PRESIDENT'S TRANSCRIPT - GRAND JURY SECRECY

Office of the Independent Counsel

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

July 18, 1995

FOR IMMEDIATE RELEASE

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

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

LAW OFFICES
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725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005
(202) 434-5000
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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

July 11, 1995

VIA HAND DELIVERY

~~CONFIDENTIAL~~

Honorable Kenneth W. Starr
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Starr:

Thank you for your letter dated July 6, 1995, which Judge Mikva and I have carefully considered. We are sensitive both to the needs of your investigation and to what you have properly described in your letter as "the dignity of the Office of the Presidency . . . [,] the demands upon the Chief Executive's schedule and the privileges appurtenant to his Office."

We appreciate the approach your office has taken, and we believe that we have on our part extended unprecedented cooperation to your investigation in providing documents, waiving privileges, furnishing information, and making available the President and the First Lady on multiple occasions for sworn testimony. Our clients have sought to accommodate your investigation's scheduling concerns, as expressed by Messrs.

Tuohey, Ewing, Lerner, and Bates at our meeting on June 23, 1995, by making themselves available during the week of July 18, as you requested. To facilitate your investigation, we also suggested that the President and Mrs. Clinton be examined on that occasion with regard to follow-up questions you might have from the so-called "Washington phase" of this matter. We will continue to work with you to assure that this investigation may be completed as fairly and speedily as possible.

We remain of the view, however, as expressed in my June 29 letter to Mr. Tuohey, that the procedures we have mutually agreed upon for the first two interviews, with both your office and Mr. Fiske's, continue to be a satisfactory and appropriate accommodation of, on the one hand, the institutional interests of the Presidency, and, on the other, your need for my clients' sworn testimony.

At my June 23 meeting with Mr. Tuohey et al., I explained the significant practical prejudice that would result from changing these procedures midway in the investigation, and we perceive no justification for doing so even after our lengthy discussions at that meeting.

It is true that there appear to be three occasions on which a President or an ex-President has given videotaped testimony for a court proceeding (in the Fromme, Poindexter, and Kidd/Lingold cases). These cases are plainly distinguishable

from the present situation because they involved criminal trials, with a specific liberty interest of a particular defendant at stake and with attendant constitutional guarantees of confrontation, compulsory process, and due process. Nor is the fact that President Carter might once have given videotaped testimony for the grand jury in the Vesco matter persuasive precedent, if in fact he did. That circumstance would have been very different from this one. Here, the proposed testimony is not an isolated event, different rules have applied from the start, and a change in procedure would be deeply prejudicial.

In any event, quite different rules apply to grand jury proceedings. The evidentiary rules of a criminal trial do not, for example, apply in a grand jury setting, and a grand jury may consider even hearsay evidence. Costello v. United States, 350 U.S. 359 (1956). By following the mutually agreed upon procedures for the first two interviews, the grand jury will have the benefit of the President's sworn testimony on questions you deem relevant. Moreover, as in the past interviews, you and your colleagues who are present will have a full opportunity to observe demeanor and responsiveness and to make such credibility judgments as you deem appropriate.

We sincerely believe that the procedures we have followed for the first two interviews continue to be an appropriate reconciliation of our respective interests.

[redacted]

Sincerely,

David E. Kendall

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

Draft Letter to Senator D'Amato

I write in response to your request for the transcripts of the sworn testimony given by President Clinton and Mrs. Clinton to Independent Counsel Robert B. Fiske, Jr., on June 12, 1994.

Last summer, Mr. Fiske submitted to the Senate those portions of the transcripts that concerned the death of Vincent Foster.

As you know, there is a longstanding tradition, rooted in principles of executive privilege, that federal prosecutors do not provide Congress records pertaining to matters then under investigation. "[T]he policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances. This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower." Office of Legal Counsel of the United States Department of Justice, Response to Congressional Requests for Information Regarding Decisions Made under the Independent Counsel Act, 10 U.S. Op. Off. Legal Counsel 68, at 7 (1986). That policy "is grounded primarily on the need to protect the government's ability to prosecute fully and fairly." Ibid. It is our understanding that the Department of Justice and the Congress have consistently adhered to this policy, even with respect to investigatory records that are not subject to Rule 6(e).

In accord with this policy, I must decline to disclose the transcripts. I appreciate and welcome the views of you and your staff on this issue. Thank you for your consideration.

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
Suite 490N
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
telephone (202) 514-8688
facsimile (202) 514-8802

TO: Professor Sam Dash

Company Name:

Fax Number: 202- 662-9444

Message:

SENDER: Brett Kavanaugh

Number of Pages: 2 **(including this cover sheet)**

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John,
As this is an important/delicate letter, please feel free to edit heavily + rewrite. Brett

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It is true that the reasons for nondisclosure of investigatory files lose some of their force once an investigation has been closed without further prosecution. Id. at __. As I have stated, however, the matters discussed [redacted] under investigation by this Office. Therefore, I must decline to disclose those transcripts to you at this time.

I very much welcome the views of you and your staff on this issue. Thank you for your consideration.

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

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in view of appearances before the grand jury

