Y.S.2d 357 (A.D. 1990); Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989) (no right of access "when there is neither a history of access nor an important public need justifying access"); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986), cert. denied sub nom. Tribune Co. v. United States, 480 U.S. 931 (1987) ("documents collected during discovery are not 'judicial records'"). Accordingly, there is no legal basis for requesting access to those portions of the tape not admitted into evidence at trial.

district court's discretion, "a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Id. (quoting Nixon, 435 U.S. at 599). See also Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371, 1376 (8th Cir. 1990) ("When the common law right of access to judicial records is implicated, we give deference to the trial court rather than taking the approach of some circuits and recognizing a 'strong presumption' favoring access" (citing Webbe)). Webbe expressly adopted the standard pioneered by the Fifth Circuit in Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), rejecting any "strong presumption" of access. Webbe, 791 F.2d at 106. Instead, Belo requires a neutral, case-specific balancing test, under which the Court of Appeals will defer to the trial court's informed consideration of all relevant factors. Belo, 654 F.2d at 429-34.

Applying that standard, the Court in Webbe affirmed the trial court's refusal of CBS's request to copy tapes admitted into evidence against the defendant, a prominent politician, in his trial on charges of vote fraud and obstruction of justice. "We think the common law requires access to information on judicial proceedings and all evidence of record (unless sealed), but this right does not necessarily embrace copying of tapes." 791 F.2d at 106. Accord United States v. Beckham, 789 F.2d 401 (6th Cir. 1986) (denying media request for common-law access to copy tapes in evidence). The Court held that the district court

had properly balanced the relevant factors to conclude that the tape should not be copied.

The factors the Eighth Circuit found relevant in Webbe were: (1) that "the news media had attended the trial and pre-trial hearings, [and] had reported the events of the trial to the public," 791 F.2d at 106; (2) that the media "had received transcripts of the tapes, which the court had released after the tapes were admitted into evidence," id.; (3) that the defendant's right to a fair trial -- both in the current proceeding and in a later trial on other, pending charges -- might be impaired by release of the tapes, id. at 106-107; (4) that release of the tapes in such a high-profile case would make it more difficult to select an unbiased jury, either in the subsequent trial on other charges or at any retrial of the defendant, id. at 107; and (5) that the court might incur administrative difficulties in providing access to the tapes that would detract from the smooth progress of the trial, id. In this case, the same factors are present, and the same result is therefore warranted.

A. The Press And Public Have Full Access To The Information To Which They Are Entitled

Here, as in Webbe, the Court has afforded the press and the public complete freedom to attend the trial and pretrial hearings, and the media has fully reported on these proceedings. The press has not been obstructed in any way from publishing the events of the trial. Most importantly, the press and the public will be allowed in the courtroom if and when the videotape is admitted into evidence and played to the jury. Written

transcripts of the testimony will also be speedily available. Under these circumstances, "the knowledge the public could gain from seeing the videotape is so small as to be inconsequential." United States v. Thomas, 745 F. Supp. 499, 502 (M.D. Tenn. 1990). See also Nixon, 435 U.S. at 599, n. 11; Belo, 654 F.2d at 432.

Indeed, in this case these considerations are even more persuasive than in Webbe. In Webbe, the tapes were documentary evidence recording the allegedly illegal transactions. In contrast, the videotape in this case is not itself documentary evidence, but merely a recording of a witness's testimony. Testimony is generally available to the public and press only by attending the trial or by reading the written transcript. Only because of the unique circumstances of this case -- the fact that the witness is a sitting President -- is the testimony being taped at all.

Relying principally on this distinction, the trial court in United States v. Hinckley rejected a press motion to copy the videotaped testimony of a trial witness, the actress Jodie Foster. The court described the distinction as one of "fundamental importance," ruling:

> To this Court's knowledge, no case authority has addressed the question whether the common law right of access to judicial records includes a right to copy videotaped testimony. But it is logical that Miss Foster's taped testimony should be treated in the same fashion as is the testimony of any live witness at trial -- namely, the testimony is displayed to the jury, which can hear and view it but not record it. The common law right of access has never been held to include the right to televise, photograph, or make aural recordings of trial testimony. See Nixon v.

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> Warner Communications, supra. Nor has the public ever been permitted to copy the sound recordings which are frequently made by court reporters to supplement their stenographic notes of trial proceedings pursuant to 28 U.S.C. § 753(b). Indeed, a number of local court rules specifically bar the copying of a court reporter's tapes. The analogy between the Foster videotape and a reporter's tape recording is far closer than is the analogy between the videotape and the Watergate or Abscam recordings [on which the press relies].

Application of American Broadcasting Companies, 537 F. Supp. 1168, 1171 (D.D.C. 1982) (footnotes omitted)(emphasis added). The court further noted that allowing copying "might contravene Rule 15" because future witnesses "might reasonably resist videotape recordation. Such a result would be counter to the Rule and would impede the utilization at trial of a practical instrument of modern technology." Id. at 1171-72 n.10. Finally, the court ruled that, even if there were a right to copy the videotaped testimony of a Rule 15 deponent, the right is not absolute. The court considered, in the exercise of its discretion, that Ms. Foster was a witness, not a defendant, and also considered matters of her personal security and privacy. For these reasons as well, the court refused to permit copying.

Precisely the same result should follow here. The videotape is not "real evidence," id. at 1171, but instead "mere testimonial evidence, a description by a witness of events within [his] knowledge." Id. It should be treated like that of any live witnesses at trial. **[This Court's rules expressly bar the broadcast even of any audiotape that might be taken with the Court's permission to assure accuracy. To permit broadcasting**

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and copying of the videotape would directly contravene the letter and spirit of that rule as well.] [cite to local rule and develop]

Because it is not usually permissible to tape the testimony of a witness in a federal trial, the public has no reason to expect access to such a tape in the unique instance when it does exist. See Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989) ("no right of access "when there is neither a history of access nor an important public need justifying access"); United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989); In re People v. Atkins, 514 N.W.2d 148, 149 (Mich. 1994). See also Nixon, 435 U.S. at 610 (press argument that access to tapes is necessary to provide full public understanding of trial "proves too much," because "[t]he same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast").

Moreover, releasing this videotaped deposition for copying would contravene the longstanding policy and practice of the federal courts that criminal trials are not to be broadcast to the public -- either live or on tape delay. See, e.g., United States v. Hastings, 695 F.2d 1278 (11th Cir.), cert. denied sub nom. Post-Newsweek Stations, Florida, Inc. v. United States, 461 U.S. 931 (1983); Estes v. Texas, 381 U.S. 532, 544-50 (1965); President Ford Transcript at 14 (attached as Exhibit 1) ("the tape would not go up on appeal any more than would a picture of

Add fact that one witness' testimony should not be taken out of context — Tried with # of witness - only 1 would be shown.

any witness who might testify in court for the reason that we do not permit the taking of pictures of witnesses in the courtroom"). Federal courts have long refused to allow members of the press or public to record trials, and this restriction has survived legal scrutiny. E.g., Hastings, supra; Conway v. United States, 852 F.2d 187 (6th Cir.), cert. denied, 488 U.S. 943 (1988). If the press were permitted to copy this tape, an end run around this historical restriction would be available. This evasion could occur in any case in which a witness is unavailable to appear at trial and must therefore testify on tape.

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B. Defendants' Rights To A Fair Trial And An Impartial Jury Would Be Compromised By Release Of The Videotape

Release of the tape for general copying might improperly influence potential jurors and jeopardize the fairness of any retrial, should one be necessary. It might also impair Governor Tucker's right to a fair trial under the second indictment he now faces. See United States v. Rosenthal, 763 F.2d 1291, 1295, n.5 (11th Cir. 1985) ("the ability of the defendant to get a fair trial if access is granted is the primary ultimate value to be weighed on the non-access side of the balance"). In ruling on press access to a tape, courts often consider the harm that could result to other proceedings involving the same or similarly-situated defendants. Webbe, 791 F.2d at 106 ("not only was the vote fraud case currently under way, but Webbe had two other charges pending against him in the district in which the tapes admitted in the vote fraud trial might also be used"); Edwards, 672 F.2d at 1296 ("[t]he pending

Can't we rely on a submission from the DJs — letter to attach to this from Counsel

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tax evasion charges against defendant Edwards made a second trial more than merely hypothetical"); Belo, 654 F.2d at 431 (court appropriately denied access due to "concern with the rights of a yet-to-be-tried defendant").

It is immaterial that the videotaped testimony at issue here was sought by two defendants (but not by Governor Tucker, it should be observed) and is not evidence originally introduced by the prosecution. If general copying of the videotape is permitted, it will be widely broadcast and may be seen by prospective jurors in any later trial, along with--most significantly--accompanying commentary, analyses, criticism, and critiques. Portions may be excerpted and presented out of context. Those viewing the tape could not help but be influenced by the views of others about the nature and substance of the testimony. Governor Tucker's ability to obtain a fair trial in his subsequent trial[4/] might therefore be compromised by the publicity generated by broadcast of the President's deposition. As in Webbe, the Governor's right to an impartial jury may be impaired by repeated broadcast of the videotape. 791 F.2d at 107.

In consideration of defendants' rights to a fair trial in any subsequent proceedings, this Court should not allow the press to copy the videotaped deposition in this case. As the

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4/ Because Governor Tucker is already under indictment for the separate charge, the fear of prejudicial publicity in a subsequent trial is not "hypothetical," but very concrete. Id.; Edwards, 672 F.2d at 1296; Belo, 654 F.2d at 431.

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Belo court observed: "It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." 654 F.2d at 431. Particularly in light of the inconsequential increase in public knowledge that would result from permitting the press to copy a tape they will be able to see in open court and elsewhere (and the contents of which will be disseminated in a verbatim transcript), the balance of factors plainly favors denying access in this case.

C. The Administrative Burden Of Allowing Inspection And Copying Should Be Considered

In addition, as in Webbe, the Court should consider the administrative burden to the Court of allowing the press and public to inspect and copy the tape. 791 F.2d at 107; Rosenthal, 763 F.2d at 1294-95. Specifically, the Court may deny access if it finds that this procedure could impede the progress of the trial and distract the participants from their principal mission to administer justice fairly and expeditiously. The Court may also deny access if copying creates a risk of loss or damage to the tape. See Matter of WNYT-TV v. Moynihan, 467 N.Y.S.2d 734, 736 (A.D. 1983).

The solution we propose, providing public access through the National Archives, would avoid any possible administrative problems for the Court. The Court would entrust the Archives with a single copy of the tape, which would be shown to the public but, by court order, neither removed nor copied.

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D. Additional Concerns Unique To This Case Militate Against Allowing Unfettered Access To The Tape

The substantial danger of misuse of the President's Rule 15 videotape also counsels against release for copying. See Nixon, 435 U.S. at 599-603. Motivated by these concerns, when Presidents Ford and Carter submitted to videotaped depositions, the courts took great care to preserve, indefinitely, the integrity of those tapes. See supra at 1-2; President Ford Transcript at 14 (attached as exhibit 1) (""the tape will not in any way be revealed to any of the news media"); Order in United States v. Kidd at 2 (April 10, 1978) (attached as exhibit 2) ("The video tape upon the conclusion of the taking shall be delivered to the court, copies thereof shall not be furnished to anyone other than the court"). Counsel for the President believe the optimal means of accommodating the interest of the public in viewing the videotape, and at the same time preserving the dignity of the Office of the President and the integrity of this Court's processes, is for the Court to order that the videotaped trial testimony be provided to the National Archives, where any member of the public might view the tape, but no one would be permitted to copy it.

Supreme Court precedent supports according special consideration to the unique interests of the President in the right-of-access inquiry. In Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), audiotapes of President Nixon's conversations were admitted into evidence at the trial of his former advisors. The press was allowed access to the trial and

provided with transcripts of the tapes, but the district court forbade copying. The Supreme Court did not resolve the issue of whether the common law right of access applied to permit the press to copy those tapes,[5/] but it did note the existence of several factors, not usually present in right-of-access cases, that apply when a President's voice (and, in this case, his likeness and demeanor) is on the tapes.

In particular, the Court observed that public copying could impair the President's interest in privacy, and in the accurate conveyance of any statements of his recollections that might be compelled by the subpoena in this case.

> If made available for commercial recordings or broadcast by the electronic media, only fractions of the tapes, necessarily taken out of context, could or would be presented. Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes. There would be strong motivation to titillate as well as to educate listeners.

435 U.S. at 601.

Perhaps more importantly, the Nixon opinion warned that a lower court should not allow itself to be used as the instrument for distortions by those who might obtain and misuse the tape. The Supreme Court emphasized:

> the crucial fact that respondents require a court's cooperation in furthering their commercial plans. The court -- as custodian of tapes obtained by subpoena over the opposition of a sitting President, solely to satisfy "fundamental demands of due process of law in

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[5/] The Court found it unnecessary to decide the issue, because a federal statute, the Presidential Recordings Act, defeated any common law claim to access in that case. Nixon, 435 U.S. at 603-08.

> the fair administration of criminal justice -- has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production."

435 U.S. at 603. The Court continued: "This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material 'to gratify private spite or promote public scandal.'" Id. (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893)).

The common-law right of access to judicial records has always been subject to the limitation that a court will not order disclosure of a document that is likely to be used for improper purposes, lest the court make itself complicit in the improper acts. In Caswell, a seminal case defining the limits of the common law right of access, the Rhode Island Supreme Court discussed the court's discretion to keep documents under seal in the context of a divorce case.

> [I]t is clearly within the [common law] rule to hold that no one has a right to examine or obtain copies of public records . . . for the purpose of creating public scandal. . . . The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records.

18 R.I. 835, 29 A. 259, 259 (1893). See also C. v. C., 320 A.2d 717, 723 (Del. Super. 1974) (adopting Caswell rule in divorce case). Numerous common law decisions support the rule that a

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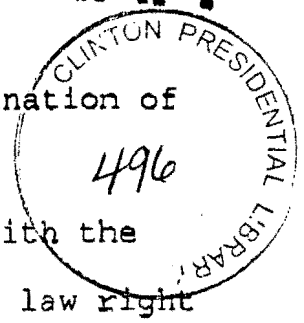
court may refuse access to documents on the ground that they will be used for an improper purpose. See, e.g., State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 137 N.W.2d 470, 476-77 (1965), modified on other grounds, 139 N.W.2d 241 (1966) (prospect of "undue damage" to a person's reputation justifies refusing public access to a document under common law balancing test); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E.2d 5, 6-7 (Mass. 1945) (court should not allow public access to documents containing libellous statements); Munzer v. Blasdell, 268 App. Div. 9, 48 N.Y.S.2d 355 (1944) ("shocking and scandalous" libellous documents are subject to seal); Flexmir v. Herman, 40 A.2d 799, 800 (N.J. Ch. 1945) (ordering sealing of court documents to avoid revealing trade secret manufacturing process). Recent cases following Nixon are to the same effect. In Mokhiber v. Davis, 537 A.2d 1100, 1115 (D.C. 1988), the District of Columbia Court of Appeals observed:

> [C]ourts have long recognized that information of certain kinds may be more readily closed from public view, such as commercial and national security secrets and information that seriously invades the privacy of third parties or would merely promote libel or scandal. Material that falls into one of these classes may be screened from public access on a showing of good cause to believe disclosure would create specific harms of the kind sought to be avoided by giving that sort of information greater protections.

(Citations omitted.) See also, e.g., Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371, 1376-77 (8th Cir. 1990) (public interest in access to file in disabled child court proceeding outweighed "by T.B.'s privacy interest and the state's



interest in protecting minors from the public dissemination of hurtful information").

The Nixon Court's concerns, in accordance with the rationale of these numerous cases applying the common law right of access, are fully applicable to this case. As an incident of his compelled testimony, the President should not be subjected to the distortions and abuses that would necessarily result from unrestricted copying of the videotape. These fears are not unfounded speculation; the President's political opponents have already declared their intention to seek access to the tape for the specific purpose of attacking the President. See, e.g., Rowley, Clinton Deposition Has Critics Pondering Potential TV Ads, Associated Press, April 1, 1996 (quoting prominent GOP "ad man" as saying, "I'd love to get my hands on the president on the stand."); Means, Clinton Whitewater Testimony: Attack Ad a Double-Edged Sword, Orlando Sentinel, April 3, 1996 ("Republican strategists are gleeful about the potential availability of a Clinton video in which he talks about his association with the principal figures in the complex banking and real-estate tangle commonly referred to as Whitewater. No matter what he says, they envision campaign attack ads showing the president on the defensive about a criminal matter, reinforcing his ties to unsavory folk."). These concerns are not present for an ordinary witness who gives live testimony; there is no reason to treat the President's testimony with any less consideration--or to penalize

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him--simply because the demands of his office require him to deliver that testimony on videotape.

Moreover, the Nixon Court's admonition that a court should act with "a sensitive appreciation of the circumstances that led to [the] production" of this videotape also mandates a prohibition on unrestricted copying. A sitting President is being compelled to testify in order to effectuate the defendants' constitutional rights to compulsory process and a fair trial. There is simply no justification for subjecting the Chief Executive of the United States to prejudice because he fulfills this solemn duty. Avoiding such an unfair result is a proper reason for denying unrestricted access to the videotape here. Beckham, 789 F.2d at 410 ("The district court could not ignore the publicity and controversy regarding the judicial proceedings"). There is simply no reason for this Court to "becom[e] a partner in the use of the subpoenaed material 'to gratify private spite or promote public scandal.'" Nixon, 435 U.S. at 603.

Lodging a copy of President Clinton's videotaped trial testimony after a verdict is reached strikes the proper balance. We respectfully submit that this would afford public access while preventing partisan abuse.

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UNDER SEAL

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Counsel for the President respectfully submit this memorandum to invite the Court to consider a proposal for affording public access to the videotaped trial testimony of President Clinton while preventing abuse of the Court's processes. The Court's March 20, 1996, Order provides:

> "The original of the videotape will be held by the Court with copies provided only to the parties and counsel to the President. Copies may not be provided to others unless and until the tape is played at trial and then only in the form presented at trial."

We understand that the parties have agreed and will present to the Court a stipulation extending this portion of the Order until a verdict is reached in this case, in order to avoid any possible prejudice to either the prosecution or the defendants.

