MEMORANDUM

TO: Ken Starr, Bill Duffey, Mark Tuohey, John Bates, Sam Dash

FROM: Brett Kavanaugh

DATE: January 25, 1995

RE: Application of Rule 6(e) to Sworn Statements of the President and the First Lady

Per Ken’s request, I have preliminarily examined the question whether the sworn statements of the President and the First Lady are covered by Rule 6(e)’s secrecy requirements. In anticipation of our meeting Friday, I thought a brief written outline of the issue, as well as my views on it, might be helpful. This memorandum is not intended to be an exhaustive or final legal analysis. (Attached to this memorandum is a letter from Williams & Connolly on the issue.)

1. Some factual background: First, Mark Stein informed me that there was no oral or written agreement between the President (and First Lady) and the Fiske team reached before the testimony on June 12, 1994, with respect to whether the Fiske team would consider the transcripts 6(e) material. Someone should double-check this point with Bob Fiske and perhaps Williams & Connolly as well. Second, the Fiske team gave Congress the 302’s relevant to the Foster death issue and to the White House-Treasury contacts issue after the Fiske team had concluded its investigation into those matters. Fourth, the Fiske team gave Congress those portions of the President’s transcript and the First Lady’s transcript that dealt with the Foster death issue, but it did not produce those portions dealing with the White House-Treasury contacts issue (or the Foster documents issue). The Fiske team thus treated parts of the transcripts as equivalent to 302’s.

2. Despite noises from the Hill, I do not see why Congress would want to obtain the transcripts at this point. We are pursuing active, ongoing investigations into both the Foster documents issue and the White House-Treasury contacts issue; and as Congress well knows, the standard practice of the Department of Justice is not to give Congress documents pertaining to

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1 Rule 6(e) states in relevant part: "A[n] attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."

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an open investigation. Congress can override that practice, but it almost never does, according to the Department of Justice.\(^2\) We need to emphasize this point to Congress, which I am not sure we have done yet. In short, even if we consider the transcripts equivalent to 302’s (as Congress wishes) rather than equivalent to grand jury transcripts (as Williams & Connolly wishes), we should not yet give the transcripts to Congress because they relate to an open (albeit in part "reopened") investigation.

To be sure, the Fiske team gave Congress the 302’s it had gathered in connection with the contacts and Foster death issues, but that alone should not constitute a waiver of our ability -- consistent with the traditional practice of the Department of Justice -- to keep our records secret until these reopened investigations are complete.

3. Once we complete our investigations into the contacts issue and the Foster issues, we must decide whether to turn over 302’s on completed individual investigations or wait until we conclude the entire investigation. That will be a tricky issue with Congress, and one we should discuss at some length before final resolution is reached. (Keep in mind that we have no legal authority to prevent Congress from obtaining these 302’s.) In any event, if we decide not to turn over any 302’s before the end of the entire investigation, it logically must follow that we should not voluntarily turn over the transcripts of the President’s testimony and the First Lady’s testimony before the end of the entire investigation.

4. If and when: (1) we give 302’s to Congress; or (2) Congress subpoenas the President’s transcript and/or the First Lady’s transcript from us, the question whether the transcripts are protected by Rule 6(e) will be squarely presented.

In considering the broad question of what are "matters occurring before the grand jury" for purposes of Rule 6(e), it is useful to consider the two kinds of grand jury subpoenas. With respect to a subpoena duces tecum, it would seem that the information in the subpoena itself and the documents returned pursuant to the subpoena should be considered matters occurring before the grand jury. (To my surprise, some courts have held that the documents returned pursuant to a subpoena are not matters occurring before the grand jury. See U.S. Department of Justice, Federal Grand Jury Practice pp. 159-160 (1993).) With respect to a subpoena ad testificandum, it similarly would seem that the information in the subpoena itself and any testimony before the grand jury should be considered matters occurring before the grand jury. And, indeed, that is what the courts have held. See id. at p. 158.

What about transcripts or reports of interviews that are conducted outside the presence of the grand jury (and that by definition therefore are not compelled by grand jury subpoena)? The

\(^2\) Mary Hardenriker, 514-2419, who is Counsel to the Assistant Attorney General for the Criminal Division (JoAnn Harris).
question seems to answer itself: An interview conducted outside the presence of the grand jury is not a matter occurring before the grand jury. See In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3rd Cir. 1982) ("information developed by the FBI, although perhaps developed with an eye toward ultimate use in a grand jury proceeding, exists apart from and was developed independently of grand jury processes"); see also Andaya v. United States, 815 F.2d 1373 (10th Cir. 1987) ("there is a clear distinction between a memorandum of the testimony given by a witness before the grand jury and a memorandum of what that person told an investigator outside the grand jury room").