question whether

as yet

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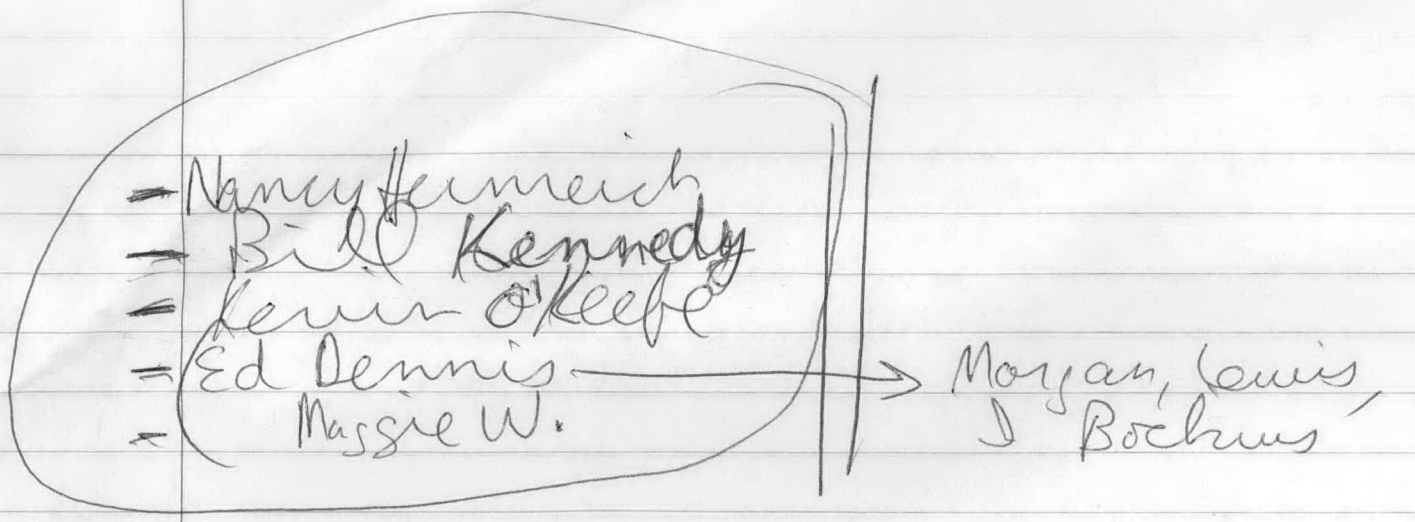
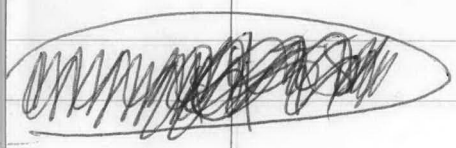
It is true that the reasons for nondisclosure of investigatory files lose some of their force once an investigation has been closed without further prosecution. Id. at __. As I have stated, however, the matters discussed in the undisclosed portions of the testimony of the President and Mrs. Clinton are matters currently under investigation by this Office. Therefore, I must decline to disclose those transcripts to you at this time.

I ~~very much~~ appreciate and welcome the views of you and your staff on this issue. Thank you for your consideration.

Accordingly, I am unable to provide the requested testimony.

It is our understanding that the Department of Justice and the Congress have consistently adhered to this policy, even with respect to investigatory records that are not subject to Rule 6(e).


Nancy Hermreich
Bill Kennedy
Kevin O'Keefe
Ed Dennis
Massie W.
Morgan, Lewis, & Bockius



1986

Sam + MT

- communicate to Congress w/r/t Pres statement that ongoing investigations + in addition we have 6(e) concerns
- Congress can file civil action to enforce subpoena

may be ~~easier~~ way for Congress to subpoena KWS

OLC opinion

302's

statement on ~~Fooler~~ death

TELL MARK

TO CALL

FISKE

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*** ACTIVITY REPORT ***
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TRANSMISSION OK

TX/RX NO.	4346
CONNECTION TEL	96629444
CONNECTION ID	
START TIME	01/26 17:15
USAGE TIME	09'08
PAGES	11
RESULT	OK

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
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TO: Professor Sam Dash

Company Name: Georgetown University

Fax Number: 662-9444

Message:

SENDER: Brett Kavanaugh

Number of Pages: 11 (including this cover sheet)

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.[1] 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, [redacted] Third, 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 [redacted] 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

[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."

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

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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").

[redacted]

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).[3]

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."[4]

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.[5]

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

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[5] 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.

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

[redacted]

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.

[redacted]

BK Copy

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

MEMORANDUM

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[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.[5]

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

---

[5] 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.

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

[redacted]

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.

[redacted]

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

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

DAVID E. KENDALL
(202) 434-5145

October 11, 1994

~~CONFIDENTIAL~~

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

By Hand

Dear Judge Starr:

Judge Mikva and I thought it prudent to follow up with a formal request my September 30 conversation with Mark Stein. I told Mr. Stein I understood there had been a recent Congressional request for your office to alter its position with regard to the confidentiality of the transcripts of the sworn testimony given by the President and Mrs. Clinton to the Independent Counsel on June 12, 1994.

Shortly before the House and Senate Banking Committee hearings on certain Whitewater matters last July, there was a request for Congressional access to these transcripts which was identical to the present request.

[redacted]

The Independent Counsel inquired what the legal position of the President and Mrs. Clinton was with respect to the release of these transcripts. At a meeting with Mr. Stein on July 25, 1994, Lloyd N. Cutler, Esq., White House Counsel, Joel I. Klein, Deputy White House Counsel, and I informed Mr. Stein of the Clintons' position and laid out the constitutional, legal, and policy reasons why such disclosure was inappropriate. The Clintons had cooperated fully with the Independent Counsel's requests for information, voluntarily appearing to give sworn testimony and answering all questions, without any claim of privilege of any kind. This testimony was responsive to the questions of the Independent Counsel [redacted] While the Clintons have emphasized their willingness to provide information to Congress in appropriate ways, [redacted]

Subsequent to our meeting on July 25, 1994, Mr. Stein telephoned me to state that the Independent Counsel had determined, quite correctly, I believe, that it would be inappropriate to disclose the transcripts to Congress. The hearings then proceeded in both the Senate and the House. -

As I told Mr. Stein in our recent telephone conversation, I do not believe any events have occurred which should cause your office to alter its previous decision. Should it consider doing so, I respectfully request the right to be heard, as we were last July, with respect to the relevant constitutional, legal, and policy considerations.

It is not my purpose here to set forth in detail these considerations, but I think it appropriate to sketch very briefly some of the relevant precedents. Serious constitutional questions are presented whenever the Congress seeks to compel or secure testimony from the President or from executive officials.

It is well settled that Presidential communications are presumptively privileged. Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973). Although the President's executive privilege may, under certain circumstances, be outweighed by the grand jury's "right to every man's evidence," id. at 712, an attempt by Congress to obtain Presidential communications presents serious separation of powers issues. In Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia rejected a Congressional committee's attempt to obtain production of tape recordings of conversations between the President and his aides holding that:

> the need for the tapes premised solely on an asserted power to investigate and inform cannot

> justify enforcement of the Committee's subpoena . . . There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.

Id. Because the Congressional request for the President's and First Lady's testimony is similarly premised upon a general and unparticularized need to "investigate and inform," the Congress is not entitled to these materials.

Moreover, Rule 6(e), of the Federal Rules of Criminal Procedure, That rule prohibits, of course, the public disclosure of "matters occurring before the grand jury," except pursuant to court order. The rule against disclosure is so well established that most reported cases do not involve the revelation of grand jury testimony but rather concern exhibits or expert reports prepared for the use of the grand jury. Acknowledging the "'necessarily broad' scope of Rule 6(e)," Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 584 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia ruled that, for purposes of an FOIA request, "the touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation', such matters as '"the identities of witnesses or jurors, the substance of testimony . . . and the like,"'" id. at 582. The United States Court of Appeals for the

Third Circuit has similarly held that Rule 6(e) prohibits disclosure of witness interviews conducted outside the grand jury's presence for the purpose of presentation to the grand jury: "No meaningful distinction can be drawn between transcripts and witness interviews conducted outside the grand jury's presence but presented to it." In re Grand Jury Matter, 697 F.2d 511, 512 (3rd Cir. 1982).