Our suggestion concerns access to the videotape after a verdict is reached. We believe that this Court has inherent authority to control future access to the videotape, as a necessary concomitant of its supervisory power over the proceedings before it. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984); Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). While it is settled that a court should not allow its own processes to be used improperly "to gratify

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private spite or promote public scandal," Nixon, 435 U.S. at 603 (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893)), we believe, as we demonstrate later in this memorandum, that there is a likelihood that if unlimited copying of the videotape is permitted, the videotape will be distorted and used in political "attack ads".

We also believe, however, that there is a way to afford public access but prevent such abuse, and we suggest that the Court enter an order authorizing the National Archives to exhibit the tape after the verdict but prohibiting all copying or public dissemination of the tape. Such a plan would, in fact, afford greater public access than has heretofore occurred when sitting Presidents have testified in videotaped depositions.

Only twice have sitting Presidents testified on videotape in criminal proceedings. In 1975, President Ford was subpoenaed by the defense to testify at the trial of the President's would-be assassin, Lynette Fromme. On April 14, 1978, President Carter testified by videotape in the prosecution of state senator Culver Kidd. In each case, custody of the videotapes was closely guarded by the Court; the public was not allowed access to them, and it could not copy them.[1/] The district courts' observations

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[1/] The Court and parties took a different approach toward the deposition of former President Reagan in United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990), which was released, in edited form, to the news media. Factually, that case is quite different from the present one. First, the deposition of President Reagan occurred after he had left office. Accordingly, concerns about misuse of the tape by political adversaries were not presented in that situation. Second, the defendant's right (continued...)

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in restricting public access are instructive [DEVELOP]; because of the difficulty of obtaining the transcripts and orders, we attach the relevant portions to this memorandum as Exhibits 1 through 4.

As the Supreme Court held in Nixon, the Constitution provides the press and the public no right, under either the First or Sixth Amendment, to inspect or copy a tape introduced into evidence, as long as the Court provides access to the information contained on the tape by other means. That condition is easily satisfied here, as the press and public will have access to the courtroom while the tape is shown, written transcripts of the President's testimony will be available to the public, and the public will be able to view the tape at the National Archives.

1/(...continued)
to a fair trial was not at issue in Poindexter, because the defendant supported the media's claim of access to the tape. Id. at 169-70 ("it now appears that defendant supports broad access of the press to the testimony of President Reagan. In view of that position by the defendant, there would seem to be no legitimate legal obstacle to early access of the public to the videotaped testimony"). That is not the case here, since, as we demonstrate infra Governor Tucker could be prejudiced by unlimited copying of the videotape. Nor does the Poindexter opinion indicate that President Reagan himself opposed public copying of the tape, and his individual interests, while represented, were not discussed in the opinion. Instead, the court appears to have been primarily concerned with the potential risks to national security from the testimony if the press were allowed to attend the actual videotaping; by contrast, no one seems to have opposed copying the edited tape of the former President's deposition. See id. at 169 ("the issue here is not whether, but rather when, the press will have access to President Reagan's testimony").

Nor is there a common law right to copy the tape when the incremental benefit to the public is outweighed by the significant harms that would arise from such copying. In this case, unlimited public copying would compromise the dignity of the Presidency and the integrity of this Court's processes.

I. The Proposal Satisfies The First And Sixth Amendments.

It is settled that the press has no constitutional right to copy tapes admitted into evidence at trial, as long as a trial court allows press access to the trial itself and provides written transcripts of the tapes. Nixon, 435 U.S. at 608-610. Thus, in United States v. Webbe, 791 F.2d 103 (8th Cir. 1986), CBS had claimed a constitutional right to copy and publish audiotapes of conversations admitted as evidence against a criminal defendant, a public official accused of vote fraud and obstruction of justice. Following the mandate of Nixon, the Eighth Circuit unequivocally held that no such right exists under the Constitution, noting that "neither the First Amendment guarantee of freedom of the press nor the Sixth Amendment guarantee of a public trial supported [the media's] claim to the audiotapes, when the press had unrestricted access to all of the information in the public domain, including the tape transcripts." Webbe, 791 F.2d at 105.[2/]

[2/] The First Amendment right to know is no broader for the press than for the general public, Nixon, 435 U.S. at 609, and the provision of tape transcripts and press access to the courtroom satisfies that right to know. Valley Broadcasting Co. v. United States District Court, 798 F.2d 1289, 1292 (9th Cir. 1986) ("Any first amendment rights to which existing case law

(continued...)

Nor does the Sixth Amendment require that the press be afforded copying privileges. In Nixon, the Supreme Court squarely rejected the media's Sixth Amendment argument, holding that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." 435 U.S. at 610. As in Nixon, "[t]hat opportunity abundantly exist[s] here." Id.

II. The Common Law Right Of Access To Public Records Does Not Provide A Right To Copy Or Publish This Videotaped Deposition.

Although there is no constitutional right to copy trial evidence, the public does enjoy a limited, common-law right to inspect and copy "public records." For numerous reasons, the common law right does not extend to copying the videotaped testimony of the President at issue in this case.[3/]

[2/](...continued)
entitled [the media] were amply satisfied by the district court's provision for media access to the trial itself.") Allowing the media to copy and publish the tape would provide no more information than is already available through attending the trial and reading the transcripts. Accordingly, "there is no such first amendment right" to copy the videotape. Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 426 (5th Cir. 1981).

[3/] In this memorandum, we treat only those portions of the videotape admitted into evidence at trial. Obviously, those portions of the tape not shown to the jury are not "public records" and thus are not subject to any right of public access.

By stipulation of the parties, and with the Court's permission, the videotaped deposition in this case will not be admitted into evidence in its entirety. Instead, any questions deemed to be improper will be redacted from the tape shown to the jury. This procedure is designed to avoid the unseemly spectacle of subjecting a sitting President to harassing, irrelevant or otherwise improper questions in public view. This rationale for (continued...)

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In Nixon v. Warner Communications, the Supreme Court observed that "the common law right to inspect and copy judicial records is not absolute." 435 U.S. at 598. Instead, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the case." 435 U.S. at 599.

In United States v. Webbe, the Eighth Circuit held, in accordance with the reasoning in Nixon, that any right of access to tapes under the common law is a matter committed to the

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3/(...continued)
redacting the videotape would be completely undermined if the public were permitted to copy the redacted portions.

There is no common law right of access to the redacted portions of the tape. Documents not admitted into evidence at trial are not "public records," and so they do not trigger the common law right of access to such records. See, e.g., United States v. Beckham, 789 F.2d 401, 411 (6th Cir. 1986) ("the common law right is stated as a right to inspect and copy public records, and the transcripts here were not public records. They were not admitted into evidence, as were the tapes."); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977), cert. denied sub nom. Miami Herald Pub. Co. v. Krentzman, 435 U.S. 968 (1978) ("The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain."); United States v. Miller, 579 F. Supp. 862, 865 (S.D. Fla. 1984) (allowing access to tapes admitted into evidence but refusing access to tapes not admitted); Newsday, Inc. v. Sise, 518 N.E.2d 930, 933, n.4 (N.Y. 1987), cert. denied, 486 U.S. 1056 (1988); People v. Glogowski, 517 N.Y.S.2d 403, 405-06 (Co. Ct. 1987), aff'd, 565 N.Y.S.2d 357 (A.D. 1990); Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989) (no right of access "when there is neither a history of access nor an important public need justifying access"); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986), cert. denied sub nom. Tribune Co. v. United States, 480 U.S. 931 (1987) ("documents collected during discovery are not 'judicial records'"). Accordingly, there is no legal basis for requesting access to those portions of the tape not admitted into evidence at trial.

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district court's discretion, "a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Id. (quoting Nixon, 435 U.S. at 599). See also Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371, 1376 (8th Cir. 1990) ("When the common law right of access to judicial records is implicated, we give deference to the trial court rather than taking the approach of some circuits and recognizing a 'strong presumption' favoring access" (citing Webbe)). Webbe expressly adopted the standard pioneered by the Fifth Circuit in Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), rejecting any "strong presumption" of access. Webbe, 791 F.2d at 106. Instead, Belo requires a neutral, case-specific balancing test, under which the Court of Appeals will defer to the trial court's informed consideration of all relevant factors. Belo, 654 F.2d at 429-34.

Applying that standard, the Court in Webbe affirmed the trial court's refusal of CBS's request to copy tapes admitted into evidence against the defendant, a prominent politician, in his trial on charges of vote fraud and obstruction of justice. "We think the common law requires access to information on judicial proceedings and all evidence of record (unless sealed), but this right does not necessarily embrace copying of tapes." 791 F.2d at 106. Accord United States v. Beckham, 789 F.2d 401 (6th Cir. 1986) (denying media request for common-law access to copy tapes in evidence). The Court held that the district court

had properly balanced the relevant factors to conclude that the tape should not be copied.

The factors the Eighth Circuit found relevant in Webbe were: (1) that "the news media had attended the trial and pre-trial hearings, [and] had reported the events of the trial to the public," 791 F.2d at 106; (2) that the media "had received transcripts of the tapes, which the court had released after the tapes were admitted into evidence," id.; (3) that the defendant's right to a fair trial -- both in the current proceeding and in a later trial on other, pending charges -- might be impaired by release of the tapes, id. at 106-107; (4) that release of the tapes in such a high-profile case would make it more difficult to select an unbiased jury, either in the subsequent trial on other charges or at any retrial of the defendant, id. at 107; and (5) that the court might incur administrative difficulties in providing access to the tapes that would detract from the smooth progress of the trial, id. In this case, the same factors are present, and the same result is therefore warranted.

A. The Press And Public Have Full Access To The Information To Which They Are Entitled

Here, as in Webbe, the Court has afforded the press and the public complete freedom to attend the trial and pretrial hearings, and the media has fully reported on these proceedings. The press has not been obstructed in any way from publishing the events of the trial. Most importantly, the press and the public will be allowed in the courtroom if and when the videotape is admitted into evidence and played to the jury. Written

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transcripts of the testimony will also be speedily available. Under these circumstances, "the knowledge the public could gain from seeing the videotape is so small as to be inconsequential." United States v. Thomas, 745 F. Supp. 499, 502 (M.D. Tenn. 1990). See also Nixon, 435 U.S. at 599, n. 11; Belo, 654 F.2d at 432.

Indeed, in this case these considerations are even more persuasive than in Webbe. In Webbe, the tapes were documentary evidence recording the allegedly illegal transactions. In contrast, the videotape in this case is not itself documentary evidence, but merely a recording of a witness's testimony. Testimony is generally available to the public and press only by attending the trial or by reading the written transcript. Only because of the unique circumstances of this case -- the fact that the witness is a sitting President -- is the testimony being taped at all.

Relying principally on this distinction, the trial court in United States v. Hinckley rejected a press motion to copy the videotaped testimony of a trial witness, the actress Jodie Foster. The court describe the distinction as one of "fundamental importance," ruling:

> To this Court's knowledge, no case authority has addressed the question whether the common law right of access to judicial records includes a right to copy videotaped testimony. But it is logical that Miss Foster's taped testimony should be treated in the same fashion as is the testimony of any live witness at trial -- namely, the testimony is displayed to the jury, which can hear and view it but not record it. The common law right of access has never been held to include the right to televise, photograph, or make aural recordings of trial testimony. See Nixon v.

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> Warner Communications, supra. Nor has the public ever been permitted to copy the sound recordings which are frequently made by court reporters to supplement their stenographic notes of trial proceedings pursuant to 28 U.S.C. § 753(b). Indeed, a number of local court rules specifically bar the copying of a court reporter's tapes. The analogy between the Foster videotape and a reporter's tape recording is far closer than is the analogy between the videotape and the Watergate or Abscam recordings [on which the press relies].

Application of American Broadcasting Companies, 537 F. Supp. 1168, 1171 (D.D.C. 1982) (footnotes omitted)(emphasis added). The court further noted that allowing copying "might contravene Rule 15" because future witnesses "might reasonably resist videotape recordation. Such a result would be counter to the Rule and would impede the utilization at trial of a practical instrument of modern technology." Id. at 1171-72 n.10. Finally, the court ruled that, even if there were a right to copy the videotaped testimony of a Rule 15 deponent, the right is not absolute. The court considered, in the exercise of its discretion, that Ms. Foster was a witness, not a defendant, and also considered matters of her personal security and privacy. For these reasons as well, the court refused to permit copying.

Precisely the same result should follow here. The videotape is not "real evidence," id. at 1171, but instead "mere testimonial evidence, a description by a witness of events within [his] knowledge." Id. It should be treated like that of any live witnesses at trial. **[This Court's rules expressly bar the broadcast even of any audiotape that might be taken with the Court's permission to assure accuracy. To permit broadcasting**

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and copying of the videotape would directly contravene the letter and spirit of that rule as well.] [cite to local rule and develop]

Because it is not usually permissible to tape the testimony of a witness in a federal trial, the public has no reason to expect access to such a tape in the unique instance when it does exist. See Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989) ("no right of access "when there is neither a history of access nor an important public need justifying access"); United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989); In re People v. Atkins, 514 N.W.2d 148, 149 (Mich. 1994). See also Nixon, 435 U.S. at 610 (press argument that access to tapes is necessary to provide full public understanding of trial "proves too much," because "[t]he same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast").

Moreover, releasing this videotaped deposition for copying would contravene the longstanding policy and practice of the federal courts that trials are not to be broadcast to the public -- either live or on tape delay. See, e.g., United States v. Hastings, 695 F.2d 1278 (11th Cir.), cert. denied sub nom. Post-Newsweek Stations, Florida, Inc. v. United States, 461 U.S. 931 (1983); Estes v. Texas, 381 U.S. 532, 544-50 (1965); President Ford Transcript at 14 (attached as Exhibit 1) ("the tape would not go up on appeal any more than would a picture of

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any witness who might testify in court for the reason that we do not permit the taking of pictures of witnesses in the courtroom"). Federal courts have long refused to allow members of the press or public to record trials, and this restriction has survived legal scrutiny. E.g., Hastings, supra; Conway v. United States, 852 F.2d 187 (6th Cir.), cert. denied, 488 U.S. 943 (1988). If the press were permitted to copy this tape, an end run around this historical restriction would be available. This evasion could occur in any case in which a witness is unavailable to appear at trial and must therefore testify on tape.

B. Defendants' Rights To A Fair Trial And An Impartial Jury Would Be Compromised By Release Of The Videotape

Release of the tape for general copying might improperly influence potential jurors and jeopardize the fairness of any retrial, should one be necessary. It might also impair Governor Tucker's right to a fair trial under the second indictment he now faces. See United States v. Rosenthal, 763 F.2d 1291, 1295, n.5 (11th Cir. 1985) ("the ability of the defendant to get a fair trial if access is granted is the primary ultimate value to be weighed on the non-access side of the balance"). In ruling on press access to a tape, courts often consider the harm that could result to other proceedings involving the same or similarly-situated defendants. Webbe, 791 F.2d at 106 ("not only was the vote fraud case currently under way, but Webbe had two other charges pending against him in the district in which the tapes admitted in the vote fraud trial might also be used"); Edwards, 672 F.2d at 1296 ("[t]he pending

tax evasion charges against defendant Edwards made a second trial more than merely hypothetical"); Belo, 654 F.2d at 431 (court appropriately denied access due to "concern with the rights of a yet-to-be-tried defendant").

It is immaterial that the videotaped testimony at issue here was sought by two defendants (but not by Governor Tucker, it should be observed) and is not evidence originally introduced by the prosecution. If general copying of the videotape is permitted, it will be widely broadcast and may be seen by prospective jurors in any later trial, along with--most significantly--accompanying commentary, analyses, criticism, and critiques. Portions may be excerpted and presented out of context. Those viewing the tape could not help but be influenced by the views of others about the nature and substance of the testimony. Governor Tucker's ability to obtain a fair trial in his subsequent trial[4/] might therefore be compromised by the publicity generated by broadcast of the President's deposition. As in Webbe, the Governor's right to an impartial jury may be impaired by repeated broadcast of the videotape. 791 F.2d at 107.

In consideration of defendants' rights to a fair trial in any subsequent proceedings, this Court should not allow the press to copy the videotaped deposition in this case. As the

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4/ Because Governor Tucker is already under indictment for the separate charge, the fear of prejudicial publicity in a subsequent trial is not "hypothetical," but very concrete. Id.; Edwards, 672 F.2d at 1296; Belo, 654 F.2d at 431.

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Belo court observed: "It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." 654 F.2d at 431. Particularly in light of the inconsequential increase in public knowledge that would result from permitting the press to copy a tape they will be able to see in open court and elsewhere (and the contents of which will be disseminated in a verbatim transcript), the balance of factors plainly favors denying access in this case.

C. The Administrative Burden Of Allowing Inspection And Copying Should Be Considered

In addition, as in Webbe, the Court should consider the administrative burden to the Court of allowing the press and public to inspect and copy the tape. 791 F.2d at 107; Rosenthal, 763 F.2d at 1294-95. Specifically, the Court may deny access if it finds that this procedure could impede the progress of the trial and distract the participants from their principal mission to administer justice fairly and expeditiously. The Court may also deny access if copying creates a risk of loss or damage to the tape. See Matter of WNYT-TV v. Moynihan, 467 N.Y.S.2d 734, 736 (A.D. 1983).

The solution we propose, providing public access through the National Archives, would avoid any possible administrative problems for the Court. The Court would entrust the Archives with a single copy of the tape, which would be shown to the public but, by court order, neither removed nor copied.

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D. Additional Concerns Unique To This Case Militate Against Allowing Unfettered Access To The Tape

The substantial danger of misuse of the President's Rule 15 videotape also counsels against release for copying. See Nixon, 435 U.S. at 599-603. Motivated by these concerns, when Presidents Ford and Carter submitted to videotaped depositions, the courts took great care to preserve, indefinitely, the integrity of those tapes. See supra at 1-2; President Ford Transcript at 14 (attached as exhibit 1) (""the tape will not in any way be revealed to any of the news media"); Order in United States v. Kidd at 2 (April 10, 1978) (attached as exhibit 2) ("The video tape upon the conclusion of the taking shall be delivered to the court, copies thereof shall not be furnished to anyone other than the court"). Counsel for the President believe the optimal means of accommodating the interest of the public in viewing the videotape, and at the same time preserving the dignity of the Office of the President and the integrity of this Court's processes, is for the Court to order that the videotaped trial testimony be provided to the National Archives, where any member of the public might view the tape, but no one would be permitted to copy it.