In the analogous situation where documents obtained independently of the grand jury's subpoena power are later given to the grand jury, courts do not consider the documents to be covered by Rule 6(e). See U.S. Department of Justice, Federal Grand Jury Practice pp. 158-159 (1993) ("Rule 6(e) usually does not govern the disclosure of documents obtained by means independent of the grand jury. This is true even when such documents later have been examined by the grand jury, or made grand jury exhibits, so long as disclosure of the documents does not reveal that they were exhibits."). That approach seems faithful to the language of the Rule. As applied to transcripts of witness interviews, therefore, the grand jury transcript of the reading of the transcript or report of prior testimony should be covered by Rule 6(e), but the original transcript or report of the prior testimony should not be covered by Rule 6(e).

There is, however, at least one circuit case stating that Rule 6(e) applies in cases where a person's statement outside of the grand jury is later read to the grand jury. In a Third Circuit case, In re Grand Jury Matter, 697 F.2d 511 (1982), the court held (without any analysis) that "[n]o meaningful distinction can be drawn between [grand jury] transcripts and witness interviews conducted outside the grand jury's presence but presented to it. Thus, Rule 6(e)(2) governs the disclosure of the witness interviews."

I doubt that many courts today would reach that conclusion. Courts now pay much closer attention to the precise language of rules and statutes than they previously did. See e.g., Central Bank of Denver v. First Interstate Bank, 114 S. Ct. 1439, 1449 (1994). Under the plain language approach to the interpretation of statutes and rules, it is difficult to understand how a witness interview that occurs outside the grand jury (and is not therefore compelled by a grand jury

3 If the Rule were otherwise, it could be easily manipulated. A document obtained without subpoena, or a transcript or report of an interview that occurred outside the grand jury, could be transformed magically into a matter occurring before the grand jury simply by reading the document or transcript or report to the grand jury.

4 It may be relevant to note that court's predilections: "Were we writing on a clean slate, we might well hold that disclosure of any matter generated in connection with a grand jury proceeding is governed by Rule 6(e)(2)." Id. at 512.
subpoena) can be considered a matter occurring before the grand jury -- regardless of what subsequently happens before the grand jury. The language of the Rule is not sufficiently elastic to cover testimony not compelled by the grand jury and not given before the grand jury. As I stated above, therefore, the most natural reading of Rule 6(e) as applied to transcripts or reports of non-grand-jury witness interviews is that: (1) the grand jury transcript of the reading of the transcript or report of prior testimony is covered by Rule 6(e); but (2) the original transcript or report of the prior testimony is not covered by Rule 6(e). Reasonable minds certainly can differ on this point, however, so we should discuss this at some length on Friday.\footnote{The Criminal Division's manual Federal Grand Jury Practice states that "statements obtained from witnesses who have been subpoenaed to appear before the grand jury ordinarily should be treated the same as grand jury testimony." P. 167. Beale and Bryson state, however, that "a statement made by a witness outside the grand jury context is not a matter occurring before the grand jury, even if the statement is identical to the witness's grand jury testimony." Grand Jury Law and Practice § 7.06, at p. 26. I agree with Beale & Bryson: A grand jury subpoena by law cannot be used to compel an interview outside the presence of the grand jury, so a witness' testimony given outside the grand jury after issuance of a grand jury subpoena is not compelled by the grand jury, much less a matter "occurring before the grand jury." In any event, this issue is not relevant here because no grand jury subpoena was ever issued to the Clintons.}

5. One other possible argument in favor of non-disclosure of the transcripts is as follows: An implicit exception to Rule 6(e) should apply when the President is involved given the time demands of the President, the security demands with respect to the President, etc. Under this approach, a President's statement outside the grand jury context could be considered the equivalent of grand jury testimony. I find the argument unpersuasive. First, there is no plausible argument that this interpretation is necessary to save the President's time so that he can work on important issues (unlike in the Paula Jones suit, for example). The President would spend almost as much time on a sworn statement as he would on a grand jury appearance. And the security issue seems especially dubious. The President jogs by the Federal Courthouse, so it would be rather strange to say that security issues prevent the President from appearing before the grand jury inside the courthouse.

Perhaps there could be some kind of argument based on the "dignity of the Presidency" and/or separation of powers. This argument seems weak, however, given the deeply rooted history and tradition of this country's jurisprudence that the President is not above the law. Why should the President be different from anyone else for purposes of responding to a grand jury subpoena ad testificandum? Once in the grand jury room, the President might claim executive privilege if asked about certain communications, but that seems a different issue altogether. Cf. also United States v. Nixon, 418 U.S. 683, 709, 713 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense. . . . We conclude that when the
ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.

Even were there a Presidential exception to the definition of "matters occurring before the grand jury," that exception likely would not apply to the First Lady. Indeed, I see far less justification for the First Lady to obtain an implied exception to 6(e) than I do for Cabinet Secretaries, for example.

Recommendations for Action

2. We should inform Congress as soon as possible that the portions of the transcripts they have requested relate to open, active investigations and that, at this point, we are relying on that rationale as the basis for non-disclosure.

3. We should decide whether, after individual investigations (the Foster documents investigation, for example) have concluded, we will produce 302's to Congress.