[redacted]

Sincerely,

David E. Kendall

cc: Mark Stein, Esq.

* Archives issue ⇒ Archives / legal capacity

Mtg. → 1/23

* reports before hearings ?? 1 report at end
* turn over 302's ?? → NO
* Dubbey here today ?
* no objection w/ interference

* ask Trubey re: Smalty

---

* D'Amato received + reviewed Fiske analysis — what D'Amato is referring to?

done orally

Steinschneider staff

(1) see what is written — letter
(2) schedule Dash for time this week
(3) Howard Manell

coding + checkoff

wkd mmg. — LR come back Thursday → FAX to Dash

- cases

for KWS

* right now, we have ongoing investigations into both (A) Foster docs
(B) WH-Treasury contacts
so shouldn't release anything related to those investigations

* after we are done, Tuohey said we are not releasing anything - 302's, deposition, OJ, until the final report is produced ⇒ IF TRUE, NO PRODUCTION UNTIL END

* once done, we have precedent on our side although a rather weak plain language argument

MEMORANDUM

TO: Mark Tuohey

FROM: Brett Kavanaugh

DATE: December 12, 1994

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

I have examined the 6(e) issue that is likely to arise with Senators D'Amato and Sarbanes -- namely, whether we would have good legal arguments to make in response to a congressional subpoena for the non-grand jury sworn statements of the President and First Lady. While I expect to discuss this issue orally with you, I thought a brief written outline of my views might be helpful.

First, if I were a judge, I would rule against us on the issue; more important, I think we would lose before the Supreme Court. (Given the variety of federal district judges and appellate panels, it is impossible to predict possible results in those fora.) As you well know, the Supreme Court pays inordinate attention these days to the precise language of statutes and rules. That would bode ill for us: It is quite hard to understand how a witness interview that occurs outside the grand jury can plausibly be considered a "matter occurring before the grand jury." And lest you think the Supreme Court could never be that simplistic in its analysis, I can cite from last year alone several very important statutory cases where the Court performed similarly simplistic analysis.

Despite that problem if the issue ever went to Court, you can make a decent argument to the Senators that we believe Rule 6(e) prohibits disclosure in light of the prevailing law that "where a witness gives a statement in lieu of a grand jury appearance, it has been held that the statement falls within the reach of Rule 6(e)." Beale & Bryson, Grand Jury Law and Practice § 7.06, p. 26 (1986). That treatise (the relevant portion is attached and highlighted) cites two cases in support of that proposition. The first is a Third Circuit case, In re Grand Jury Matter, 697 F.2d 511 (3rd Cir. 1982). In that case, the court held (without any serious analysis, however) that "[n]o meaningful distinction can be drawn between 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." A second case, In re Special 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981), stated that a transcript of a witness interview that was later read to the grand jury was "too grand jury related" and thus was protected under Rule 6(e).

memorialize various + sundry thoughts in memo to KWS
cc: Mark T
Bill Duffey
Sam Dash

share draft w/ Sam
Dash ⇒ important
⇒ sees light of day

finalize it so reflects internal

* commission some outreach research ⇒
  = William French Smith
  - OLC
  - Bork / Wechsler

⇓ identify several people to consult with
↓
venerable
gray-haired eminences

* Abe Goldstein
* Paul Freund
neutral principles

* us to schedule a time for informal
* Michael Cherkasky - City Club [5 at desk]

(1)

KWS, AA mtg. Fri 12-16 2:00 pm

① congressional access to Pres. statements

② reimbursement of FBI
- Barrett, Dubbey
- final answer from AO + GAO
- Bureau assumes responsibility for fixed costs
- problem for FBI is that invest. is centered in inconvenient location [unlike past OIC's]
- FBI is faced w/ variable cost problem travel, per diem

Ⓐ gather together all material
- Dubby memo is principal thing
- OLC advice

Ⓑ talk to Jack Barrett for his thinking

Ⓒ go to AO - Mel Bryson first
Bob Burchfield - GC

Ⓓ GAO w/ Mark Tuohey

Ⓔ prelaw w/ oversight committee
* Govt. Reform Committee Chair + Ranking Member - gives KWS cover

Ⓕ one of us be designated hitter to keep Steve Irons informed + then Ed ___ of material developments including unexpected delay

(2)

KWS - happy to accommodate FBI if reasonably possible to do so
A) precedent
B) historical practice
C) how much of a budget buster

- start w/ Larry Potts - on day to day, go to Mr. Esposito

President's transcripts

- formal legal memorandum that is objective re: what the law is
- strengths + non-strengths of competing positions
- informed by conversations w/ Hill
  - Chertoff ⇒ their understanding of legal authority
- preliminary meeting w/ interested persons on Capital Hill to hear them out ⇒ nothing in file at that stage

⇓

"informing myself w/ respect to the law"

* REPORT BACK BY JAN. 10 w/ REVIEW → show them there is life here → set up mtg.

- talk to W+C after meet w/ Hill

(3)

* Stein chronology on events

Copy of Portion Produced to Senate

OFFICE OF THE INDEPENDENT COUNSEL

TESTIMONY OF

HILLARY RODHAM CLINTON

Sunday, June 12, 1994

Washington, D. C.

~~CONFIDENTIAL~~

Testimony of

HILLARY RODHAM CLINTON

before the Independent Counsel, held at The White House, Washington, D. C., beginning at 3:55 p.m., when were present on behalf of the respective parties:

FOR THE INDEPENDENT COUNSEL: ROBERT B. FISKE, JR., ESQ.
Independent Counsel

RODERICK C. LANKLER, ESQ.
Associate Counsel

FOR HILLARY RODHAM CLINTON: LLOYD N. CUTLER, ESQ.
Counsel to the President

DAVID E. KENDALL, ESQ.
Williams & Connolly
Washington, D. C.

Court Reporter: Elizabeth A. Eastman

PROCEEDINGS

WHEREUPON,

HILLARY RODHAM CLINTON

having been called for examination by the Independent Counsel, and having been first duly sworn by the notary, was examined and testified as follows:

EXAMINATION BY THE INDEPENDENT COUNSEL

BY MR. FISKE:

Q Mrs. Clinton, we've had some conversations with Mr. Kendall before we started and I think you probably understand this. What we are trying to do today is cover the so-called Washington aspects of what we have been doing, which are essentially events relating to the death of Vincent Foster, events that occurred in the White House after his death, and any subject of contacts between the White House and the Treasury officials.