Supreme Court precedent supports according special consideration to the unique interests of the President in the right-of-access inquiry. In Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), audiotapes of President Nixon's conversations were admitted into evidence at the trial of his former advisors. The press was allowed access to the trial and

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provided with transcripts of the tapes, but the district court forbade copying. The Supreme Court did not resolve the issue of whether the common law right of access applied to permit the press to copy those tapes,[5/] but it did note the existence of several factors, not usually present in right-of-access cases, that apply when a President's voice (and, in this case, his likeness and demeanor) is on the tapes.

In particular, the Court observed that public copying could impair the President's interest in privacy, and in the accurate conveyance of any statements of his recollections that might be compelled by the subpoena in this case.

> If made available for commercial recordings or broadcast by the electronic media, only fractions of the tapes, necessarily taken out of context, could or would be presented. Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes. There would be strong motivation to titillate as well as to educate listeners.

435 U.S. at 601.

Perhaps more importantly, the Nixon opinion warned that a lower court should not allow itself to be used as the instrument for distortions by those who might obtain and misuse the tape. The Supreme Court emphasized:

> the crucial fact that respondents require a court's cooperation in furthering their commercial plans. The court -- as custodian of tapes obtained by subpoena over the opposition of a sitting President, solely to satisfy "fundamental demands of due process of law in

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5/ The Court found it unnecessary to decide the issue, because a federal statute, the Presidential Recordings Act, defeated any common law claim to access in that case. Nixon, 435 U.S. at 603-08.

> the fair administration of criminal justice -- has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production."

435 U.S. at 603. The Court continued: "This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material 'to gratify private spite or promote public scandal.'" Id. (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893)).

The common-law right of access to judicial records has always been subject to the limitation that a court will not order disclosure of a document that is likely to be used for improper purposes, lest the court make itself complicit in the improper acts. In Caswell, a seminal case defining the limits of the common law right of access, the Rhode Island Supreme Court discussed the court's discretion to keep documents under seal in the context of a divorce case.

> [I]t is clearly within the [common law] rule to hold that no one has a right to examine or obtain copies of public records . . . for the purpose of creating public scandal. . . . The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records.

18 R.I. 835, 29 A. 259, 259 (1893). See also C. v. C., 320 A.2d 717, 723 (Del. Super. 1974) (adopting Caswell rule in divorce case). Numerous common law decisions support the rule that a

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court may refuse access to documents on the ground that they will be used for an improper purpose. See, e.g., State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 137 N.W.2d 470, 476-77 (1965), modified on other grounds, 139 N.W.2d 241 (1966) (prospect of "undue damage" to a person's reputation justifies refusing public access to a document under common law balancing test); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E.2d 5, 6-7 (Mass. 1945) (court should not allow public access to documents containing libellous statements); Munzer v. Blasdell, 268 App. Div. 9, 48 N.Y.S.2d 355 (1944) ("shocking and scandalous" libellous documents are subject to seal); Flexmir v. Herman, 40 A.2d 799, 800 (N.J. Ch. 1945) (ordering sealing of court documents to avoid revealing trade secret manufacturing process). Recent cases following Nixon are to the same effect. In Mokhiber v. Davis, 537 A.2d 1100, 1115 (D.C. 1988), the District of Columbia Court of Appeals observed:

> [C]ourts have long recognized that information of certain kinds may be more readily closed from public view, such as commercial and national security secrets and information that seriously invades the privacy of third parties or would merely promote libel or scandal. Material that falls into one of these classes may be screened from public access on a showing of good cause to believe disclosure would create specific harms of the kind sought to be avoided by giving that sort of information greater protections.

(Citations omitted.) See also, e.g., Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371, 1376-77 (8th Cir. 1990) (public interest in access to file in disabled child court proceeding outweighed "by T.B.'s privacy interest and the state's

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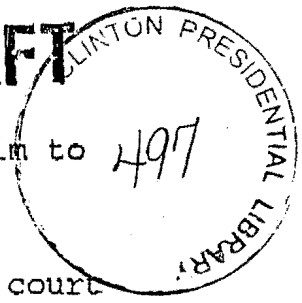
interest in protecting minors from the public dissemination of hurtful information").

The Nixon Court's concerns, in accordance with the rationale of these numerous cases applying the common law right of access, are fully applicable to this case. As an incident of his compelled testimony, the President should not be subjected to the distortions and abuses that would necessarily result from unrestricted copying of the videotape. These fears are not unfounded speculation; the President's political opponents have already declared their intention to seek access to the tape for the specific purpose of attacking the President. See, e.g., Rowley, Clinton Deposition Has Critics Pondering Potential TV Ads, Associated Press, April 1, 1996 (quoting prominent GOP "ad man" as saying, "I'd love to get my hands on the president on the stand."); Means, Clinton Whitewater Testimony: Attack Ad a Double-Edged Sword, Orlando Sentinel, April 3, 1996 ("Republican strategists are gleeful about the potential availability of a Clinton video in which he talks about his association with the principal figures in the complex banking and real-estate tangle commonly referred to as Whitewater. No matter what he says, they envision campaign attack ads showing the president on the defensive about a criminal matter, reinforcing his ties to unsavory folk."). These concerns are not present for an ordinary witness who gives live testimony; there is no reason to treat the President's testimony with any less consideration--or to penalize



him--simply because the demands of his office require him to deliver that testimony on videotape.

Moreover, the Nixon Court's admonition that a court should act with "a sensitive appreciation of the circumstances that led to [the] production" of this videotape also mandates a prohibition on unrestricted copying. A sitting President is being compelled to testify in order to effectuate the defendants' constitutional rights to compulsory process and a fair trial. There is simply no justification for subjecting the Chief Executive of the United States to prejudice because he fulfills this solemn duty. Avoiding such an unfair result is a proper reason for denying unrestricted access to the videotape here. Beckham, 789 F.2d at 410 ("The district court could not ignore the publicity and controversy regarding the judicial proceedings"). There is simply no reason for this Court to "becom[e] a partner in the use of the subpoenaed material 'to gratify private spite or promote public scandal.'" Nixon, 435 U.S. at 603.

Lodging a copy of President Clinton's videotaped trial testimony after a verdict is reached strikes the proper balance. We respectfully submit that this would afford public access while preventing partisan abuse.

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Charles Ruff to David Kendall (1 page)	04/28/1997	P5 498
~~002. report~~	~~RE: Grand Jury Matter [18 U.S.C. 6] (5 pages)~~	~~04/1997~~	~~P3/b(3)~~
~~003. report~~	~~RE: Grand Jury Matter [18 U.S.C. 6] (7 pages)~~	~~03/03/1997~~	~~P3/b(3)~~
~~004. report~~	~~RE: Grand Jury Matter [18 U.S.C. 6] (6 pages)~~	~~03/07/1997~~	~~P3/b(3)~~

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

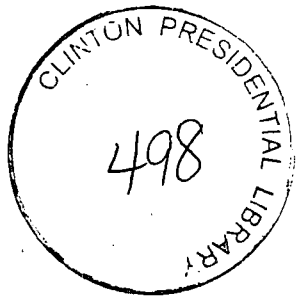
C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON



April 28, 1997

BY FACSIMILE

David E. Kendall, Esq.
725 12th Street, N.W.
Washington, D.C.

Andrew Frey, Esq.
Miriam Nemetz, Esq.
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Dear Colleagues:

I really am not convinced that this is a wise course. Even if Starr were to agree to allow us to assert the privilege and even if the court of appeals were to withdraw this opinion (an unlikely event), we would be faced with a situation in which any disagreement by Starr with our claim in a particular case would result in a motion to compel and an adverse ruling either by Judge Wright or on appeal or both.

Let me have your thoughts as soon as possible, since, if we are going to send this, we should do it this afternoon.

Sincerely,

Charles F.C. Ruff
Counsel to the President

Enclosure

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Draft Q & A RE: Attorney -Client/Work Product (3 pages)	04/05/1995	P5 499
~~002. report~~	~~Chronology; RE: Lawyer Work Product (9 pages)~~	~~02/20/1995~~	~~P6/b(6)~~
003. draft	RE: Talking Points RE Request for Residence Security Logs (7 pages)	02/13/1995	P5 500
004. memo	Draft memo from Miriam Nemetz to file; RE: Possible Assertion of Privileges (8 pages)	02/14/1995	P5 501
005. memo	Stephen Neuwirth to Abner Mikva; RE: Executive Privilege (1 page)	02/06/1995	P5 502
006. memo	Lloyd Cutler to Sandy Berger, et al. ; RE: Meeting on Congressional requests (2 pages)	06/09/1994	P5 503

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 23484

FOLDER TITLE:
Judge's Desk File on Whitewater, (1995)

Debbie Bush
2006-0320-F
db2038

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
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DRAFT 04/06/95
PRIVILEGED AND ~~CONFIDENTIAL~~
ATTORNEY-CLIENT/WORK PRODUCT

Q: What does the $10,000 deduction for "Legal and Tax Preparation " represent?

A: This represents payments made during 1994 for tax-deductible return preparation costs and legal expenses.

Q: Who paid this amount?

A: Mrs. Clinton paid this amount by checks.

Q: When was it paid?

A: In March 1994

Q: Why were payments made only at that time?

A:

Q: What was the legal bill for 1994:

A: The legal bills submitted to the Presidential Legal Expense Trust by Williams & Connolly for 1994 were $_____ and, the legal bills submitted by Skadden, Arps, Meagher & Flom were $_____.

Q: What is the total legal bill to date?

A: On February 3, the Presidential Legal Expense Trust announced that bills had been certified to it as outstanding as of December 31, 1994, for Williams & Connolly - $505,436, and for Skadden, Arps, Meagher & Flom - $476,246.

Q: Are the Clintons getting a free ride on their legal fees? (e.g., why are they able to postpone payment?) Isn't that a gift, like an interest-free loan?

A: No. As with many clients who suddenly face high legal expenses, they are unable to pay these bills on a current basis. The firms are continuing to bill for past as well as current legal expenses.

Q: What is the difference between the amount associated with "Legal and Tax Preparation" and the amount associated with "Accounting"?

A: The "Accounting" deduction of $3,000 is a payment made to the President's Little Rock accountants for accounting work in preparing a financial disclosure report.

Q: Why isn't there any reporting about the Clinton's legal defense fund?

A: None is required under the tax laws.

Q: Who determined that contributions to the fund are not income to the Clintons?

A: The Clintons' legal and accounting advisors.

Q: Who determined that income earned by the fund is not income to the Clintons?

A: The trust earned no income during 1994.

Q: What was the basis for these determinations?

A: Legal and accounting advisors determined the contributions to the fund were gifts, and therefore not taxable income.

Q: Is there a written opinion that can be made available to the press?

A: No.

Q: Is there a precedent for the decision not to treat any of this as income?

A: There is no specific precedent for this situation. However, under the Internal Revenue Code and a long line of judicial precedent, donations made out of he donors' generosity are recognized as tax free gifts.

G:\DATA\TP.001
DRAFT -- 2/13/95

PRIVILEGED AND ~~CONFIDENTIAL~~
ATTORNEY CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT

TALKING POINTS
RE REQUEST FOR RESIDENCE SECURITY LOGS

- Introduction. The President has made every effort to cooperate with the Office of Independent Counsel ("OIC"). However, the recent request for production of the Secret Service log that shows movement in and out of the First Family's living quarters moves this inquiry to a new level of intrusiveness and seeks a type of information that has not been produced before. In keeping with our continued cooperation, we are interested in working with you to see if there is another way to provide the information you need.

- The F-1 post log cannot be disclosed without intruding upon the privacy of the First Family and impeding the Secret Service's performance of its protective function.

  - The F-1 post logs are different from the perimeter gate logs and alarm logs that have been provided in the past. The gate logs and alarm logs involve the business end of the White House; the F-1 post log tracks arrivals and departures from the First Family's living quarters.

  - The log monitors the movement of members of the First Family, their personal staff, and their guests in and out of the Residence living quarters.

  - The F-1 post is the only Secret Service guard post in the White House where a log is maintained. The log is kept because of the unique security needs inside the living quarters, where Secret Service agents are normally not present.

  - By providing a record of who is in the living quarters at all times, the logs facilitate the maintenance of security by:

    - informing the Secret Service guard on duty whether the President and his family are "at home;" and

    - permitting an appropriate response to a security

breach.

- The logs do not perfectly reflect movement in and out of the living quarters.[1]

- The logs are an intrusion upon the privacy of the First Family, which they must tolerate for their own protection.

- The notion of using the logs to provide third parties with a round-the-clock chronicle of movement in and out of the President's home, for reasons unrelated to security, is simply offensive.

  - If requests such as this one were granted, those in need of protection would resist security procedures such as the maintenance of logs that allow the Secret Service to perform effectively but create opportunities for extraordinary invasions of privacy.

- <u>If the logs are disclosed to the OIC, there is substantial risk that they will ultimately be disclosed to the Congress and to the public.</u>

  - First, no grand jury is "leak-proof."

  - Second, production of information to the OIC increases the likelihood of Congressional demands for the same information.

  - Finally, the Independent Counsel statute creates additional disclosure risks. In an ordinary grand jury proceeding, the information gathered in the investigation normally remains confidential. Under the Independent Counsel statute, even if there is no indictment, the OIC must make a final report to the Division of Court "setting forth fully and completely a description of the work of the independent counsel." 28 U.S.C. § 594(h)(1)(B). Once the OIC makes its final report to the Division of Court, the Division may release to Congress, the public, or any appropriate person any portion of the report as it considers appropriate. <u>Id</u>. § 594(h)(2).

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[1] The Secret Service officers at the post do not always enter every entry and exit onto the log, particularly when groups of people are traveling together. Furthermore, the logs do not account for movement via other points of access to the living quarters, such as the public stairway or the service elevator.

- Estalished legal principles support protection of the logs from disclosure.

  - The principles underlying executive privilege support the confidentiality of Secret Service information.

    - In United States v. Nixon, 418 U.S. 683, 707-706 (1974), the Supreme Court recognized a constitutionally-based privilege of confidentiality for the President's communications with his advisors.

    - The privilege flows from the President's Article II powers:

      - "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar underpinnings." 418 U.S. at 705.

      - "Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." 418 U.S. at 711.

    - Although Nixon dealt with Presidential communications, the principles outlined in Nixon support the protection of confidential information related to Presidential security.[2]

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[2] The Court in Nixon also ruled that the Special Counsel had to make a showing of relevancy, admissibility, and specificity before obtaining discovery in connection with a criminal trial. 418 U.S. at 699-700. The Supreme Court has ruled, however, that the Nixon test does not apply to subpoenas issued in the context of a grand jury investigation. United States v. R. Enterprises., Inc., 498 U.S. 292 (1991). The Court found the test inappropriate in light of the "broad brush" of grand jury investigations, the undesirability of procedural delays in the grand jury process, and the strict secrecy of grand jury proceedings.

- That the President must be protected if he is to discharge his constitutional duties effectively is beyond dispute.

- As discussed above, disclosure of information generated by the Secret Service in protecting the President would impair its ability to perform its function.

- For this reason, the Secret Service has consistently asserted a privilege against disclosure by Secret Service agents of conversations they overhear in the course of protective assignments.

- For the same reason, other confidential information generated by the Secret Service in protecting the President must be protected from disclosure.[3]

o Even absent a claim of executive privilege, the President's privacy interests weigh heavily against production of the logs.

- Any person may resist a grand jury document

The OIC may cite the Enterprises case as justification for refusing to make a detailed showing why the F-1 post logs are relevant to its investigation. The Court in Enterprises stated:

> Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand jury proceedings. Broad disclosure also affords the targets of investigation far more information about the grand jury's internal workings than the Federal Rules of Criminal Procedure appear to contemplate.

Id. at 299 (citations and quotations omitted).

[3] We might also argue that the privilege attaching to Presidential communications should protect all records that indicate when and with whom the President meets, regardless of their relationship to Presidential security. In Nixon, however, "White House daily logs and appointment records," which allowed the Special Prosecutor "to fix the time, place, and persons present" at the discussions at issue, were apparently produced without protest. 418 U.S. at 688.

subpoena[4] on the ground that production of the material sought would be "unreasonable or oppressive." This recognition of privacy interests, even in the context of a grand jury investigation, argues in favor of an accommodation that would not require production of the logs.

- Federal Rule of Criminal Procedure 17(c) authorizes a federal district court to quash or modify a grand jury subpoena duces tecum "if compliance would be unreasonable or oppressive." See United States v. Calandra, 414 U.S. 338, 346 n.4 (1974).

- "[I]f a witness can show that compliance with the subpoena would intrude significantly on his privacy interests, or call for the disclosure of trade secrets or other confidential information," the court must conduct a balancing test to determine whether the information should be produced. United States v. R. Enterprises, Inc., 498 U.S. 292, 305 (1991) (Stevens, J., concurring in part and concurring in the judgment).

- We are aware of no basis for believing that the logs requested contain information specifically relevant to the investigation of the handling of documents from Foster's office.

- The President's privacy interests are entitled to more than ordinary weight. The courts have recognized the importance of protecting the privacy interests even of former Presidents. The privacy interests of a sitting President are entitled to even greater deference because politically motivated opponents may seek to acquire and use confidential information to embarrass or undermine him.

  - In Dellums v. Powell, 561 F.2d 242, 250 (D.C. Cir. 1977), the Court stated that "the privacy interests of a former President must be safeguarded."

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[4] The letter from the OIC requesting production of the logs does not refer to the subpoena previously issued to the White House. This may provide an opportunity to negotiate the request informally with the OIC, without bringing the matter before a court.

* In Dellums, the plaintiffs-appellants, who alleged civil rights violations in connection with the Nixon Administration's response to the "May Day" demonstrations held to protest American military involvement in Southeast Asia, subpoenaed tape recordings of President Nixon's conversations regarding the demonstrations.