There obviously are a lot of questions about what went on or didn't go on in Arkansas that we will want to talk to you about later. But those are not on the program for today.

A All right.

MR. FISKE: I think maybe it would be useful to start the way we did with the President and ask the two lawyers to identify themselves.

MR. KENDALL: David E. Kendall of the firm of

Williams and Connolly, and I represent Mrs. Clinton in her personal capacity.

MR. CUTLER: I am Lloyd N. Cutler, Counsel to the President, and I am here representing the First Lady in her official capacity.

BY MR. FISKE:

Q Mrs. Clinton, Mr. Kendall was here representing the President, and I take it that have discussed with Mr. Kendall and with your husband the fact that he is representing both of you?

A Yes, we have.

Q And you are comfortable with that?

A Yes, I am.

Q Fine. Let me start by showing you two documents which we have marked as Exhibits 1 and 2, which are subpoenas that were served on the White House in March and May of this year, calling for on the one hand documents relating to contacts between the White House and Treasury, and, in the second subpoena, documents relating to Vincent Foster.

We have not served personal subpoenas on you or the President, but Mr. Kendall has explained to us that your personal files have been searched and that any personal documents that you have that would be responsive to those two subpoenas have, in fact, been produced. Is that correct?

A Yes, that is correct.

Q We would like to start by talking about Mr. Foster. I take it you knew him for a long time?

A Yes, I have.

Q You worked together with him at the Rose Law Firm?

A Yes.

Q In terms of the lawyers that you worked with at the Rose Law Firm, how would you place Mr. Foster in terms of the frequency with which you were associated with him, as opposed to other lawyers?

A Oh, I was probably associated with him among the three or four most frequent associations with respect to work that I did with other lawyers during my time at the Rose Law Firm.

Q Okay. And you were personal friends as well?

A Yes, we were.

Q Did you have the kind of personal relationship where he would from time to time discuss confidential personal matters with you?

A Very rarely. That was not something that he did with me at least, and I don't believe very often with anyone.

Q During the time before your husband became President, had Mr. Foster done any personal work for you or your husband?

A Yes.

Q What type of work?

A Well, he in many respects was kind of an ongoing counselor to us in many matters, and I don't know that I can point to any specific instances. But at least on one occasion I believe he was an attorney of record for me many years ago arising out of some action taken by Legal Service Corporation, and we needed to enter an appearance. I'm vague about it, but I think that occurred probably in the late 1970s, if I recall.

But on many other occasions he would be the person that I would go to for advice of a legal or quasi-legal nature. He was someone that both my husband and I turned to for advice and counsel. It was a continuing relationship of that nature, but I can't really pull out any specific instances. But I certainly relied on his advice on many occasions.

Q Would it be fair to say that you and your husband included the Fosters in your close circle of friends?

A Yes, it would.

Q Did you have any role in his selection as Deputy White House Counsel?

A Well, I certainly thought it was a good idea.

Q Other than expressing that opinion?

A I don't know that it really was much of an opinion needed. My husband thought very highly of Vince and wanted him to come to Washington, and I think decided that would be

the appropriate role, which I certainly thought was a good idea.

Q Did you have any conversations with Mr. Foster yourself about that prospective appointment?

A I'm sure I did. But I don't recall anything specifically, other than urging him to do it if he thought it was a good idea for him.

Q Did he express to you any reluctance about coming to Washington and taking this job offer?

A Not to me. The nature of our conversations were very positive about what he saw as a great professional challenge. That's all I recall.

Q Had you heard at the time from anyone else that he had any concern about leaving Arkansas and coming to Washington?

A No. No one told me that, that I remember.

Q Could you just tell me, in the best of your memory, during this period of time in the two or three years before you all came to Washington, how frequently did you see Mr. and Mrs. Foster socially?

A Socially?

Q Yes.

A Let's see. From like around, what, 1989 or '90?

Q Yes.

A We saw them on a regular basis, but I wouldn't say

a frequent basis, partly because 1990 was an election year for my husband. And then by, you know, late '91 he was in the campaign. We didn't have much time to socialize with anybody. In fact, it was one of the things that we used to regret and we would laugh about with the Fosters when we did see them that, you know, we just didn't have time to have fun any more or to go to our friends' houses for dinner and do the things that we used to be able to do much more frequently.

So, toward the time leading up to my husband being President, our social activities with everyone, including the Fosters, was much less than, you know, it had been in previous years probably.

Q From the period of time that you all came up to Washington and your husband became President in January of '93, right through the time of Mr. Foster's death, how frequently did you see him?

A Well, when I went over to the West Wing office, I would sometimes see him several times a day or sometimes not at all. It was a -- there was no regular planned meetings. So, it was a very random kind of series of contacts.

Socially, we tried to have all of the people from Arkansas over for movies or for dinners. And we would always invite Vince, because he was up here for the first five or six months without his family. Toward the end of that time

his daughter came and then Lisa came. But we always tried to invite him, as we did with the Hubbells and the others.

So, you know, I couldn't tell you exactly how many times, but, you know, a number of times, but particularly in the sort of Friday night gathering of friends and people, and we would try to mix it up with some of the new people we were meeting. But we always invited him.

Q And did you work with him on White House business?

A Only in a couple of instances. We were sued over the Federal Advisory Commission Act, or something like that, FACA. And I think -- and Vince was one of the lawyers involved in that, along with Steve Neuwirth and others in the counsel's office. So, occasionally I would talk to him if he would have questions about that. He did some work for the health care group on medical malpractice, and I think I had at least one meeting with him about that.

Those were the two main reasons why I met with him in a professional way.

And then he was the person in the counsel's office assigned to coordinate with our outside lawyers and accountants on the blind trust. So, I had several meetings with him about that.

Q Was he doing any personal work for you or the President other than the blind trust?

A Not that I'm aware of, no. Oh, wait. The only

thing I would add to that is I think he also did some personal advising, or at least was in some way involved in the tax returns when they were being finalized for '93, but that was part of the blind trust work, as I recall.

Q Your own tax returns?

A Yes.

Q Was he doing work, to your knowledge, with respect to the filing of the Whitewater tax returns?

A Not that I know of, no.

MR. CUTLER: This is while in the White House?

MR. FISKE: Pardon me?

MR. CUTLER: While in the White House?

MR. FISKE: Yes.

MRS. CLINTON: Not that I know of.

BY MR. FISKE:

Q When was the last time that you talked to Mr. Foster?

A You know, I've thought about that a lot because I don't recall it. I don't think I talked with him for a week before we left for Asia, and I did not talk to him all the time I was gone, and I left July 5th or 6th, as I remember. And then I got back to Arkansas on July 20th.

And I just don't have any memory of -- I never thought it would be the last time I ever saw him or talked to him. And I don't have any memory of when that was. But I

don't think it was for about a month before his death.

Q So, as you sit there, you can't sort of bring back the last conversation you had with him?

A No. I know that I had a conversation with him in mid-June, because there were a bunch of people up here from Arkansas and my husband was out of town, and he and Lisa called to see if I would go to dinner with them. And I talked to both of them, as I remember. But I couldn't do it.

And I'm sure I saw him in and around the office after that, after that mid-June phone call. I remember it was mid-June, because it was around Father's Day because that's one of the reasons they were all gathered together and were going to be doing some things together.

But I just don't have any specific memory of when the last time I saw him or talked to him after that, and I've tried to remember it, because I would like to remember it, but I can't.

Q Again, talking about the time from January '93 right up through July, did he ever express to you during that period of time any concern about anything that was troubling him, either in his job here at the White House or in his personal life?

A No. I mean, he like everybody would say things about, you know, how tough this was, and how different it was, and how stressful it was. And I would, you know,

express the same feelings. I think we were all amazed at some of what we found when we got here.

But he never confided in me. He never told me -- I didn't know until after he died that he took the Wall Street Journal editorial seriously. If I had known that, I would have, you know, said something funny or dismissive in some way. But he never said that to me.

So, I don't have any specific memory of any conversation that went beyond the, you know, general blowing off steam about, I can't believe this place, or can you get over this, or stuff like that.

Q Let me just ask you about a few specific things just to be sure. Did he ever express any concern to you about anything having to do with sort of nominations that didn't work out?

A No, not to me.

Q How about anything related to problems connected with the travel office situation?

A Not that I recall, no.

Q Did you ever hear from any source that back then he had given consideration to resigning from his job?

A No. I have heard since his death from people who say that they thought he might have considered that, but he never said anything to me about it.

Q So, the last time you talked to him, whenever that

was, if you can sort of go back to that time in your mind, how would you assess sort of his attitude towards what he was doing and life in general?

A Well, you know, the last specific conversation I can recall is this phone conversation which was either Friday or Saturday before Father's Day, whenever that was. I guess it was like mid-June, because Father's Day is next week and that is like June 19th. So, I guess it was probably around that time.

And, you know, I mean, there was nothing. He said, well, why don't you come out to dinner with us and, you know, you need to be with us. We've got a lot of friends up here. Let's just have a good time and, you know, I was saying, you know, I just couldn't do it because I had too much else to do. And that's all. That's all I remember from all of June.

Q Did he ever express during this time, that is January through July, any concern to you about anything relating in any way to his personal life?

A No. And I have a distinct memory, I don't know when it was, of him celebrating Laura's birthday and bringing her to one of our Friday night movies. And I remember seeing them walk in together. He had his arm around her and they looked so happy. And it was shortly before Lisa was getting there and shortly before, I think, Vincent was getting out of school. And he seemed very -- you know, he seemed very happy

that finally he was going to have his family back.

And I think it had been hard on him, you know, being an involuntary bachelor for all those months. At least, that's the way he and his daughter were talking when I saw them.

Q Did he ever express any concern to you about anything relating to any potential legal problems that you or the President might have relating to Whitewater?

A No. We never talked about that. That was -- that was something that I can't ever recall having any conversation with him about after we got here. He had handled the sale right before we left because, as I recall, somebody else was going to do it and couldn't, and he did it. But that's the only conversation, and that was before we moved here, that I can remember with him about Whitewater.

Q Did he express any concern to you during this period about any legal problem that he thought you or the President might have?

A No. No, I mean, other than this lawsuit that we were, you know, fighting over this FACA statute.

Q I meant personal.

A No.

PAGE 15 TO THE
END REDACTED

~~CONFIDENTIAL~~

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OFFICE OF THE INDEPENDENT COUNSEL

~~CONFIDENTIAL~~

TESTIMONY OF	Sunday, June 12, 1994
PRESIDENT WILLIAM J. CLINTON	Washington, D. C.

Testimony of

PRESIDENT WILLIAM J. CLINTON

before the Independent Counsel, held at The White House, Washington, D. C., beginning at 2:05 p.m., when were present on behalf of the respective parties:

FOR THE INDEPENDENT COUNSEL:	ROBERT B. FISKE, JR., ESQ. Independent Counsel
	RODERICK C. LANKLER, ESQ. Associate Counsel
FOR THE PRESIDENT:	LLOYD N. CUTLER, ESQ. Counsel to the President
	DAVID E. KENDALL, ESQ. Williams & Connolly Washington, D. C.

OIC 000463

Court Reporter: Elizabeth A. Eastman

be

PROCEEDINGS

WHEREUPON,

PRESIDENT WILLIAM J. CLINTON

having been called for examination by the Independent Counsel, and having been first duly sworn by the notary, was examined and testified as follows:

EXAMINATION BY THE INDEPENDENT COUNSEL

BY MR. FISKE:

Q You are the President of the United States?

A Yes.

Q I would just like to make a few opening comments, matters that I have discussed with Mr. Kendall. The questions that we are going to be asking you today relate to the Washington phase of our investigation, essentially relating to the death of Vincent Foster, events in the White House following his death, and questions relating to the contacts between people in the White House and Treasury.

There will be a time, sometime later, when we will also want to ask you questions about the events that we are investigating in Arkansas, but we are not going to go into those today.

MR. FISKE: Could I just start by asking the two other lawyers here to identify themselves?

MR. KENDALL: Certainly. I am David E. Kendall of the firm of Williams and Connolly.

be

MR. FISKE: Could you state in what capacity you are here, Mr. Kendall?

MR. KENDALL: I represent the President personally.

MR. CUTLER: I am Lloyd N. Cutler, Counsel to the President, and I am here representing the President in his capacity as President.

BY MR. FISKE:

Q I understand, Mr. President, that Mr. Kendall is also acting as counsel for Mrs. Clinton?

A That's right.

Q And I take it that you have discussed that with him and with her, and you are perfectly comfortable with that joint representation?

A We have and we are.

Q I would like to start by showing you two documents which we have marked as Exhibits 1 and 2. I hope you don't mind that we have simply used the abbreviation WJC.

A Okay.