* The Court found that the plaintiffs had demonstrated a "very strong entitlement" to the tapes, stating that other evidence suggested strongly that conversations about the demonstrations existed, and that evidence sought "could constitute the most direct and central sort of evidence for the plaintiffs' case." Id. at 248.

* Nevertheless, the Court did not allow the plaintiffs to comb through the tapes for relevant evidence, noting that Nixon would have to give the plaintiffs access to any records only "if such recorded conversations do exist." Id.

* Furthermore, the Court found that "the District Court erred in failing to provide adequate protection for Mr. Nixon's personal privacy interests in the material subpoenaed." Id. at 249.

  + "If the subpoena is read . . . as requiring an entire tape to be produced if any portion of it relates to the May Day demonstrations, plaintiffs would be entitled to discover all conversations recorded on such a day, including those of an intensely personal nature -- some of which would be subject to an independent common law privilege." Id. at 250.

  + The Court ordered that a professional government archivist be appointed a special master to transcribe those portions of the tape that contained relevant

nonpersonal information. Id.

- In Nixon v. Warner Communications, Inc., 435 U.S. 589, 602 (1978), the Supreme Court refused to require the district court to allow reproduction of tapes of presidential conversations played in the courtroom, noting "the danger that the court could become a partner in the use of subpoenaed material 'to justify public spite or promote public scandal.'"

- See also Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977) ("[P]ublic officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to acts done by them in their personal capacity"); Dellums v. Powell, 642 F.2d 1351, 1358 (1980) ("The claims and objections based upon the Presidential privilege and upon privacy . . . are entitled to a considerable measure of deference by the courts").

- Conclusion. The overlapping interests of Presidential security and privacy make production of the F-1 post logs extremely problematic for the White House. In order to avoid a litigated dispute, we propose working together to reach an accommodation that will satisfy the OIC's investigatory needs without making new and unprecedented inroads on the zone of security and privacy surrounding the First Family.

DRAFT
~~CONFIDENTIAL LAWYER~~ WORK PRODUCT
February 14, 1995

MEMORANDUM FOR THE FILE

FROM: Miriam R. Nemetz
Associate Counsel to the President

SUBJECT: Possible Assertion of Privileges In Connection With Subpoena to Bruce Lindsey

About forty of the documents responsive to the subpoena issued by the Office of Independent Counsel ("OIC") to Bruce Lindsey on December 8, 1994, have been withheld from production pending a final decision by the White House whether to assert the privileges that apply to them. The attached draft privilege log briefly describes each document and identifies the privilege or privileges that could be claimed with respect to each. This memorandum further describes the documents withheld and discusses the privileges that apply to them, with particular attention to the deliberative process and executive privileges. The memorandum also discusses why it may be appropriate to begin asserting privileges at this juncture.

I. Deliberative Process or Executive Privilege

The only privilege that potentially applies to most of the documents is the privilege that protects White House deliberative communications, which may be called either the deliberative process privilege or the executive privilege. These documents include drafts of letters and press statements, talking points, "Q's and A's," notes of conversations among White House staff, and similar materials generated by White House staff while developing responses to press reporting, congressional inquiries, and the independent counsel investigation regarding Whitewater. Also among the documents withheld are a few documents unrelated to Whitewater that Mr. Lindsey's attorneys have deemed responsive to the subpoena but which reflect internal deliberations regarding Presidential appointments.

The deliberative process privilege, which is frequently asserted by executive branch officials in civil litigation, applies to "written and oral communications comprised of opinions, recommendations, or advice offered in the course of the executive's decisionmaking process." [1] The Court of Appeals for the District of Columbia Circuit has stated:

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[1] G. Wetlaufer, "Justifying Secrecy: An Objection to the General Deliberative Privilege," 65 Ind. L. J. 845 (1990); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

> In deciding whether a document should be protected by the privilege we look to whether the document is "predecisional" -- whether it was generated before the adoption of an agency policy -- and whether the document is "deliberative" -- whether it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. . . . To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency. . . . [2]

The deliberative process privilege is not absolute, but may be overcome by sufficient showing of need.

The deliberative process privilege is closely related to executive privilege. Some courts have used the terms "deliberative process" privilege and "executive" privilege interchangeably.[3] The Office of Legal Counsel of the Department of Justice ("OLC") has generally viewed the deliberative process privilege as a prong of the constitutionally-based executive privilege:

> Executive privilege protects material the disclosure of which would significantly impair the conduct of foreign relations, the national security, or the performance of the Executive's lawful duties. It also shields confidential deliberative communications which have been generated within the executive branch from compulsory disclosure,

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[2] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[3] See, e.g., Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990) (discussing "the common law 'deliberative process' or 'executive' privilege'").

> in the absence of a strong showing of need by the branch seeking disclosure . . . .[4]

OLC has recognized, however, that the deliberative process prong of the executive privilege has common law as well as constitutional roots. For example, in an opinion addressing the propriety of withholding certain White House and presidential task force documents from production in a criminal proceeding, OLC concluded that the documents were "protected by the common-law governmental privilege and the constitutionally-based executive privilege for documents reflecting the deliberative process."[5]

Although there is precedent for treating the two privileges as distinct,[6] as a practical matter, it appears to make little difference which privilege -- "executive" or "deliberative process" -- is asserted with respect to the documents discussed herein, with the following caveats. First, it can be argued that presidential deliberations are entitled to more protection than the deliberations of other executive branch officials.[7] In United States v. Nixon, the Supreme Court

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[4] "Confidentiality of the Attorney General's Communications Counseling the President," 6 Op. O.L.C. 481, 484 (1982). See also, e.g., "Congressional Requests for Confidential Executive Branch Information," 13 Op. O.L.C. 185, 186 (1989) (alluding to "at least three generally recognized components of executive privilege: state secrets, law enforcement, and deliberative process"); 5. Op. O.L.C. 27 (1981) (recommending assertion of executive privilege in response to Congressional subpoena seeking deliberative, predecisional materials generated by the Department of the Interior).

[5] 6 Op. O.L.C. 564, 565 (1982); see also 6 Op. O.L.C. 481, 490 (1982) (Exemption 5 of FOIA codifies "the traditional common law privileges afforded certain documents in the context of civil litigation and discovery, including the executive 'deliberative process' privilege")(citations omitted).

[6] For example, in a recently filed brief, the Department of Justice stated explicitly that it was "not asserting executive privilege" with respect to the White House and Department of Interior documents that it was withholding pursuant to a claim of deliberative process privilege. See "Federal Defendants' Opposition to SAS's Motion to Compel," Seattle Audobon Society v. Lyons, Civ. No. C94-758WD (W.D. Wash.), Br. at 16 n.9.

[7] Indeed, one commentator has argued that, because the President is constitutionally distinct from other members of the executive branch, presidential communications are entitled to

emphasized "the singularly unique role under Article II of a President's communications and activities, related to the performance of duties under that Article:"

> [A] President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.[8]

Although it is not necessary to refer explicitly to the "executive privilege" rather than deliberative process to invoke this heightened protection, to decline affirmatively to assert a constitutional basis for the privilege and rely exclusively on the common law understanding of the deliberative process privilege might weaken the privilege claim.

Second, it can be argued that the constitutionally-based executive privilege protects even non-deliberative communications between the President and his close advisors. In United States v. Nixon, the Supreme Court appeared to recognize a "general privilege of confidentiality of Presidential communications in performance of the President's responsibilities."[9] The Court stated that "[t]he need for confidentiality even as to idle conversations with associates . . . is too obvious to call for further treatment."[10] If any documents that reflect direct communications with the President

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greater protection than the communications of other executive offices which are, "at least in some respect, creatures of the legislature." G. Wetlaufer, supra note 1, at 901-02.

[8] United States v. Nixon, 418 U.S. 683, 715 (1974). Although the Nixon case dealt with communications directly with the President, OLC has argued that, for the privilege to apply, "it is not essential that the communications for which the privilege claims have been directed to or emanated from the President himself." 6 Op. O.L.C. 481, 489 (1982). As OLC has noted, the Supreme Court in Nixon "recognized the need for the President 'and those who assist him [to] be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.'" Id. (quoting Nixon, 418 U.S. at 708 (emphasis supplied).

[9] 418 U.S. at 711.

[10] Id. at 715 (emphasis supplied).

but lack the deliberative and predecisional character that would bring them within the deliberative process privilege are withheld, the executive privilege rather than the deliberative process privilege should be explicitly invoked.[11]

II. Attorney-Client and Work Product Privileges

Another group of documents, which reflect communications to, from, or among attorneys in the Counsel's Office, are also protected by the attorney-client privilege. Some of these documents are outlines of responses to news articles, "talking points," and similar materials prepared by Neil Eggleston, who was the lawyer on the White House's "Whitewater Team." Others address more strictly "legal" matters, such as statute of limitations questions. Several other documents may be entitled to protection as attorney work product. These documents are memoranda drafted by attorneys in the Counsel's Office in connection with its preparation for congressional hearings, during Lloyd Cutler's tenure as Special Counsel.

All of the documents described above would also qualify for protection under the deliberative process or executive privilege, described above.[12] However, there may be reasons for asserting the attorney-client or work product protection instead of or in addition to the deliberative process privilege. First, unlike the deliberative process privilege, the attorney-client privilege, where it applies, is absolute. Second, in the event the President decides to waive executive privilege generally, he may want to draw the line at turning over documents that reveal the legal advice and/or work product of White House lawyers. The President would have a compelling argument that do so would prevent the Counsel's Office from functioning, and would in essence rob the White House of any legal representation before Congress or the OIC.

On the other hand, we should keep in mind the limitations of those privileges. First, the attorney-client privilege has been interpreted relatively narrowly in the District of Columbia Circuit as protecting a communication from an attorney to his client only to the extent that the communication reveals or is based, "in part at least," on a

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[11] We do not now intend to direct that any such documents be withheld from the Lindsey document production.

[12] See, e.g., Murphy v. Dep't of the Army, 613 F.2d 1151, 1154 (D.C. Cir. 1974) (memoranda from the General Counsel of the Army to the Secretary of the Army recommending legal strategy "a classic case of the deliberative process at work").

confidential communication from the client to the attorney.[13] A court could rule that some or all of the documents in question do not reflect confidential client communications. Second, the work product protection normally applies to documents prepared by an attorney in connection with litigation, or in anticipation of potential litigation.[14] The availability of work product protection for documents prepared in anticipation of congressional hearings is uncertain.

III. Relationship to Previous Policy

The White House asserted no privileges in connection with its response to the OIC subpoenas seeking documents relating to contacts between White House and Treasury officials concerning the RTC's Whitewater activities and the activities of the White House staff in connection with the Foster suicide. (We have withheld, but without explicit assertions of privilege, documents generated by the Counsel's Office in preparation for congressional hearings.) In connection with those phases of the OIC investigation, the President has frequently expressed his intention to cooperate fully with the OIC and has noted, as evidence of his cooperation, his waiver of executive privilege in those contexts.[15] I am aware of no statement by the President,

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[13] See In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (emphasis in original); Coastal States Gas Corp., 617 F.2d at 862 (attorney-client privilege protects documents generated by attorneys that may reveal "information which the client has previously confided to the attorney's trust); Mead Data Central, Inc. v. United States Dept. of Air Force, 566 F.2d 242 (D.C. Cir. 1977) (attorney-client privilege applicable to communications from attorney to client "based on confidential information provided by the client").

[14] See Hickman v. Taylor, 329 U.S. 495, 509-510 (1947).

[15] The President has made the following statements on the issue of assertion of privilege. On March 7, 1994, during a press conference, the President was asked a series of questions regarding the issue of White House-Treasury contacts regarding Whitewater. The President noted his intention to cooperate fully with the special counsel's subpoenas relating to the matter. Later, he was asked whether, as part of his commitment to cooperate, he would instruct his staff not to assert any privileges. The President replied, "I can't answer any of those questions because I haven't even thought about it." Transcript of Press Conference by President Clinton and Chairman Shevardnadze (3/7/94).

The following day, in the press conference announcing the appointment of Lloyd Cutler as Special Counsel, the President was

however, that he would never assert appropriate privileges in

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asked:

> To follow up on a statement that came up yesterday that perhaps you've had a chance to discuss with Mr. Cutler -- have you decided whether you're going to be able to -- invoking executive privilege and the lawyer-client relationship in response to all these inquiries?

The President responded:

> . . . [O]bviously, I have no way of knowing what will come up. But it is hard for me to imagine a case in which I would invoke it. In other words -- again, I can't imagine everything that -- it's difficult for me -- I thought about it a little bit, and we've talked about it a little bit. My interest is to get the facts out, fix the procedures for the future, get the facts out about what was known here and what happened, and cooperate with the special counsel. So I can't -- it's hard for me to imagine a circumstance in which that would be an appropriate thing for me to do.

Transcript of Remarks by the President in Appointment of Lloyd Cutler for Special Counsel to the President (3/8/94) (emphasis added). The President's answer was clearly directed to the issue of White House-Treasury contacts, which was the focus of attention at the time.

When turning over documents relating to the contacts issue in March 1994, Joel Klein noted that no documents were being withheld under a claim of attorney-client or executive privilege. The Washington Post (3/11/94). Later, the President also noted that he had not asserted any privileges. In a press conference on April 5, 1994, the President stated:

> [T]he Watergate special counsel, Sam Dash . . . said, Bill Clinton's not like previous administrations; they haven't stonewalled, they've given up all the information. Every time there's a subpoena they quickly comply. I've claimed no executive privilege; I've looked for no procedural ways to get around this. I say, you tell me what you want to know, I'll give you the information. I have done everything I could to be open and above board.

Transcript of President Clinton's Remarks in April 5 Event in Charlotte, N.C. (4/6/94).

response to an OIC document request.

There are important differences between the documents previously produced to the OIC and those sought by the subpoena to Mr. Lindsey that easily justify the assertion of privileges now. The documents subpoenaed from the White House in connection with the Foster and the contacts issues were generated by White House officials whose conduct as White House officials was being examined, and were created roughly contemporaneously with the conduct under investigation. In contrast, the current subpoena focuses on pre-inaugural events. The documents we now propose to withhold reflect only the White House's internal efforts to respond to the scrutiny of these past events, and thus are only "secondary sources" of information relevant to that inquiry. Any relevant information contained in the documents is more reliably and appropriately obtained elsewhere. The OIC's need for these documents is therefore minimal, and does not override the strong interests of the Presidency in maintaining the confidentiality of such internal White House documents.

THE WHITE HOUSE

WASHINGTON

February 6, 1995

MEMORANDUM FOR ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

FROM: STEPHEN R. NEUWIRTH
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: EXECUTIVE PRIVILEGE

A federal district judge recently upheld a formal claim of privilege by the Clinton Administration with respect to documents reflecting communications between the White House and executive branch agencies.

Private plaintiffs had sought those documents in the "spotted owl" litigation in Washington state, before Judge William Dwyer. Those documents addressed development of the Administration's plan for the Northwest forests.

This past summer, Lloyd and I strongly encouraged the Justice Department to assert some form of "executive privilege" in the litigation. At the time, the White House had withheld from two Congressional committees similar types of documents reflecting White House-agency communications.

The Justice Department asserted both the "deliberative process" privilege and, where appropriate, the attorney-client and work product privileges. The Department preferred not to use the term "executive privilege" for two reasons. First, OLC has traditionally taken the position that the deliberative process privilege -- like the attorney client or work product privilege -- is a species of executive privilege. Second, the attorneys handling the litigation (including Lois Schiffer) felt that the term "executive privilege" might generate a negative political reaction in the communities affected by the Administration's forest plan.

As you will see in the attached opinion, Judge Dwyer chose not to reach attorney-client or work product claims once he determined that the documents were privileged on deliberative process grounds. The Justice Department's brief on these issues is also attached.

Attachments

June 9, 1994

MEMORANDUM FOR SANDY BERGER
SUSAN BROPHY
SALLY KATZEN
BRUCE LINDSEY
SYLVIA MATHEWS
KATIE McGINTY
JACK QUINN
CAROL RASCO
ROBERT RUBIN

FROM: LLOYD CUTLER
STEPHEN NEUWIRTH

SUBJECT: 3:00 p.m. meeting today on Congressional requests for information concerning the White House role in agency rulemaking

The purposes of today's meeting are (1) to review the Administration's policy on the confidentiality of discussions between the White House and Executive Branch agencies on rulemaking and regulatory issues; and (2) to determine what action, if any, the White House should take in response to a written request to EPA from Senator Baucus seeking detailed information on the National Economic Council and its role in any EPA rulemaking, regulatory or policy matters since the start of the Administration.

Background

As you know, Senator Baucus, Chairman of the Senate Committee on Environment and Public Works, has been investigating EPA's promulgation of rules for compliance with statutory re-formulated gasoline (RFG) standards under the Clean Air Act. In May, the Senator sent to the White House written requests for information concerning what role, if any, the National Economic Council played in EPA's rulemaking process (including what contacts the White House had on the RFG issue with the Government of Venezuela and the Venezuelan oil company, PDVSA).

The White House provided Senator Baucus with comprehensive information on the involvement of NEC and other White House staff on the RFG issue, as well as information about the involvement of other offices in the Executive Office of the President (NSC, OMB and USTR). We explained that this information was subject to claims of executive privilege, but was being provided in a spirit of cooperation.

The White House also provided a description of the NEC's coordinating role in the Executive Branch. But we declined to provide a list, requested by Senator Baucus, of all EPA regulatory issues, during the period February 1993 to the present, in which the NEC was involved and the dates and participants of all meetings involving NEC that included discussions of EPA regulatory issues. We explained our view that this broad and extremely burdensome request is not appropriate in relation to the matter under investigation, and is totally unrelated to the RFG issue.

Senator Baucus has now directed a new set of broad requests to EPA, seeking comprehensive information on the relationship between the NEC and EPA since the start of the Administration. Senator Baucus now requests production by EPA of:

-- complete and unredacted copies of all correspondence, memoranda, reports, or notes received by EPA from the NEC;

-- a list of all NEC meetings attended by EPA staff during which matters involving EPA were discussed, including the dates, EPA staff in attendance, and the subject of the discussion; and

-- complete and unredacted copies of all notes, minutes, memoranda, reports, or correspondence prepared by EPA personnel pertaining to NEC meetings.

The approach taken by the Administration in responding to this request will set a precedent that could have broad ramifications for other policy councils in the White House.

We have attached copies of the White House correspondence with Senator Baucus, as well as Senator Baucus' most recent request to EPA. The White House responses to Senator Baucus should be treated as confidential and should not be distributed.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Lloyd Cutler to Max Baucus; RE: National Economic Council (NEC) (7 pages)	05/12/1994	P5 504
002. letter	Lloyd Cutler to Max Baucus; RE: Environmental Protection Agency (3 pages)	06/01/1994	P5 505
003. letter	Lloyd Cutler to Max Baucus; RE: National Economic Council (NEC) (4 pages)	06/17/1994	P5 506
004. letter	Gary S. Cuzy to David Finnegan; RE: Environmental Protection Agency (EPA) (2 pages)	06/17/1994	P5 507
005. letter	Abner J. Mikva to Reid P.F. Stuntz; RE: Environmental Protection Agency (EPA) (2 pages)	12/21/1994	P5 508
006. talking points	RE: Legal Team (2 pages)	12/13/1994	P5 509
007. draft	RE: Whitewater Team (2 pages)	01/20/1995	P5 510
008. draft	Draft Q&A's RE: Attorney-Client/ Work Product (1 page)	n.d.	P5 511
009. draft	Draft Q&A's RE: Attorney-Client/Work Product (3 pages)	04/06/1995	P5 512
010. draft	Recommendations; RE: Interagency Criminal Referral Form (7 pages)	12/01/1994	P5 513
011. memo	Jane Sherburne to the File; RE: Meeting with Independent Counsel (3 pages)	02/20/1995	P5 514
012. list	RE: Task List (12 pages)	12/13/1994	P5 515

COLLECTION:
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Beth Nolan
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FOLDER TITLE:
Judge's Desk File on Whitewater, (1995) [2]

Debbie Bush
2006-0320-F
db2039

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

May 12, 1994

Honorable Max Baucus
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your letter to Robert Rubin, dated April 28, 1994, concerning what role, if any, the National Economic Council (NEC) played with respect to the Environmental Protection Agency's promulgation in December 1993 of a final rule on reformulated gasoline.

As an initial matter, it should be noted that the NEC is a Cabinet-level council established by President Clinton pursuant to Executive Order 12835 (January 25, 1993). The membership includes the President; the Vice President; the Secretaries of State, the Treasury, Defense, Agriculture, Commerce, Labor, Housing and Urban Development, Transportation and Energy; the Administrator of EPA; the Administrator of the Small Business Administration; the Chair of the Council of Economic Advisers; the Director of the Office of Management and Budget; the United States Trade Representative; the Assistants to the President for Economic Policy and Domestic Policy; the National Security Adviser; and the Assistant to the President for Science and Technology Policy.

The principal functions of the NEC are to coordinate the economic policy-making process with respect to domestic and international economic issues; to coordinate economic policy advice to the President; to ensure that economic policy decisions and programs are consistent with the President's stated goals; and to monitor implementation of the President's economic policy agenda.

Pursuant to Executive Order 12835, the NEC staff is a White House staff group headed by the Assistant to the President for Economic Policy. The staff is responsible for carrying out the day-to-day tasks involved in coordination and integration of Administration economic policy.

In responding to your letter, we first set forth a skeletal chronology of events bearing on the questions in your April 28 letter, and then provide answers to those questions. The

information below is subject to claims of executive privilege, but is provided in a spirit of cooperation. In providing this information, we do not waive any such claims of executive privilege and reserve the right to assert such claims in the future.

In 1991, 1992 and 1993, EPA promulgated several proposed versions of a rule on compliance with statutory reformulated gasoline (RFG) standards. We understand that during the fall of 1992 and during 1993, EPA officials held a series of meetings -- including meetings with representatives of Petroleos de Venezuela (PDVSA), the Government of Venezuela, domestic refiners and officials of other agencies -- to discuss the proposed rule. We understand that officials of the State Department and the United States Trade Representative participated in discussions on the RFG issue with representatives of Venezuela and PDVSA during this period.

At the request of the Ambassador of Venezuela, W. Bowman Cutter, Deputy Assistant to the President for Economic Policy and a principal point of contact in the White House for international economic policy issues, met on December 6, 1993, with the Ambassador and two other Venezuelan government officials, and Venezuela registered its concerns -- including potential claims under the General Agreement on Tariffs and Trade (GATT) -- regarding the RFG issue.

On December 13, 1993, Sally Katzen, Administrator of OMB's Office of Information and Regulatory Affairs, met with representatives of PDVSA and discussed the Venezuela RFG issue.

On December 14, 1993, Mr. Cutter convened a meeting composed largely of deputy level officials to discuss the Venezuela RFG issue. The RFG rule under consideration by EPA implicated international economic and trade issues of concern to the Department of State and the United States Trade Representative (USTR). The purpose of this December 14 meeting was to allow an airing of issues arising from the different perspectives of the interested agencies. EPA reported that a court-ordered deadline of December 15, 1993, for promulgating a final rule would preclude resolution of the Venezuela RFG issue before the final RFG rule would be promulgated, but that EPA wanted to continue to meet with officials from Venezuela after the rule was promulgated. It was agreed that the State Department would advise Venezuela officials that EPA wanted to continue discussions notwithstanding the issuance of a final rule.

On December 15, 1993, EPA announced the promulgation of a final RFG rule. At the press conference announcing the rule, an EPA official noted that EPA was still considering the Venezuela RFG issue and would continue discussions with PDVSA.

On January 14, 1994, the Venezuelan government requested formal consultations on the December 15 final rule pursuant to Article XXII of the GATT. Venezuela claimed that the final rule constituted discrimination in violation of GATT, because it did not allow foreign refiners to establish individual baselines, as domestic refiners are allowed.

During February and March 1993, officials of EPA, USTR and the State Department continued discussions on the RFG issue with the Venezuelans, including a consultation pursuant to Article XXII of the GATT. This consultation was a normal procedure required by the GATT following a formal request from the Government of Venezuela.

Mr. Cutter called for an interagency meeting on the RFG issue to be held on March 14, 1994, to allow for a report on the status of EPA's continued discussions with the Venezuelans, and to provide an opportunity for airing issues with respect to steps EPA might take in response to those discussions. Mr. Cutter was unable to attend this meeting, and the meeting was chaired by Ms. Katzen of OIRA.

Ms. Katzen convened two additional follow-up interagency meetings, and one interagency telephone conference call, on the RFG issue during March and April of 1994. These meetings also addressed informal inquiries from Congressional offices regarding the Venezuela RFG issue.

On April 22, 1994, EPA promulgated a proposed RFG rule that would revise the final rule of December 15, 1993.

The NEC as a body of principals never met to discuss the Venezuela RFG issue. As noted, certain members of the NEC staff were involved in interagency meetings on the issue, meetings convened for the purpose of airing and coordinating the various agency perspectives on a matter that implicated national and international economic and trade concerns and involved a foreign government.

Set forth below are the specific answers to the numbered questions in your April 28 letter.

1. Five members of the NEC staff have worked on the Venezuela reformulated gas (RFG) rule issue: Robert E. Rubin, Assistant to the President for Economic Policy; W. Bowman Cutter, Deputy Assistant to the President for Economic Policy; Heather Ross, Special Assistant to the President; Sylvia Mathews, Special Assistant to Mr. Rubin; and Holly Hammonds, formerly Director to the NEC and the National Security Council.

2. The NEC as a body of principals never met to discuss the Venezuela RFG issue. Members of the NEC staff participated

in meetings as follows, according to the best recollections of those involved:

A group composed largely of deputy level officials met to discuss the Venezuela RFG issue on the evening of December 14, 1993, in Room 231 of the Old Executive Office Building. The RFG rule under consideration by EPA implicated international economic and trade issues of concern to the Department of State and the United States Trade Representative (USTR). The purpose of the December 14 meeting was to allow an airing of issues arising from the different perspectives of the interested agencies. Those attending the meeting were: Carol Browner, Administrator of EPA; Michael Vanderberg, Chief of Staff to the Administrator of EPA; Richard Wilson, Director for Mobile Sources, Air & Radiation, EPA; W. Bowman Cutter, Deputy Assistant to the President for Economic Policy; Heather Ross, Special Assistant to the President for Economic Policy; Samuel (Sandy) Berger, Deputy Assistant to the President for National Security; Sally Katzen, Administrator, OMB Office of Information and Regulatory Affairs; Joan Spero, Under Secretary of State for Economic and Agricultural Affairs; Ambassador Alexander Watson, Bureau of Inter-American Affairs, Department of State; and Ambassador Charlene Barshefsky, Deputy United States Trade Representative.

EPA continued discussions with the Venezuelans on the RFG issue after December 15, 1993. Mr. Cutter called for an interagency meeting to be held on March 14, 1994, to allow for a report by EPA on the status of EPA's continued discussions with the Venezuelans, and to provide an opportunity for airing issues with respect to steps EPA might take in response to those discussions, as well as the timing of any response to the Venezuelans. While this meeting did take place on March 14 in Room 180 of the Old Executive Office Building, Mr. Cutter was unable to attend, and the meeting was chaired by Sally Katzen, Administrator of OIRA. Holly Hammonds and Heather Ross of the NEC staff attended this March 14, 1994 meeting. Other attendees included Mary Nichols, Assistant Administrator, Air & Radiation, EPA; Mary Smith, Director of Field Operations & Support, Air & Radiation, EPA; Richard Wilson, Director for Mobile Sources, Air & Radiation, EPA; Joan Spero, Under Secretary of State for Economic and Agricultural Affairs; Edward Casey, Deputy Assistant Secretary of State for the Bureau of Inter-American Affairs; Kyle Simpson, Executive Assistant, Office of the Deputy Secretary of Energy; Wesley Warren, Associate Director, White House Office of Environmental Policy; Eileen Clausen, Special Assistant to the President for Global and Environmental Affairs, National Security Council; Bruce Lindsey, Assistant to the President and Senior Advisor; Barbara Chow, Special Assistant to the President for Legislative Affairs; Ambassador Charlene Barshefsky, Deputy United States Trade Representative; and Daniel Brinza, Senior Advisor and Special Counsel for Natural Resources, USTR.

After March 14, 1994, Ms. Katzen of OIRA convened two interagency meetings for agency representatives and White House staff at which the Venezuela RFG issue, including inquiries on the matter from Congressional offices, was discussed. One meeting was held in Ms. Katzen's office, Room 350 of the Old Executive Office Building; the second meeting was held in Room 180 of the OEOB. Sylvia Mathews attended both of these meetings for the NEC; Heather Ross of the NEC attended the second of these meetings.

Ms. Katzen also chaired an interagency telephone conference call on the Venezuela RFG issue on April 20, 1994. Robert Rubin, Heather Ross and Sylvia Mathews of the NEC each participated in this telephone conference call.

3. At the request of the Ambassador of Venezuela, Mr. Cutter met on December 6, 1993, with the Ambassador, the Economic Counselor of the Embassy of Venezuela, and the Minister of Energy of the Government of Venezuela. The Ambassador requested the meeting so that Venezuela could register its concern regarding the reformulated gasoline issue.

At the meeting, the Ambassador described Venezuela's point of view regarding the issue. In particular, the Venezuelans argued that if EPA were to adopt a rule that would not allow foreign refiners to establish individual baselines, as domestic refiners would be allowed, this would amount to discrimination in violation of the GATT.

Mr. Cutter asked at the meeting whether the Department of State and EPA were aware of the nature of Venezuela's concern. Mr. Cutter was told that the Venezuelans had been in frequent contact with both agencies throughout much of 1993 and that both agencies were well aware of the issue. Mr. Cutter thanked the Ambassador for providing this information and concluded the meeting.

This December 6 meeting was in no respects unusual. In addition to his responsibilities as day-to-day manager of the NEC staff, Mr. Cutter has functioned within the White House staff as a principal point of contact for international economic policy issues.

Neither Mr. Cutter nor other members of the NEC staff attended any other meetings with Venezuelan government officials or representatives of PDVSA concerning the Venezuela RFG issue. We understand, however, that representatives of Venezuela did meet regarding this issue with officials of various agencies of the United States Government.

4. Sally Katzen of OIRA met with representatives of PDVSA on December 13, 1993, and discussed the Venezuela RFG issue.

OIRA is an office within OMB, which is an agency within the Executive Office of the President.

Since February 1, 1993, members of the staff of the United States Trade Representative, also a separate entity within the Executive Office of the President, met with representatives of the Venezuelan Government and PDVSA and discussed the Venezuela RFG issue on several occasions. On April 23, 1993, representatives of the Venezuelan government raised the RFG issue with USTR staff at a U.S.-Venezuela Trade and Investment Council Meeting; the issue had not been formally on the meeting agenda. During November 1993, a member of the USTR staff attended a meeting between EPA officials and representatives of PDVSA at which the RFG issue was discussed. On December 10, 1993, USTR staff discussed the RFG issue with Venezuelan Energy Minister Parra and Ambassador Sosa, Emissary of the Venezuelan President-elect. On February 11, 1994, members of the USTR staff, as well as officials of the State Department and EPA, participated in a consultation with the Government of Venezuela, pursuant to Article XXII of the GATT, on the RFG issue. And on March 11, 1994, representatives of the Venezuelan government met with USTR staff to discuss Venezuela's position on the issue.

One member of the National Security Council staff met on a number of occasions with representatives of the Government of Venezuela, and on one occasion with representatives of PDVSA, during 1993 and 1994, where, among other issues, the Venezuela RFG issue was raised.

To our knowledge, no members of the staff of the White House Office other than Mr. Cutter met with representatives of the Venezuelan government or PDVSA regarding the Venezuela RFG issue. Several members of the White House Office staff did participate in meetings at which the Venezuela RFG issue was discussed.

5. The purpose and mission of the NEC includes, as noted above, coordinating and integrating the development of national and international economic policy for the President. A significant aspect of this mission is to assist in the coordination of different perspectives that emerge as agencies of the Executive Branch pursue their particular missions. In the case of the Venezuela RFG issue, it became clear that an action contemplated by EPA would implicate international economic and trade issues involving a foreign government -- including an asserted violation of the GATT -- of concern both to the Department of State and the United States Trade Representative. The role and responsibility of the NEC in this instance was to coordinate among the agencies involved so that there could be an airing of issues. It was for this purpose that the meetings of December 14, 1993, and March 14, 1994, were held.

6. At the December 14, 1993 meeting, EPA reported that there had been discussions between EPA and officials from Venezuela and PDVSA, that the December 15, 1993 deadline for promulgating a final rule precluded resolution of the Venezuela RFG issue before the final RFG rule would be promulgated, and that EPA wanted to continue to meet with the Venezuelans after the rule was promulgated. At the meeting, it was agreed that the State Department would inform Venezuelan officials that EPA wanted to continue discussions with the Venezuelans notwithstanding the issuance of a final rule. The NEC did not itself make any decision regarding these continued discussions.

7. The Venezuelan RFG issue was a specific instance of interagency coordination by the NEC staff where action by an agency implicated international economic and trade concerns, in this case involving a foreign government. The NEC typically is involved in issues requiring resolution of, or the development of a process for resolving, differences of perspective among different agencies. Such coordination necessarily covers the full spectrum of policy development, including Presidential decisions and initiatives, regulatory process, and legislative development. The NEC and the NEC staff have carried out coordinating activities across this full spectrum, and many of the issues addressed have involved EPA -- the Administrator of which is a member of the NEC -- because of that agency's important involvement in issues that have a significant economic dimension.

* * *

As you know, this Administration has been committed to ensuring a coordinated economic policy, and has given particular focus to the complex intersection of trade and environmental issues. The Administration believes firmly that a strong environmental policy is good economic policy, and looks forward to working with you and other members of Congress to realize that vision.

Sincerely,

Lloyd N Cutler

Lloyd N. Cutler
Special Counsel to the President

THE WHITE HOUSE

WASHINGTON

June 1, 1994

Honorable Max Baucus
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have received your letter of May 17, 1994, in which you have set forth additional questions concerning the Environmental Protection Agency's rule on reformulated gasoline (RFG).

As you know, my letter of May 12, 1994, explained that the National Economic Council as a body of principals never considered the Venezuela RFG issue. That letter also set forth that certain members of the NEC staff were involved in interagency meetings on the Venezuela RFG issue, meetings convened for the purpose of airing and coordinating the various agency perspectives on a matter that implicated international economic and trade concerns and involved a foreign government. As I noted, this Administration has given particular focus to the complex intersection of environmental and trade issues, and believes firmly that a strong environmental policy is good economic policy.

Set forth below are specific answers to the numbered questions in your May 17 letter.

1. We have attempted to provide you with accurate and complete information on the Venezuela RFG issue, including, among other things, information on any meetings on that issue involving members of the NEC staff and EPA. As explained in my letter of May 12, the Venezuela RFG issue was a specific instance of interagency coordination by the NEC staff where action by an agency implicated international economic and trade concerns.

You have also requested a complete list of all EPA regulatory issues in which the NEC was involved from February 1, 1993 to the present, and the dates of and participants in all meetings during that period that involved the NEC and included discussions of EPA regulatory issues. We do not believe this broad and extremely burdensome request is appropriate in relation to the particular matter you are reviewing, and it is totally unrelated to the Venezuela RFG issue.

2. As set forth in my letter of May 12, W. Bowman Cutter of the NEC convened a meeting on December 14, 1993, composed largely of deputy level officials, to discuss the Venezuela RFG issue. The purpose of the December 14 meeting was to allow an airing of issues arising from the different perspectives of the interested agencies. EPA reported that the Venezuela RFG issue could not be resolved prior to the court-ordered deadline of December 15, 1993, for promulgating a final rule. EPA also reported that it wanted to continue to meet with officials from Venezuela to continue discussions on the RFG issue after the final rule was promulgated.