Q Those are subpoenas which were served on March 4th and May 4th of this year respectively on the White House, requesting documents generally relating to contact between the White House and the Treasury in Exhibit 1, and documents relating to Vince Foster in Exhibit 2.

Have you seen those subpoenas before?

A I have not personally seen them, but I am aware

that they came to the White House.

Q I discussed with Mr. Kendall, before we came here today, whether in connection with those subpoenas there had been a request made to you to provide whatever personal documents you might have that would be responsive to those subpoenas. Was there such a request?

A There was.

Q And have any documents that you personally had that are responsive to those subpoenas been produced?

A I believe you got two documents. One was a letter from Roger Altman to me explaining why he decided to step down as the RTC -- acting head of the RTC. The other was a memorandum from a law school classmate of mine in New Jersey, Bob Raymar, generally describing how he thought we ought to handle the Whitewater investigations.

Q The role of the White House Counsel?

A That's correct.

Q We have both of those documents. I would like to start, Mr. President, by asking you some questions about Vincent Foster. We know that you and Mr. Foster go back a long way, back to kindergarten, as I understand it.

A Yes. I lived with my grandparents until I was four and they had a house behind where Mr. Foster's family lived in Hope. So, I knew him from the time I was three or four years old.

Q And we are not going to take you right through every year since then, but I would like to go back to the period of time for just a few years before you became President in early 1993, that is, go back to say 1990, and just in that period of time ask you some general questions.

First of all, I ask as to the extent to which during that period of time you and Mrs. Clinton had social contact with Mr. Foster and his wife?

A By our standards, because we didn't go out much, we had a lot of social contacts with him. We were frequent guests in their home. That was mostly our social contact. We would go over there and we would swim around the pool or have dinner with them. Once in a while we would go out. I would say not more than once a year, maybe twice a year, but we didn't go out much.

Q Did you consider them in your close circle of friends?

A Yes, I did.

Q What professional contact did you have with Mr. Foster in those years, let's say 1990 up to 1993?

A I'm not sure I recall in that timeframe. Of course, Hillary worked with Vince. They were in the same division of the law firm and they worked very closely together for the period that she was in the Rose Law Firm.

It seems to me that from time to time Vince may

have advised me on things that related to my work as Governor, but I honestly don't remember whether they occurred within that frame. If you have something specific in mind, I could respond to that.

Q I will be happy to extend the frame back a little bit if there is something in your mind that you are thinking of.

A I'm trying to remember whether he worked on things that Hillary also worked on, or whether he ever advised -- I think from time to time he advised me on matters relating to my performance as Governor that required outside counsel. I'm not sure, but I don't remember them specifically. Nothing related to the savings and loan business or anything like that, but other things like maybe public utility controversies or something. I'd have to go back and look at my records.

But I seem to remember that he did do one or two things like that during the pendency of my governorship.

Q Were those matters that Mrs. Clinton also worked on?

A Well, let's see. She worked on the Little Rock school desegregation case which affected -- which the state was also involved in. I'm not sure that Vince worked on that. And then it seems to me they both may have done some work on the Grand Gulf nuclear power case. I think that's

right. I don't recall that I remember anything else.

Q This is work they were doing for the State of Arkansas, or for you as Governor?

A I'm not sure. I'd have to go back and look at my records. But essentially in the 12 years I was Governor, he may have done a couple of things like that. Now, the Rose Law Firm had, independent of Vince, had done various things with state government for years, before my becoming Governor. But I don't remember anything else specifically.

Q We are not going to go into those at this time. I just am really more interested at the moment in Mr. Foster personally. Did Mr. Foster --

A If you would like, I could go back and try to refresh my memory as to these things or do some research on it. I just don't remember the specifics. It's nothing I thought about in trying to get ready for this.

Q I'll discuss that with Mr. Kendall.

A Okay.

Q During this period, let's take it five years back from January 1993, did Mr. Foster do any personal work for you, not in your capacity as Governor but just for you or Mrs. Clinton, sort of Clinton family work?

A I don't believe so, unless -- I don't believe so.

Q I take it you obviously were responsible for his eventual selection as Deputy White House Counsel?

A That's right.

Q Mrs. Clinton, I assume, played a role in that as well?

A She didn't -- she certainly didn't object to it. But I was surprised frankly that he was willing to come to Washington. He seemed so happy doing what he was doing and it seemed to fit him so well. But when I learned that he was willing to come, I wanted him here because of his legal ability and his judgment, and because he was cool under fire. He tended to have a calming influence on people around him and he tended to engender an awful lot of respect. So, I did want him here.

Q Did you have conversations with him personally about that?

A Yes, I did, and I offered him the job.

Q I think maybe you have anticipated one of the questions, but was this something where he needed a little selling to come, or was it something that you could tell he really wanted to do from the beginning? Was he at all reluctant to come?

A I don't recall that he was by the time I talked to him. I think he had to -- he wanted to make sure that it was okay with his family. I mean, he had -- my recollection of our conversation was that he personally wanted to do it, but he wanted to make sure it was okay with his family and that

it was appropriate with the firm and all, that he could do all the professional things he needed to do.

Q Was there a reason that he wasn't selected as the White House Counsel?

A Yes.

Q What was that?

A There were two reasons. One is we thought that we ought to have someone who had had more experience in and around Washington. And the second was, we thought that given the enormous scrutiny and, to some of us, occasional prejudice that the national press corps had shown against our state, it would be better if someone who was such a good friend of mine were not the White House Counsel.

Q Did Mr. Foster ever express to you a desire to be the White House Counsel?

A Never. Never. As a matter of fact, he thoroughly agreed with my decision.

Q During the period from January '93 right through July 20, while you were President and he was Deputy White House Counsel, how frequently did you have contact with him?

A Not often, and usually I would say the largest number of times I saw him were on social occasions when he would be at the White House after working hours for something.

Q How frequently was that?

A Once, twice a month, I would say. And then perhaps I saw him a time or two a month, unless we were working on something specific.

Q Was he during this period of time working on any matters for you personally?

A Yes. I believe that he was trying to handle the transition of our assets into a blind trust. I think that's all he was doing.

Q Were you aware that he was also doing some work in connection with the preparation and filing of the tax returns for Whitewater for '90, '91, and '92?

A I don't recall that I was aware of that, no.

Q Was there any work that he was doing for you in connection with some property where you and Mrs. Clinton might have wanted to build a home? Does that ring any bells?

A Yes. But I don't know that he did any work beyond his collecting proposals. When I came up here, there were any number of people who thought they ought to -- various communities in the state ought to have Presidential retreats of some kind, and there were all these ideas. And I wasn't sure any of it was appropriate.