As I explained in my May 12 letter, it was agreed at the December 14 meeting that the State Department would advise Venezuelan officials that EPA wanted to continue discussions notwithstanding the issuance of a final rule. It is a normal role of the State Department to communicate messages from the United States government to foreign officials. It was necessary to advise Venezuelan officials that EPA wanted to continue discussions because without such advice, the Venezuelan officials might construe the issuance of the final rule as the end of the matter. Among the issues that EPA wanted to continue to discuss with Venezuelan officials were those relating to monitoring and enforcement of individual baselines, issues that were necessary to resolve before the final rule promulgated on December 15 could be modified. As set forth in my letter of May 12, EPA announced on December 15 the promulgation of the final rule. At the press conference announcing the rule, an EPA official noted that EPA was still considering the Venezuela RFG issue and would continue discussions with PDVSA.

3. As set forth in my letter of May 12, one member of the National Security Council staff, the Special Assistant to the President and Senior Director for Inter-American Affairs, Richard Feinberg, met on a number of occasions during 1993 and 1994 with representatives of the Government of Venezuela, and on one occasion with representatives of PDVSA, where, among other issues, the Venezuela RFG issue was raised. As a Senior Director, Mr. Feinberg meets frequently with officials representing the Government of Venezuela as well as other Latin American countries.

In the context of a December 1993 visit to Venezuela to express United States support for the upcoming democratic elections, Mr. Feinberg met with Venezuelan Minister of Energy Parra to discuss the Venezuela RFG issue. Mr. Parra indicated that the RFG issue had become a national issue in Venezuela and raised trade concerns that could give rise to a GATT challenge. Mr. Feinberg listened to the Venezuelan Government's concerns about the international implications of the RFG issue and indicated that he would study the problem when he returned to Washington. During this same trip, Mr. Feinberg was briefed on

the general Venezuelan economic picture by Venezuelan officials and industry representatives, including representatives of PDVSA. These PDVSA representatives took the opportunity to raise the RFG issue with Mr. Feinberg.

Venezuelan government officials raised the RFG issue with Mr. Feinberg on other occasions, as they would other matters of importance to United States-Venezuelan relations. This occurred, for example, when a Venezuelan delegation visited Washington at some time after Mr. Feinberg's December 1993 trip to Venezuela. Consistent with his responsibilities, Mr. Feinberg recalls that he reported on the international implications of the RFG issue to the Deputy Assistant to the President for National Security.

4. As set forth in my letter of May 12, the meetings addressing the Venezuela RFG issue on December 14, 1993 and March 14, 1994, were not meetings of the NEC as a body of principals, though members of the NEC staff did attend both meetings. No NEC minutes were created for either of those meetings.

* * *

The information provided above, like the information in my letter of May 12, is subject to claims of executive privilege, but is provided in a spirit of cooperation. In providing this information, we do not waive any such claims of executive privilege and reserve the right to assert such claims in the future.

Sincerely,

Lloyd N. Cutler

Lloyd N. Cutler
Special Counsel to the President

SENT IN FINAL

June 17, 1994

Honorable Max Baucus
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have reviewed your letter to me, dated June 9, 1994, seeking additional information about the involvement of the National Economic Council in EPA regulatory matters other than the Venezuela RFG issue, from February 1993 to the present. I have also reviewed your letter to EPA Administrator Browner, dated May 24, 1994, seeking broad categories of information relating to meetings of the NEC, and communications between the EPA and the NEC, from January 1993 to the present.

We continue to believe that these broad requests to the White House and the EPA raise questions of executive privilege, go well beyond the particular matters you are reviewing, and are extremely burdensome to comply with. However, in an effort to cooperate with your Committee, we set forth below a list of issues giving rise to communications between the NEC and the EPA from January 25, 1993, to the present. This information is provided in response both to your June 9 letter to me and the first three questions of your May 24 letter to Administrator Browner.

As you know, the NEC is a Cabinet-level council established by President Clinton pursuant to Executive Order 12835 (January 25, 1993). The President and Vice President are both members of the Council, as is the Administrator of the EPA, an Executive Branch agency. The principal functions of the NEC, as set forth in Executive Order 12835, are to coordinate the economic policy-making process with respect to domestic and international economic issues; to coordinate economic policy advice to the President; to ensure that economic policy decisions and programs are consistent with the President's stated goals; and to monitor implementation of the President's economic policy agenda. The NEC staff is a White House staff group headed by the Assistant to the President for Economic Policy. The staff is responsible for carrying out the day-to-day tasks involved in coordinating and integrating Administration economic policy.

The Venezuelan RFG issue was a specific instance of interagency coordination by the NEC staff where proposed action by an agency raised international economic and trade concerns, in

this case involving a foreign government and a major multilateral treaty to which the United States is a party. The NEC is also involved in issues requiring resolution of differences of perspective among different agencies, each with a single mission of its own. The NEC and the NEC staff have carried out coordinating activities across this full spectrum, including the EPA, because of the economic as well as the environmental policy implications of that agency's major mission.

In fulfilling these duties since February 1993, the NEC staff has worked with the EPA on many issues. To the best of our knowledge, these include:

- Superfund;
- the Clean Water Act;
- the Safe Drinking Water Act;
- the Food Safety Act (including new legislation on pesticides);
- the BTU tax;
- Clean Air Act -- General Conformity;
- Clean Air Act -- Reformulated Gasoline;
- the 1993 Earth Day Executive Orders (the Executive Order on recycling and the Executive Order on Environmental Justice);
- Risk Assessment Principles;
- the Climate Change Action Plan;
- the Climate Change Post-2000 Strategy;
- Oil and Gas Incentives;
- issues relating to NAFTA;
- issues relating to trade and the environment;
- the Northwest Economic Adjustment Initiative;
- the Administration's wetlands policy;
- on-board refueling vapor recovery;
- the Administration's policy on regulatory takings;

- the White House Conference on Travel and Tourism;
- the proposed National Rural Summit;
- regulatory reform for small business;
- amendments to the Regulatory Flexibility Act;
- displaced workers;
- federal facilities clean-up;
- the working group on new and growing businesses;
- the working group on non-trade steel issues;
- the motor vehicle working group;
- the process, pursuant to the Climate Change Action Plan, to develop measures to significantly reduce greenhouse gas emissions from personal motor vehicles; and
- the Ozone Transport Commission rulemaking.

A number of these issues -- including regulatory reform for small business, steel issues, and the proposed rural summit -- fall outside the major mission of the EPA. The NEC and its staff ensured that the EPA had an opportunity to present to other departments and agencies its views on such issues.

Further details concerning deliberations and exchanges of advice at meetings of the NEC, or between the White House and the EPA, on any of the aforementioned issues are clearly protected by executive privilege. It is the Constitutional responsibility of the President to coordinate and resolve conflicting perspectives of agencies within the Executive Branch, including the EPA. It is also well established that the President (directly or through his staff) is entitled to oversee, and communicate his views on, rulemaking by Executive Branch departments and agencies. See, e.g., Sierra Club v. Costle, 657 F.2d 298, 405-08 (D.C. Cir. 1981); Meyer v. Bush, 981 F.2d 1288, 1297 (Silberman, J.), 1307 (Wald, J., dissenting) (D.C. Cir. 1993). See generally United States v. Nixon, 418 U.S. 683, 705, 708 (1974); Myers v. United States, 272 U.S. 52, 117, 135 (1926). With respect to EPA rulemaking under the Clean Air Act, the United States Court of Appeals for the District of Columbia Circuit has observed:

> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those

involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems.

Costle, supra, 657 F.2d at 406 (Wald, J.).

Where, as here, Congress has asserted a need for information and the Executive Branch has a legitimate, constitutionally recognized need to keep certain information confidential, each Branch has a duty to seek to accommodate the legitimate needs of the other. See generally United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977) ("each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation"). We have attempted to accommodate your Committee's interest in obtaining information by providing you with detailed information about the role of the NEC in the Venezuela RFG issue, as well as the information above about other issues giving rise to communications between the NEC and the EPA.

We will continue our efforts to arrive at a mutual accommodation as to any further information you require.

Sincerely,

Lloyd N. Cutler
Special Counsel to the President

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

JUN 17 1994

David Finnegan, Esq.
Counsel
Committee on Energy and Commerce
House of Representatives
Room 2123 Rayburn
Washington, D.C. 20515

Dear Mr. Finnegan,

Chairman Dingell's letter of April 21, 1994 requested that EPA produce various documents concerning a prior EPA proposal, under former President Bush's administration, on the use of ethanol in reformulated gasoline, as well as documents concerning the recent EPA proposal to require the use of renewable oxygenates in reformulated gasoline. Enclosed is EPA's response to this document request.

The vast bulk of the documents are not considered confidential by EPA. However, as we discussed, EPA does consider certain of the documents to be confidential and privileged under the deliberative process, attorney client, or attorney-work product doctrine. EPA does not intend to waive the protection of these privileges by releasing these documents to the Committee. These privileged and confidential documents have been segregated from other documents.

As we have discussed, EPA has been coordinating the treatment of certain documents with the White House. Based on a communication from Lloyd N. Cutler, Special Counsel to the President, certain responsive documents are being produced that reflect deliberations within the White House, or communications between and among the White House and executive departments and agencies. These documents are being provided to the Subcommittee in a spirit of accommodation. Any applicable claims of executive privilege are not waived, and the right to assert such claims in the future are reserved. These documents are identified separately in the production.

Certain other documents are not being produced at this time, as the Special Counsel to the President is continuing to examine them to determine whether they are subject to executive privilege. Mr. Cutler notes that he expects to discuss with you and the Subcommittee whether a mutually satisfactory accommodation can be reached that will take account both Congress' interest in obtaining information and the privilege accorded to deliberations within the Executive Branch.

With respect to EPA documents previously produced relating to foreign refiners, we at that time asserted several broad categories of privilege. We will refine this aspect of our request on Monday. Finally, a few offices are still reviewing their files to locate any responsive documents. I will promptly forward any additional documents that are obtained based on this search.

If you have any questions on this response to the Chairman's request for certain documents, please feel free to contact me at (202) 260-8040, or contact John Hannon of my staff at (202) 260-7634.

Sincerely,

Gary S. Guzy
Deputy General Counsel

enclosure

THE WHITE HOUSE

WASHINGTON

December 21, 1994

Reid P. F. Stuntz
Staff Director and Chief Counsel
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515-6116

Dear Mr. Stuntz:

I am writing in response to Chairman Dingell's letter, dated August 29, 1994, to Administrator Browner of the Environmental Protection Agency.

In June 1994, the Subcommittee on Oversight and Investigations convened a hearing on implementation of the Clean Air Act provisions regarding reformulated gasoline. In connection with that hearing, Chairman Dingell requested that EPA produce certain documents to the Subcommittee. EPA promptly produced a large volume of documents in response to that request. By letter dated June 17, 1994, Gary Guzy, Deputy General Counsel of EPA, also advised the Subcommittee that a small number of documents responsive to the request were subject to potential claims of executive privilege. Mr. Guzy explained in his letter that the White House and EPA sought to work with the Subcommittee to reach an accommodation with respect to these documents that would take account of both Congress' oversight interests and the privilege accorded to deliberations within the Executive Branch.

As you know, it has been our position that only fourteen documents responsive to the Chairman's June 1994 request (along with earlier drafts of those same documents) may be subject to executive privilege claims. We have already shown four of these documents to the Subcommittee staff.[1]

We agree with Chairman Dingell that discussions to date between the White House Counsel's Office and the Subcommittee staff have been productive. We are, of course, prepared to continue these discussions with you if you determine that further

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[1] The Chairman's August 29 letter requests that the documents at issue be returned by the White House to EPA. Please note, however, that EPA has always retained the originals of all of the documents in its files. The White House only received copies of the documents, and has reviewed them to determine whether they may be subject to claims of executive privilege.

discussions are warranted. The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege.

We look forward to continuing to work with you on the important issues within the Subcommittee's jurisdiction.

Sincerely,

Abner J. Mikva
Counsel to the President

cc: Jean Nelson
General Counsel
Environmental Protection Agency

December 13, 1994

Talking Points

1. Legal Team Structure

   a. JCS (in consultation with XX) will direct the counsel's office preparation with respect to issues related to the conduct of Administration officials that could become the subject of congressional hearings or press interest

      i. on major issues, counsel office preparation will include fact gathering and investigation, legal research and the preparation of briefing materials

      ii. at a minimum, lawyers will assemble for each issue, a binder that includes a vanilla summary of the issue, key documents, major press stories, and a set of hard hitting Qs & As.

   b. JCS also will be responsible for liaison with other investigations (e.g. Starr, Smaltz, GAO) and counsel for represented officials, including Kendall.

2. Legal Team Staffing

   a. Current staff who have familiarity with targeted issues will be designated to continue their work on such issues under JCS direction

   b. The legal team will be supplemented with additional lawyers as necessary. We immediately will add two (JCS wants three).

      i. Senior Lawyer, prosecutor type, to:

         (1) assist in liaison activity with independent counsels and lawyers for individuals

         (2) prepare for obstruction of justice issues (RTC KC investigation; DOJ[illegible]

handling of criminal referrals; some Jay Stephens)

(3) pick up unassigned issues [Tyson's, Brown, NationsBank, State Department, PIC etc.]

ii. Lawyer (Miriam Nemetz) to assist in preparation for hearings on Foster document handling

iii. [Lawyer for the Arkansas, pre-inaugural issues -- WDC, MGSL, Hale, Rose, etc.]

c. Support

i. Jennifer Dudley
ii. Legal Assistant
iii. Kim Holliday (Secretary)

January 20, 1995 5/0
Draft/Sherburne

Whitewater Team

1. Purpose -- To develop and implement a coherent offensive and defensive White House strategy for responding to inquiries directed at the character of the President or Mrs. Clinton.

2. Structure -- This objective will be implemented by the Office of White House Counsel under the direction of Judge Mikva. Jane Sherburne will oversee the operation of the Whitewater team, which will report through her to Judge Mikva. The team will consist of three components:

   a. Legal

      i. Sherburne (Special Counsel)
      ii. Fein (Associate Counsel)
      iii. Nemetz (Associate Counsel)
      iv. [additional lawyer]
      v. [other OWHC lawyers as issues require -- e.g. Cerf with respect to Travel Office]
      vi. [Ches Johnson - paralegal]
      vii. Lisa Connelly - intern
      viii. Jennifer Dudley - researcher

   b. Legislative

      i. Yurowsky (OWHC)

         (1) Ira Fishman (Leg - House)
         (2) [Mark Childress (Leg - Senate)]

   c. Communications

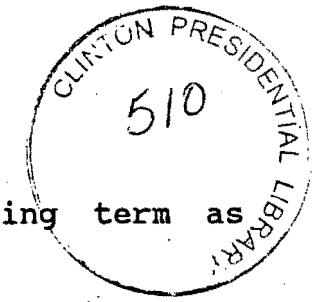
      i. [Fabiani or Eggleston (OWHC)]
      ii. [additional press assistant -- e.g. Schloss, Gauldon, LeHane]

3. Scope

   a. The team's <u>central focus</u> will be issues that involve <u>direct</u> challenges to the character of the President or Mrs. Clinton.

      i. pre-inaugural issues -- e.g.

         (1) Rose Law Firm
         (2) Commodities



(3) Whitewater investment
(4) Madison
(5) Gubernatorial campaigns
(6) Tyson relationship to WJC during term as governor

ii. post-inaugural character/integrity issues -- e.g.

(1) HRC role in White House (Foster documents, Health Care Task Force, Travel Office etc.)
(2) criminal referrals re Madison

iii. conduct of senior White House officials that is being characterized as reflecting on or relating to the character of the President or Mrs. Clinton -- e.g.

(1) White House/Treasury contacts
(2) Foster documents
(3) Travel Office

b. The team will not be primarily responsible for issues related to the conduct of cabinet secretaries, other White House officials (e.g. Magaziner, Watkins FEC issue) or topics that involve criticisms of the White House with more attenuated connections to character issues (e.g. Legal Defense Fund, White House budget & travel). However, OWHC lawyers working on any of these issues will consult and coordinate with the team to ensure a consistent White House response regarding matters that may have broader implications for congressional hearings, defense strategies, etc. Such matters would include the following:

i. questions involving the assertion of privileges
ii. requests for document production
iii. requests for witnesses
iv. potential criminal exposure

4. Process

a. daily team meetings with core (Sherburne, Yurowsky, [Eggleston/Fabiani]) and other as determined by the current agenda of "hot" issues

b. weekly meetings (more or less as necessary) with core team and Mikva or Deputy and others from the OWHC involved in the peripheral issues described in 3.b.

DRAFT
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ATTORNEY-CLIENT/WORK PRODUCT

What does the $10,000 deduction for "Legal and Tax Preparation" represent?

Who paid this amount?

When was it paid?

Why were payments made only at that time?

What was the total legal bill for 1994?

What is the total legal bill to date?

Are the Clintons getting a free ride on their legal fees? (e.g., why are they able to postpone payment?) Isn't that a gift, like an interest-free loan?

What is the difference between the amount associated with "Legal and Tax Preparation" and the amount associated with "Accounting"?

Why isn't there any reporting about the Clinton's legal defense fund?

Who determined that contributions to the fund are not income to the Clintons?

Who determined that income earned by the fund is not income to the Clintons?

What was the basis for these determinations?

Is there a written opinion that can be made available to the press?

Is there any precedent for the decision not to treat any of this as income?

DRAFT 04/06/95
PRIVILEGED AND ~~CONFIDENTIAL~~
ATTORNEY-CLIENT/WORK PRODUCT

Q: What does the $10,000 deduction for "Legal and Tax Preparation " represent?

A: This represents payments made during 1994 for tax-deductible return preparation costs and legal expenses.

Q: Who paid this amount?

A: Mrs. Clinton paid this amount by checks.

Q: When was it paid?

A: In March 1994

Q: Why were payments made only at that time?

A:

Q: What was the legal bill for 1994:

A: The legal bills submitted to the Presidential Legal Expense Trust by Williams & Connolly for 1994 were $_____ and, the legal bills submitted by Skadden, Arps, Meagher & Flom were $_____.

Q: What is the total legal bill to date?

A: On February 3, the Presidential Legal Expense Trust announced that bills had been certified to it as outstanding as of December 31, 1994, for Williams & Connolly - $505,436, and for Skadden, Arps, Meagher & Flom - $476,246.

Q: Are the Clintons getting a free ride on their legal fees? (e.g., why are they able to postpone payment?) Isn't that a gift, like an interest-free loan?