So, he was asked to just collect and evaluate the proposals. We never did anything with any of them.

Q So, is it your best recollection then that the only work that he was doing for you that was personal in nature

was this business of trying to put your assets into a blind trust?

A Uh-huh. And I later learned what you said about the Whitewater thing.

Q When did you first learn that?

A I don't know, because I was aware that -- this kind of gets back to the other inquiry you want. But I was aware that we were trying to make sure that the tax returns were appropriately filed. I'm just not sure I knew Vince had anything to do with that.

Q Okay.

A I could have known it, too. I'm just not sure.

Q Okay. Did anyone ever raise any question at that time whether it was appropriate for Mr. Foster to be working on any of those matters while he was White House counsel?

A No.

Q Or Deputy White House Counsel?

A No.

Q Did you have any concern about that yourself?

A No, because I knew that we were simply -- with regard to the blind trust, I thought that was part of my responsibility as President, to just get my things in a blind trust, and I think he was just overseeing that.

With regard to the proposals for a Presidential retreat, I never took the whole idea very seriously. And I

just wanted to make sure that we had lodged them in a place, and that if we turned them down we could say that it was an appropriate thing to do, legally appropriate, given my position as President.

So, I didn't think either one of those things was out of the way.

Q Going now to the period of time, let's say starting in May, late spring, the first of May through the middle of July --

MR. CUTLER: Of 1993?

BY MR. FISKE:

Q Of '93, yes. How frequently did you see Mr. Foster then?

A Late spring to when?

Q That would make it two or three months before his death.

A I would say no more than two or three times a month.

Q And were these on the social occasions that you mentioned?

A Either that or he would come into the office for some occasion that was in the course of something the legal counsel's office was working on.

Q Did you have an occasion during those situations to talk to him at any length about anything to do with his

personal situation?

A No, not at length.

Q Well, let me ask you, right up to let's say July 19th, the day before his death, right up to then had he ever expressed any concern to you personally about anything that was bothering him about his job or anything in his personal life?

A The answer to your specific question is no. I wouldn't characterize it that way.

Q Well, is there some way that I could have put that that would --

A Yes.

Q -- have produced a better answer?

A No. Well, yes.

Q A more complete answer, I mean?

A I knew that he felt badly that he had been personally criticized in the Wall Street Journal, and I knew that he -- even though he thought it was unfair and inaccurate. And I knew that he was a perfectionist who was concerned at the bad publicity the Administration had gotten over two or three issues relating to the organization of the White House.

Q What were those issues?

A Well, specifically I know the travel office issue. And that he was concerned that these problems were not

serving me well and were undermining my -- or at least not undermining, but interfering with my ability to do my job as well as possible.

But I have to tell you, sir, that didn't surprise me. I mean, he was a serious man and a perfectionist. So, he didn't like to see things go wrong in the office on the one hand. And, on the other, he had, as far as I know, never been subject to any sort of criticism about his professional work or his judgment before the Journal editorial page issues.

Q Other than the Wall Street Journal and the concern about the travel office, was there anything else specific that you heard was concerning him?

A No.

Q When you say you learned this, did you learn this from him or did you learn this indirectly through someone else?

A Well, with regard to the Journal, I didn't have to learn it from anybody. I knew him well enough to know when I read the editorial it would bother him. So, I asked about that.

Q Asked him?

A No, I didn't ask him. I can't remember. I may have asked Mr. Nussbaum or somebody. But, you know, this was just in passing. I didn't spend a lot of time on it.

I had -- I presume you are going to ask about this, but I did have a conversation with him the night before his death.

Q Yes, I will get to that. That's why up to now we are just up to the 19th.

A Uh-huh. But in that conversation, I referred in the briefest manner to the whole question of operational problems in the White House. So, when we get to that, we can talk about that.

Q We'll get there in just a minute. Was there anything else that you heard, right up to that phone conversation on the 19th, that --

A No.

Q -- might be disturbing him?

A No.

Q Had you ever heard that he was thinking of resigning his job?

A No.

Q Had you ever --

A Not that I recall.

Q Okay. Had you ever heard that he expressed concern about some of the unfairness of life in Washington?

A Not that I recall. But there was a lot of that kind of concern around that time. I don't recall anything specific though from him.

Q Did you ever hear that he had been concerned in any way about anything relating to his personal life?

A No.

Q Had you heard from him or anyone else that he was depressed?

A No. Not depressed. Now, again leading up to the day --

Q Right.

A -- when I talked to him, I knew that he had been concerned about these things that I mentioned earlier. But I wouldn't use the word "depressed".

Q Okay. Let me ask you now about the telephone conversation on the 19th. I understand, at least from press reports, that you initiated that call?

A Yes, I called him. I called him because I hadn't seen him in a while and I had talked that day to Mr. Hubbell who told me that the Hubbells and the Fosters and another couple had spent the weekend in Maryland and had a very good time. It was a time of high stress for the counsel's office because of the White House travel office matter and other things. And he said that he thought Vince had had a great time and that it had been good for them to get away from the grind of the office and had been a very good weekend.

And so, I hadn't seen Vince in a while and I hadn't had a chance to talk to him in a few weeks. So, I decided I

would call and invite him to the movie that night. So, that's what prompted the call. I called him and asked him if he wanted to come and watch the movie.

Q That was "In The Line Of Fire"?

A Uh-huh.

Q And you were watching that in the White House?

A Uh-huh, in the theater here.

Q Who else was there?

A I think there was just a couple of us. I think Mr. Hubbell was there. I think Mr. Lindsey was there. I'm not sure if anybody else was there.

Q Where did you reach Mr. Foster?

A I got him at home.

Q How long did you talk?

A Ten, 15 minutes.

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Q Can you give us the conversation, to the best of your memory?

A Yes. When I called him, I thought he might still be at work but it was in the evening. I don't remember exactly what time it was, but it was already night. But he said -- first I asked him if he wanted to come to the movie. And he said that he would like to, but that he was already home with Lisa and he didn't think he should leave and come back to the White House. I understood that.

And then I asked him, you know, if he had a good

time over the weekend, and he said they had a great time.

Then I told him that I wanted to talk to him about some matters relating to the White House and I wanted to ask his advice on some organizational issues, but that I could not see him the next day because we had the announcement of Mr. Freeh, the FBI Director, and several other things on my schedule, and could we please meet on Wednesday. And he said, yes, I've got some time on Wednesday and I'll see you then.

And that was it. That's basically what we talked about.

Q And how did he seem to you?