A: No. As with many clients who suddenly face high legal expenses, they are unable to pay these bills on a current basis. The firms are continuing to bill for past as well as current legal expenses.

Q: What is the difference between the amount associated with "Legal and Tax Preparation" and the amount associated with "Accounting"?

A: The "Accounting" deduction of $3,000 is a payment made to the President's Little Rock accountants for accounting work in preparing a financial disclosure report.

Q: Why isn't there any reporting about the Clinton's legal defense fund?

A: None is required under the tax laws.

Q: Who determined that contributions to the fund are not income to the Clintons?

A: The Clintons' legal and accounting advisors.

Q: Who determined that income earned by the fund is not income to the Clintons?

A: The trust earned no income during 1994.

Q: What was the basis for these determinations?

A: Legal and accounting advisors determined the contributions to the fund were gifts, and therefore not taxable income.

Q: Is there a written opinion that can be made available to the press?

A: No.

Q: Is there a precedent for the decision not to treat any of this as income?

A: There is no specific precedent for this situation. However, under the Internal Revenue Code and a long line of judicial precedent, donations made out of he donors' generosity are recognized as tax free gifts.

~~CONFIDENTIAL~~ - DRAFT FOR DISCUSSION ONLY

December 1, 1994

Marginal comments are LNC's.

RECOMMENDATIONS

- The Department of Justice and any other government entity involved in the development of the "Interagency Criminal Referral Form" should develop and implement uniform interagency policies for handling criminal referrals and criminal investigations involving the President, members of the President's family, and senior administration officials. These policies should address:

  (a) processing and routing of such criminal referrals;

  (b) efforts required to maintain the confidentiality of such criminal referrals, including detection and sanctioning of agency staff who "leak" information about criminal referrals and criminal investigations to the press or the public;

  (c) a method of providing notice to the agency head, the agency's general counsel, and the Director of the Office of Government Ethics; and

  (d) educating and updating agency staff on agency policies concerning criminal referrals and criminal investigations.

E.O. ~~also~~ advice from OGE, DJ etc.

- The Office of Government Ethics should promulgate a standard of conduct delineating what contacts between White House officials and executive branch officials are proper. (This could also be accomplished by Executive Order.)

Simply strike reg. & prior consultation

- To address the difficulties imposed by an extended Vacancy Act appointment, the Committee recommends consideration of the following two options.

  One option is to conduct a review of the enacting or enabling legislation for all agencies to ensure that that legislation provides for a succession policy and obviates the need for a Vacancy Act appointment. Under this option,

steps should also be taken to ensure that legislation creating any new agency contains an appropriate succession policy.

A second option is to amend the Vacancy Act to require the Office of Government Ethics or other designated ethics official to review and issue a written ethics opinion on actual and potential conflicts of interest which a Vacancy Act appointee may face as a result of that appointee serving two agencies.

COMMITTEE CONCERNS

The Committee's hearings have highlighted several issues including how to balance competing constitutional, policy, and historical concerns about the provision of White House officials with notice of a criminal referral or criminal investigation in which the President or a member of the President's family may be mentioned.[1]

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[1] In making Recommendations Nos. 1 and 2, the Committee is cognizant of the many arguments in favor of providing advance notice to the President. The Committee recognizes that historically, Presidents, including Presidents Nixon, Carter, and Reagan, have received advance notice of criminal investigations into both their own conduct as well as the conduct of senior administration officials. The Committee has also considered the constitutional arguments favoring the provision of such advance notice based on the "vesting" and "take care" clauses of Article II of the Constitution. Finally, the Committee has considered various public policy arguments--including that the President must be able to respond to press inquiries to govern effectively--in favor of giving advance notice to the President and members of the President's family of criminal referrals and investigations.

The Committee has also considered the many arguments against providing advance notice to the President. The Committee recognizes the negative effects advance notice in Watergate and Iran-contra matters have had on the office of the Presidency. The Committee has considered the "necessary and proper" clause of Article I which grants the Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested in this Constitution in the Government of the United States, or in any Department or Officer thereof." The Committee has considered the views of some constitutional experts challenging the constitutional basis of the strong unitary executive argument. Finally, the Committee has also considered the public policy arguments which militate against advance notice to the President, including the long-held notion that the United States is a government of laws, not of men and women. The Committee believes that public policy requires that the public have confidence in the system and not believe that some are above the law.

The Committee believes that Recommendations Nos. 1 and 2 take into account the historical lessons of Watergate, Iran-contra, and the investigation of the Carter family peanut business and that these recommendations fairly balance the competing constitutional and public policy concerns.

The Committee suggests that serious consideration be given to an Executive Order, legislation, or agency regulation along the lines set forth below. In making this suggestion, the Committee has attempted to balance competing concerns and propose a method to guide the provision of advance notice when it is most important. The Committee attempted to be comprehensive and to address a multitude of possible situations, thus, in making this suggestion, the Committee has gone beyond the specific factual situation which was the subject of these hearings.

No Department of Justice official, executive branch agency official, independent agency official, or other government official should provide advance notice to the President, a member of the President's family, any White House official, or any of their agents when the President or a member of the President's family (who resides with the President) is listed as a "suspect" in a criminal referral[2] or is designated a "subject" or "target" of a criminal investigation.[3]

Such an Executive Order, legislation, or agency regulation should not preclude the provision of advance notice where the President or a member of the President's family is listed solely as a "witness" in a criminal referral,[4] provided that the procedures for giving such advance notice, described below, are followed.

Formal advance notice shall be provided, pursuant to the procedure outlined below, by the Attorney General of the United States or the general counsel of the executive branch agency or independent agency responsible for a criminal referral or a criminal investigation in which a senior

---

[2] A "suspect" is defined in the Interagency Criminal Referral Form as a person "suspected of criminal violations(s)." (S. Hrg. 103-579 pp. 292-293)

[3] A "subject" of criminal investigations is defined in the United States Attorneys' Manual as a person "whose conduct is within the scope of a grand jury's investigation." A "target" of a criminal investigations is defined in the United States Attorneys' Manual as a person "to whom the prosecutor or grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. (United States Attorneys' Manual 9-11.150)

[4] "Witnesses" are defined in the Interagency Criminal Referral Form as a person who "might have information about the suspected criminal violation(s). (S. Hrg. 103-579 pp. 292-293)

administration official[5] is listed as a "suspect" or a "witness" in that criminal referral or is designated a "subject" or "target" of that criminal investigation.

The procedure for providing advance notice should include the following:

(a) The Attorney General or agency general counsel should provide the Director of the Office of Government Ethics with a written summary of the nature and status of the criminal referral or criminal investigation including all then known and anticipated witnesses, suspects, subjects, and targets.

(b) The Director of the Office of Government Ethics should review the written summary provided and, unless the President or a member of the President's family (who resides with the President) is also listed as a "suspect" in a criminal referral or as a "subject" or a "target" of a criminal investigation, shall transmit the written summary of the criminal referral or investigation to the President, White House Counsel, Attorney General, and, if one has been appointed for that referral or investigation, Independent Counsel. At the same time, the Director of Government Ethics should transmit with these materials a written advisory that, among other things, misuse of the advance notice or other conduct which constitutes obstruction of a criminal investigation will be subject to punishment.

[N.B.: We may wish to consider adding a national security/foreign policy exception.]

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[5] For purposes of this recommendation, a "senior administration official" is a any person appointed by the President and confirmed by the United States Senate.

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December 1, 1994

RECUSAL

A. Recommendations

- The OGE should amend the standards of conduct to clarify the procedures to be followed where a government employee has an appearance of a lack of impartiality that stems from a relationship other than a "covered relationship," as that term is defined by 5 C.F.R. §2635.502(b)(1).

- The OGE should amend the standards of conduct to require that the public perception of an appearance of a lack of impartiality be weighted more heavily in the balancing of factors used to determine whether a government employee should recuse/disqualify himself from a matter.

- The OGE should amend the standards of conduct to cause the process of recusal/disqualification to become more uniform. The OGE should consider whether all recusals and disqualifications should be made in writing, dated, signed and/or filed in a certain location. The OGE should consider the public disclosure requirements of the Freedom of Information Act in determining the proper regulations recommended by this section.

B. Additional Committee Concerns

- The Committee is concerned that the current OGE standards of conduct do not adequately define the circumstances under which government employees may communicate with other government employees regarding recusal issues. Specifically, the Committee is concerned that the current standards of conduct do not adequately define the circumstances under which actual or apparent conflicts of interest should prohibit such intragovernmental communications. The OGE should consider promulgating new standards of conduct to provide additional guidance in this important area.

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December 1, 1994

Recommendations for Witnesses wishing to "correct the record" after Congressional Testimony before the Committee on Banking, Housing, and Urban Affairs

It is recommended that the Committee on Banking, Housing, and Urban Affairs ("Banking Committee") adopt rules which will reflect the following:

Witnesses providing testimony before the Banking Committee are expected to testify truthfully, accurately, completely and candidly. However, there are times when a witness realizes, albeit belatedly, that their testimony as given is inaccurate, may be misinterpreted or may be misleading. It is the witness' duty and obligation to correct that testimony as quickly as possible; corrections and amplifications should be effected while the hearing is still in progress if possible. Oral or written notification should be given to the Chairman and Ranking member that the witness wishes to correct or amplify upon an answer and a decision will then be made whether to allow the correction at the time or to request it later in writing.

The Committee will endeavor to provide a transcribed copy of each witnesses' testimony to the witness or agency for which the witness testified as soon as possible after it is received by the Committee. All government witnesses should review their testimony immediately upon receipt of the transcription. If a witness realizes or is advised that an answer is wrong, incorrect or misleading that witness should advise the Chairman and Ranking member immediately, in writing of the inaccuracy. Corrections and amplifications to the record should be made no later than 7 calendar days after the official stenographic transcript is received by the witness or the witnesses' agency unless a longer period is requested and allowed by the Chairman.

Mikva

~~CONFIDENTIAL~~ LAWYER WORK PRODUCT
DO NOT COPY

February 20, 1995

MEMORANDUM TO THE FILE

FROM: Jane Sherburne
Special Counsel to the President

SUBJECT: Meeting With Independent Counsel

On February 20, 1995, White House Counsel Abner Mikva and I met with Independent Counsel Kenneth Starr, Mark Tuohey and John Bates in their Washington D.C. offices. We discussed the following:

1. We provided telephone directories in response to a request by the Independent Counsel.

2. We asked the Independent Counsel to consider alternative ways of obtaining the information they were seeking from the "FI Post Logs." Tuohey agreed to consider our request and get back to us.

3. We requested that the Independent Counsel make arrangements for White House witnesses to enter the grand jury unobserved. We were assured that such arrangements could and would be made and that White House witnesses would be advised of procedures to follow.

4. We noted that Tuohey had told Sherburne there were only four White House employees who would be receiving Arkansas subpoenas but that we had learned of at least seven who had received them. Tuohey apologized and confirmed there had been no more than seven.

5. Tuohey advised that some of the problems with press leaks originated with witnesses who talked to others about their subpoenas or appearances. He suggested we might advise White House witnesses to be discreet. He and Starr emphasized their efforts to prevent leaks from the Independent Counsel operation. Sherburne described the latest "leak" as reported to her by AP -- that the Independent Counsel is investigating the entry of Foster's office by yet another woman during the night of July 20-21. Starr and Tuohey encouraged us to continue reporting leaks to them. Tuohey, disavowing facetiousness, invited Sherburne to give him her ideas about who the woman might be.

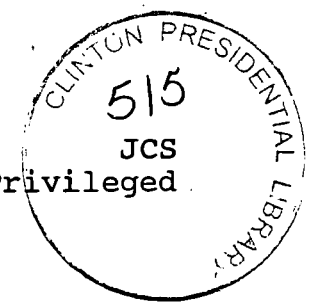
6. When asked about reports and timing, Starr said he planned to issue a report on the Foster death sooner rather than later, although he declined to predict when that might be. With respect to the Foster document handling issue, Starr said that his current inclination is to wait to issue a report or complete his investigation until after he has the benefit of congressional hearings that may turn up something that his own inquiry missed. We vigorously objected, pointing out that it was in his interest as well as ours to avoid politicizing his inquiry. Starr said he would consider our views.

7. In response to a question, Tuohey said the Indepdendent Counsel would be interviewing White House officials or taking them before the grand jury on the subject

of White House/Treasury contacts over the next few weeks. He and Starr agreed to rethink the protocols for notifying us about who they expected to interview or subpoena in response to our concern that their testimony implicated important privilege questions about which the White House had an interest and ought to be consulted.

8. The Independent Counsel expects to request further interviews from WJC and HRC on subjects pertaining to the Washington and Arkansas phases of the investigation.

9. Starr is continuing to evaluate D'Amato's request for the transcripts of the earlier depositions given by WJC and HRC. He has concerns that the presence of Lloyd Cutler and David Kendall at the deposition weakens the argument that the depositions are protected by the grand jury secrecy rule. He observed that these concerns have implications for the manner in which the Independent Counsel conducts further depositions. We agreed to provide an analysis of the issue to supplement Kendall's prior letter on the subject. In any event, Starr said that the Independent would not release the transcripts during the pendency of his investigation.



Task List
December 13, 1994

1. Issues

a. Foster document handling (Nemetz)
b. Travel Office (Cerf)
c. White House/Treasury contacts (revisited; report) (JCS)
d. obstruction of justice (DOJ handling of criminal referrals; Jay Stephens; RTC whistleblower reprisals) (**)
e. use of White House resources for response efforts (Nolan)
f. Foster suicide (Nemetz)
g. Espy (ethics; expanded Smaltz inquiry re Tyson's, Hatch Act) (Mills/Nolan/**)
h. Cisneros (**)
i. Brown (**)
j. Hubbell (**)
k. Ickes/union representation (**)
l. Stephanopoulos/NationsBank (**)
m. State Department -- passport files (**)
n. Archives -- abuse of personnel system (**)
o. Legal Defense Fund (Mills)
p. Health Care Task Force (Neuwirth)
q. White House operations (drugs, passes, helicopters) (Mills/Nolan)
r. residence renovations (Neuwirth)
s. presidential immunity (Sloan)
t. White House Arkansans (Thomasson, Nash, Rasco) (**)
u. PIC surplus (**)
v. improper electioneering (SBA) (**)
w. GSA (Roger Johnson) (**)
x. Value Partners (Neuwirth)
y. presidential campaign (FEC audit) (**)
z. commodities (Kendall/**)
aa. gubernatorial campaigns (Lindsey, Wright) - record keeping (Kendall/**)
ab. gubernatorial campaigns - MGSL (Kendall/**)
ac. Whitewater/MGSL (Kendall/**)
ad. other MGSL/McDougal (Kendall/**)
ae. Rose Law Firm (HRC work for MGSL; Frost Case, FSLIC representation) (Kendall/**)
af. David Hale/Susan McDougal/SBA (Kendall/**)
ag. Tucker (**)

ah. Lasater (bond deals; cocaine; Roger Clinton) (**)
ai. use of loans to achieve legislative initiatives (**)
aj. ADFA (political favors; Larry Nichols) (**)
ak. Mena Airport (**)
al. troopers (**)
am. women (Kendall/Bennett/**)

2. Preliminaries

a. identify key republican objectives and routes for achieving them -- e.g.

i. sustain shadow on WJC character
ii. hype HRC threat to white men, traditional women

b. identify guiding principles for response -- e.g.

i. nothing to hide
ii. stick to the facts
iii. get it right the first time
iv. keep it simple
v. resist harassment
vi. govern America

c. executive privilege research

i. OLC state of the play
ii. comments by republicans re assertion
iii. protocol
iv. strategy/principles for asserting

d. research re entitlement of Congress to HRC/WJC transcripts of depositions given to Fiske

e. research re congressional subpoena power

i. reach (HRC/WJC)
ii. precedents
iii. committee rules
iv. procedures

f. research re limitations on legislative power to investigate

i. legislative purpose
ii. overreaching precedents$^{n}\approx\delta$

g. learn new Hill committee jurisdiction, membership

h. courtesy visits to Hill -- member and staff level (eg. Frank, Sarbanes, leadership; Harris, Meek, etc.)

i. consultations

j. offensive structure

i. FEC legal research
ii. W&C
iii. DNC/DCCC/DSCC
iv. surrogates

k. representation of Administration officials by private counsel

i. compensation

l. research re proper role of OWHC with respect to pre-inaugural issues with an aim toward articulating principles for determining who should be principal spokesperson on a particular issue and the extent to which each (private counsel/OWHC) should participate.

3. Foster Document Handling

a. independent counsel inquiry

i. set meeting with Starr

(1) identify options with respect to issuance of report

(a) precedents

(2) inquire about status and timing
(3) HRC/WJC depositions

ii. status check with counsel for individuals

b. congressional hearings

i. identify likely committees (Senate Banking; House Banking, Gov Ops, Judiciary)

(1) identify friends -- key Members and staff

(2) identify leadership
(3) identify key republicans

ii. congressional visits

(1) Daschle
(2) Sarbanes & other Banking
(3) house

iii. prepare background materials

(1) assemble public record
(2) talking points and fact memoranda

iv. determine how to handle representation of individual White House staff

(1) outside counsel
(2) attorney fees
(3) assertion of privileges

c. press strategy

d. surrogate role

i. Hamilton
ii. identify others

e. offensive research

f. issue specific tasks

i. security/Livingstone issues

(1) debrief Joel
(2) review Livingstone file
(3) consult with Randy Turk
(4) interview Livingstone
(5) fact memo

ii. inconclusiveness re Williams removal of documents

(1) confer with Ed Dennis
(2) debrief Joel re security officer
(3) assemble public reports of document removal on 7/20 and statements attributed to White House officials[n≈δ]

iii. chain of custody re transfer of Clinton personal files

(1) complete interviews

(a) Carolyn Huber
(b) Linda Tripp
(c) Deborah Gorham
(d) Bob Barnett
(e) Syvia Mathews

(2) fact memo
(3) assemble public record
(4) determine strategy re release of WDC file

iv. search of Foster office

(1) assemble public record

(a) including any relevant testimony at Senate hearing on Foster suicide in July 1994

(2) fact memo
(3) legal research

(a) obligation to seal the office immediately

(b) obligation to cooperate with law enforcement authorities vs. protection of privileged material

(c) basis for protecting disclosure to Congress of privileged material in VF office

(i) basis for resisting identification/production of all documents in VF office and Bernie's safe

v. delay in surfacing suicide note

(1) complete interviews

(a) Gergen
(b) Burton

(2) assemble material in public record

(3) fact memo

(4) legal research

(a) obligations to disclose a note to law enforcement authorities

(i) if not obviously a suicide note

(ii) timeliness requirements

4. Foster suicide

a. Chris Ruddy/Center for Western Journalism
b. causes for suicide
c. monitor Senate report; coordinate with Hamilton
d. develop press response

5. Obstruction of Justice

a. delay in addressing criminal referrals; DOJ role (D.C. and Paula Casey)

i. determine usual process
ii. develop chronology/fact memo with key documents

(1) Charles Banks
(2) Paula Casey
(3) (track Lewis correspondence released by Leach)

iii. identify Committee interest (D'Amato; House)
iv. assemble public record

b. RTC/Kansas City investigation (suspension of Jean Lewis, Richard Iorio etc.; April Breslaw; pre-1993 activity)

i. develop chronology of known facts and key documents
ii. interview Breslaw
iii. identify Committee interest (Leach; Senate)
iv. examine last day of House hearings for offensive help

c. Jay Stephens retention

i. track public record
ii. identify efforts to give IC civil jurisdiction
iii. identify Committee interest (D'Amato; House)

6. White House/Treasury contacts

a. Senate Report

i. review/comment on Report
ii. keep in touch with Minority Report developments
iii. prepare press strategy
iv. identify surrogates

b. White House investigation of White House/Treasury contacts (receipt of information about RTC investigation; work product; redactions)

i. prepare file memorandum describing use of unredacted transcripts
ii. determine continuing Bond interest

c. Truthfulness of White House and other Administration witnesses (referral of testimony to Starr -- Ickes, Stephanopoulos)

i. consult with lawyers
ii. identify areas of vulnerability
iii. research re perjury
iv. press response

d. Heads-up policy

i. surrogates
ii. uniform application
iii. Treasury status
iv. press strategy for release of Committee report
v. work up background paper on precedents

e. Recusal policies/OGE/Executive Orders

i. press strategy for release of Committee report
ii. background paper
iii. consult with OGE
iv. consider Executive Order or other response to Committee"≈δ

f. Contacts policy (Executive Order)

i. press strategy for release of Committee report
ii. background paper
iii. consult with OGE
iv. consider Executive Order or other response to Committee

g. Rikki Tigert

i. determine her first likely congressional appearance in the new congress
ii. assemble public record
iii. interview Gergen, Tigert and Klein re communications on the subject of recusal

(1) determine response to allegations of "pressure"
(2) determine response to allegation that Klein misled the committee

iv. determine press strategy/talking points

7. Smaltz Investigation

a. Espy -- ethics (Mills)
b. beyond Espy ethics (Hatch Act, Tyson's)

i. determine charter, scope of inquiry
ii. determine press strategy
iii. identify congressional interest
iv. assemble public record
v. fact gathering

8. White House Whitewater response effort

a. legal research

i. the appropriate role of White House staff with respect to issues arising pre-inauguration (see above)

b. fact development (scope of effort, etc.)

c. determine press strategy/develop talking points

d. assemble public record

i. Lindsey involvement pre-1994 n≈δ

ii. Ickes' Ward Room undertaking (1/94)
iii. Podesta damage control effort

9. Cisneros

a. gather facts
b. establish contact with counsel
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d. identify source of congressional interest
e. assemble binder with summary and key documents

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a. establish contact with counsel
b. determine press strategy/develop talking points
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11. Hubbell

a. monitor cooperation
b. determine press strategy/develop talking points

12. Ickes (union representation)

a. monitor
b. assemble binder with summary and key documents

13. Stephanopoulos (Nationsbank)

a. monitor
b. assemble binder with summary and key documents

14. State Department (passport files)

a. identify issue
b. determine congressional interest
c. assemble binder with summary and key documents

15. Archives (abuse of personnel system)

a. identify issue
b. determine congressional interest
c. assemble binder with summary and key documents

16. SBA (improper electioneering)

a. identify issue
b. determine congressional interest
c. assemble binder with summary and key documents

17. GSA (Roger Johnson)

a. identify issue
b. determine congressional interest
c. assemble binder with summary and key documents

18. FEC Audit

a. determine congressional interest
b. assemble binder with summary and key documents

19. PIC surplus

a. identify issue
b. determine congressional interest
c. assemble binder with summary and key documents

20. MGSL-related

a. Whitewater Investment

i. assemble public record
ii. review documents, including work of accountants and tax returns; Lyons reports
iii. develop fact memo and chronology
iv. press strategy

b. MGSL

i. assemble public record
ii. review W&C documents
iii. develop fact memo and chronology
iv. fact memo

(1) why MGSL failed; relationship of campaign contributions to failure
(2) Rose Law Firm work (HRC 1985)

(a) conflicts
(b) enabled MGSL to stay open longer than it should have

v. surrogate strategy

c. Rose Law Firm

i. fact memo

(1) status of conflicts inquiry
(2) Frost case[n]≈δ

(3) Rose services to FSLIC related to Lasater brokerage firm (HRC 2 hours in 1987, signed pleadings for VF)
(4) billing practices

ii. assemble public record
iii. determine press strategy

d. David Hale

21. Other Pre-Inaugural

a. Gubernatorial Campaigns

i. identify issues

(1) whether expenditures and loans were properly reported under state law

(a) Lindsey role
(b) Betsey Wright

(2) role of the Bank of Cherry Valley

(3) Starr looking at 1984, 1986, 1990

ii. interview Kendall; review Kendall documents
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b. Negative Associations

i. Jim Guy Tucker
ii. David Hale (SBA)
iii. Jim McDougal
iv. Dan Lasater (bond deals, cocaine, Roger Clinton)

c. Mena Airport

i. identify issue
ii. determine congressional interest
iii. assemble binder with summary and key documents

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i. identify issue (political favors)
ii. determine congressional interest[n]≈δ

iii. assemble binder with summary and key documents

e. Use by Governor Clinton of loans to further legislative initiatives

i. identify issue
ii. determine congressional interest
iii. assemble binder with summary and key documents

f. Commodities

i. determine congressional interest
ii. assemble binder with summary and key documents

g. Paula Jones

i. assemble binder with summary and key documents

h. Troopers

i. identify issue (job for silence, other)
ii. determine congressional interest
iii. assemble binder with summary and key documents[n]≈δ

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	To Jim; RE: Privilege (1 page)	n.d.	P5 S16
~~002a. note~~	~~Lynn; RE: Telephone number [partial] (1 page)~~	~~n.d.~~	~~P6/b(6)~~
~~002b. note~~	~~RE: Attorney Work Product (1 page)~~	06/05/1998	P6/b(6)
~~002c. note~~	~~RE: Telephone number [partial] (1 page)~~	~~n.d.~~	~~P6/b(6)~~
~~002d. note~~	~~RE: Handwritten notes (9 pages)~~	~~12/14/1998~~	~~P6/b(6)~~
003. list	RE: Sherburne Memo (10 pages)	12/13/1994	P5 S17

COLLECTION:
Clinton Presidential Records
Counsel's Office
Sally Paxton
OA/Box Number: 13851

FOLDER TITLE:
Whitewater

Debbie Bush
2006-0320-F
db2041

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Jim –

I think we need to be more careful of leading questions.

People investigated in Whit-Castro =

Do we have a privileged relationship w/ Mari?

According to the 4TH Circuit, yes.

not the DC?

The Wall Street Journal Interactive Edition – September 6, 1996
Sherburne Memo

JCS
Privileged

Task List December 13, 1994

1. Issues
a. Foster document handling (Nemetz)
b. Travel Office (Cert)
c. White House/Treasury contacts (revisited; report) (JCS)
d. obstruction of justice (DOJ handling of criminal referrals; Jay Stephens; RTC whistleblower reprisals) (**)
e. use of White House resources for response efforts (Nolan)
f. Foster suicide (Nemetz)
g. Espy (ethics: expanded Smaltz inquiry re Tyson's, Hatch Act) (Mills/Nolan/**)
h. Cisneros (**)
i. Brown (**)
j. Hubbell (**)
k. Ickes/union representation (**)
l. Stephanopoulos/NationsBank (**)
m. State Department–passport files (**)
n. Archives–abuse of personnel system (**)
o. Legal Defense Fund (Mills)
p. Health Care Task Force (Neuwirth)
q. White House operations (drugs, passes, helicopters) (Mills/Nolan)
r. residence renovations (Neuwirth)
s. presidential immunity (Sloan)
t. White House Arkansans (Thomasson, Nash, Rasco) (**)
u. PIC surplus (**)
v. improper electioneering (SBA) (**)
w. GSA (Roger Johnson) (**)
x. Value Partners (Neuwrith)
y. presidential campaign (FEC audit (**)
z. commodities (Kendall/**)
aa. gubernatorial campaigns (Lindsay, Wright)–record keeping (Kendall/**)
ab. gubernatorial campaigns – MGSL (Kendall**)
ac. Whitewater/MGSL (Kendall/**)
ad. other MGSL/McDougal (Kendall/**)
ae. Rose Law Firm (HRC work for MGSL; Frost Case, FSLIC representation) (Kendall/**)
af. David Hale/Susan McDougal/SBA (Kendall/**)
ag. Tucker (**)
ah. Lasater (bond deals; cocaine; Roger Clinton) (**)
ai. use of loans to achieve legislative initiatives (**)
aj. ADFA (political favors; Larry Nichols) (**)
ak. Mena Airport (**)
al. troopers (**)
am. women (Kendall/Bennett?**)

2. Preliminaries

a. identify key republican objectives and routes for achieving them—e.g.
i. sustain shadow on WJC character
ii. hype HRC threat to white men, traditiional women

b. identify guiding principles for reponse—e.g.
i. nothing to hide
ii. stick to the facts
iii. get it right the first time
iv. keep it simple
v. resist harassment
vi. govern America

c. executive privilege research
i. OLC state of the play
ii. comments by republicans re assertion
iii. protocol
iv. strategy/principles for asserting

d. research re entitlement of Congress to HRC/WJC transcripts of depositions given to Fiske

e. research re congressional subpoena power
i. reach (HFC/WJC)
ii. precedents
iii. committee rules
iv. procedures

f. research re limitations on legislative power to investigate
i. legislative purpose
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g. learn new Hill committee jurisdiction, membership

h. courtesy visits to Hill—member and staff level (eg. Frank, Sarbanes, leadership; Harris, Meek, etc.)

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j. offsensive structure
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k. representation of Administration officials by private counsel
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l. research re proper role of OWHC with respect to pre-inaugural issues with an aim toward articulating principles for determining who should be principal spokesperson on a particular issue and the extent to which each (private counsel/OWHC) should participate.

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i. set meeting with Starr
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(1) identify friends--key Members and staff
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(1) Daschle
(2) Sarbanes & other Banking
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iii. Prepare background materials

(1) Assemble public record
(2) Talking points and fact memoranda

iv. Determine how to handle representation of individual White House staff

(1) outside counsel
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i. Hamilton
ii. Identify others

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2. Review Livingstone file
3. Consult with Randy Turk
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a. Carolyn Huber
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2. fact memo
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a. Including any relevant testimony at Senate hearing of Foster suicide in July 1994
2. fact memo
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a. obligation to seal the office immediately

b. obligation to cooperate with law enforcement authorities vs. protection of privileged material
c. basis for protecting disclosure to Congress of privileged material in VF office
i. Basis for resisting identification/production of all documents in VF office and Bernie's safe

d. delay in surfacing suicide note

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(a) Gergen
(b) Burton

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(a) obligations to disclose a note to law enforcement authorities

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c. monitor Senate report; coordinate with Hamilton
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a. Delay in addressing criminal referrals; DOJ role (D.C. and Paula Casey)
i. determine usual process
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1. Charles Banks
2. Paula Casey
3. (track Lewis correspondence released by Leach)

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i. develop chronology of known facts and key documents
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ii. keep in touch with Minority Report developments
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d. Heads-up policy

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i. press strategy for release of committee report
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b. beyond Espy ethics (Hatch Act, Tyson's)

i. determine charter, scope of inquiry
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a. legal research

i. the appropriate role of White House staff with respect to issues arising pre-inauguration (see above)

b. fact development (scope of effort, etc.)

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i. Lindsey involvement pre-1994
ii. Ickes' Ward Room undertaking (1/94)
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a. identify issue
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(1) why MHGSL failed; relationship of campaign contributions to failure
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(1) status of conflicts inquiry
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(4) Billing practices

ii. assemble public record
iii. determine press strategy

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i. determine congressional interest
ii. assemble binder with summary and key documents

g. Paula Jones

i. assemble binder with summary and key documents

h. Troopers
i. identify issue (job for silence, other)
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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001. memo~~	~~Middleton to Stock; RE: Moores' home telephone number (partial) (1 page)~~	~~07/19/1994~~	~~P6/b(6)~~
002. memo	Nancy H to Ann Stock; RE: Yeltsin Dinner (1 page)	08/25/1994	P5 518
~~003. schedule~~	~~RE: Personal telephone numbers and manifest [partial] (2 pages)~~	~~09/18/1994~~	~~P6/b(6), b(7)(E)~~
004. memo	~~RE: Personal telephone numbers and message (1 page)~~	~~n.d.~~	~~P6/b(6)~~
005. list	~~RE: Home addresses [partial] (3 pages)~~	~~n.d.~~	~~P6/b(6)~~

COLLECTION:
Clinton Presidential Records
Counsel's Office
Shelli Peterson
OA/Box Number: 13462

FOLDER TITLE:
Whitewater Production - Mannatt and Moore: Miscellaneous

Debbie Bush
2006-0320-F
db806

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

MEMORANDUM

TO: ANN STOCK

FROM: NANCY H

RE: YELTSIN DINNER

8/25/94

Mark Middelton feels very strongly that both Steve Green and John Moores should be invited to the State Dinner. They have done an incredible amount for us and may have to be called on again. Please give them very serious consideration for this event.

I would only invite celebrities who have done things for us.

These are the ones I think should be invited who are on your list. (i.e., those other than Members of Congress, staff, State Dept. Officials and **Cabinet officials.**

REDACTED

John and Becky Moores

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Marsha Scott to Bo Cutter and Sandy Berger; RE: APEC (1 page)	09/22/1994	P5	519

COLLECTION:
Clinton Presidential Records
Counsel's Office
Shelli Peterson
OA/Box Number: 13462

FOLDER TITLE:
Whitewater Production - Lippo and Subsidiaries: APEC

Debbie Bush
2006-0320-F
db2043

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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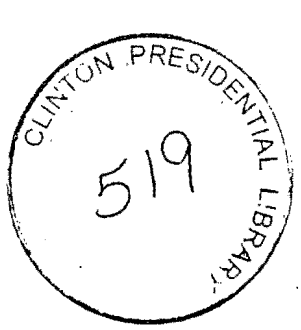

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: **BO CUTTER**
SANDY BERGER

CC: MACK MCLARTY
BRUCE LINDSEY

FROM: **MARSHA SCOTT**
DATE: **SEPTEMBER 22, 1994**

SUBEJCT: **APEC**

Even though the President is not the host of APEC, there is need for coordination with all of the entities who are going to be present from the United States. Will Ito received the memo from Vida Benevides of the DNC about having Ron Brown lead an independent delegation. She proposes that we host various briefings and receptions following a model we adapted for the Seattle APEC. There is also a delegation from Arkansas to be lead by Senator David Pryor and Governor Jim Guy Tucker. Among his friends included in that group will be Jim and Diane Blair and Curt Bradbury.In conjunction with that state delegation, there will also be a large number of business representatives and friends of the President such as Webb Hubbell, Mark Grobmeyer and spouses, who will be present as invited guests of the Indonesian hosts or their friends (i.e. James Riady).

When James Riady was here last week for a brief visit with the President, he (James) made three requests:

1. He wanted to be allowed to see the President and have access during the APEC trip. The President said, "sure, anytime."
2. He asked that the President visit his father's home for a brief visit or drink.
3. He suggested that the President stop and play golf in Bali after the conclusion of APEC. The Bali course is rated one of the five best in the world. Needless to say this was a welcome suggestion.

I understand the need to downplay our official presence since we are not hosting this conference. However, it is imperative that we take control of the side meetings that are being arranged and going to occur, so that we can minimize the President's exposure to potentially embarrassing situations. I, of course, would love to be involved because I do know all of these folks. However, I will work with anyone you assign.

I did speak briefly to the President about what I knew to be going on and asked him to give you direction. Please help him to follow up on this. Thanks...

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	North ~~China Power Group; RE: Dates of birth, Passport numbers, and SSN (partial) (1 page)~~	~~n.d.~~	~~P6/b(6)~~
002. memo	John E. to Veronica; Craig; Antonella; RE: Asian Pacific Appointments (1 page)	05/23/1994	P5 520
~~003. resume~~	~~Mi Ryu Ahn; RE: Date of Birth, SSN, home address, and home telephone number (partial) (1 page)~~	~~06/08/1995~~	~~P6/b(6)~~
~~004. resume~~	~~Peter A. Alexander; RE: Home address, telephone number, date of birth, and SSN (partial) (2 pages)~~	~~n.d.~~	~~P6/b(6)~~

COLLECTION:
Clinton Presidential Records
Counsel's Office
Shelli Peterson
OA/Box Number: 13462

FOLDER TITLE:
Whitewater Production - Lippo and Subsidiaries: Miscellaneous

Debbie Bush
2006-0320-F
db808

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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To: Veronica; Craig; Antonella
Fr: John E.
Dt: May 23, 1994
Re: Asian Pacific Appointments

We are getting heat, especially from California, on our record of Asian Pacific American appointees. Several that are of importance are:

Redacted

John Huang, who is, I believe, in the process somewhere for a job at Commerce (he is a friend of the POTUS, too).

These appointments would get us good "bang for the buck" within the community. Thanks.

cc: Alexis Herman; Doris Matsui