A Well, he didn't seem unduly distressed. I mean, Vince Foster was a very low-key guy. And when you talk to him on the phone, I mean it was not that different from any other conversation I ever had with him.

Q When you hung up the phone, did you have any cause for concern about --

A None. None. As a matter of fact, I was just pleased that I was going to be seeing him Wednesday because I hadn't seen him in a while. I mean, whole weeks would go by and I wouldn't see him and I missed that. So, I wanted to see him.

Q Was that the last time you talked to him?

A Yes, it was.

Q At any time from him, or from anyone else directly or indirectly, did you ever hear that he was concerned in any way about anything relating to Whitewater, Madison Guaranty Savings & Loan?

A No.

Q Did you ever hear, directly or indirectly from him or anyone else, that he had any concern about any matters relating to any legal problems that you and Mrs. Clinton might or might not be facing?

A No.

Q Just one last question about this phone call. Did you place this phone call to him because you had heard from other people that he was sort of down and you thought he might need a little cheering up?

A No, because I knew he had been under a lot of stress, as all the members of the counsel's office were, trying to deal with this travel office issue and other things that were going on, just general burden of work. But, in fact, I had heard from Mr. Hubbell that they had had a very good weekend and that he seemed much more relaxed and that it was a good thing for him to have a chance to get away with his wife and with two other couples who were friends of his.

So, I called him just because I genuinely missed him and I wanted to talk with him. I wanted to see how he was doing, but I also wanted to ask his advice on some

things.

Q Did you see him on the 20th?

A Yes. I believe I saw him in the Rose Garden. I think when we named Mr. Freeh, he was in the back of the Rose Garden watching the ceremony. And that's the last time I ever saw him.

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PAGE 22 TO THE

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

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.[1] 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, [redacted] Third, 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 [redacted] 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

[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."

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

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[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").

[redacted]

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).[3]

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."[4]

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.[5]

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

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[5] 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.

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.

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

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October 11, 1994

~~CONFIDENTIAL~~

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

By Hand

Dear Judge Starr:

Judge Mikva and I thought it prudent to follow up with a formal request my September 30 conversation with Mark Stein. I told Mr. Stein I understood there had been a recent Congressional request for your office to alter its position with regard to the confidentiality of the transcripts of the sworn testimony given by the President and Mrs. Clinton to the Independent Counsel on June 12, 1994.

Shortly before the House and Senate Banking Committee hearings on certain Whitewater matters last July, there was a request for Congressional access to these transcripts which was identical to the present request.

[redacted]

The Independent Counsel inquired what the legal position of the President and Mrs. Clinton was with respect to the release of these transcripts. At a meeting with Mr. Stein on July 25, 1994, Lloyd N. Cutler, Esq., White House Counsel, Joel I. Klein, Deputy White House Counsel, and I informed Mr. Stein of the Clintons' position and laid out the constitutional, legal, and policy reasons why such disclosure was inappropriate. The Clintons had cooperated fully with the Independent Counsel's requests for information, voluntarily appearing to give sworn testimony and answering all questions, without any claim of privilege of any kind. This testimony was responsive to the questions of the Independent Counsel [redacted] While the Clintons have emphasized their willingness to provide information to Congress in appropriate ways, [redacted]

Subsequent to our meeting on July 25, 1994, Mr. Stein telephoned me to state that the Independent Counsel had determined, quite correctly, I believe, that it would be inappropriate to disclose the transcripts to Congress. The hearings then proceeded in both the Senate and the House.

As I told Mr. Stein in our recent telephone conversation, I do not believe any events have occurred which should cause your office to alter its previous decision. Should it consider doing so, I respectfully request the right to be heard, as we were last July, with respect to the relevant constitutional, legal, and policy considerations.

It is not my purpose here to set forth in detail these considerations, but I think it appropriate to sketch very briefly some of the relevant precedents. Serious constitutional questions are presented whenever the Congress seeks to compel or secure testimony from the President or from executive officials.

It is well settled that Presidential communications are presumptively privileged. Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973). Although the President's executive privilege may, under certain circumstances, be outweighed by the grand jury's "right to every man's evidence," id. at 712, an attempt by Congress to obtain Presidential communications presents serious separation of powers issues. In Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia rejected a Congressional committee's attempt to obtain production of tape recordings of conversations between the President and his aides holding that:

> the need for the tapes premised solely on an asserted power to investigate and inform cannot

> justify enforcement of the Committee's subpoena . . . There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.

Id. Because the Congressional request for the President's and First Lady's testimony is similarly premised upon a general and unparticularized need to "investigate and inform," the Congress is not entitled to these materials.

Moreover, Rule 6(e), of the Federal Rules of Criminal Procedure, That rule prohibits, of course, the public disclosure of "matters occurring before the grand jury," except pursuant to court order. The rule against disclosure is so well established that most reported cases do not involve the revelation of grand jury testimony but rather concern exhibits or expert reports prepared for the use of the grand jury. Acknowledging the "'necessarily broad' scope of Rule 6(e)," Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 584 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia ruled that, for purposes of an FOIA request, "the touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation', such matters as '"the identities of witnesses or jurors, the substance of testimony . . . and the like,"'" id. at 582. The United States Court of Appeals for the

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

Third Circuit has similarly held that Rule 6(e) prohibits disclosure of witness interviews conducted outside the grand jury's presence for the purpose of presentation to the grand jury: "No meaningful distinction can be drawn between transcripts and witness interviews conducted outside the grand jury's presence but presented to it." In re Grand Jury Matter, 697 F.2d 511, 512 (3rd Cir. 1982).

[redacted]

Sincerely,

David E. Kendall

David E. Kendall

cc: Mark Stein, Esq.

Gorham Tripp Pond

next week

Griffin Conversation 2/27

- cannot release the transcript
- cannot release any portion of transcript
- transcript could be disclosed

* HAVE MARK CONFIRM W/ SHERBOURNE + KENDALL THAT THEY DID NOT GET TRANSCRIPT COPIES

- get out Senate resolution, depositions, + [redacted] document requests
- they need to know some time in March

Radek

Wed + Friday
will check + see

→ Radek [redacted] Wed. 10:00

- Not special treatment
- want to put our position in writing → call + send letter
- if D'Amato decides to do nothing, then no letter
- transcript

(1)

Bob Giuffra 2/24

- they would like to [redacted]
  do something satisfactory opinion
- file a motion on 6(e)
- not seeking

- 40 Op. A G 45 (1941)
  p. 51 opinion

- Mike Davidson
- public interest standard

① it is President's choice regarding whether he wants to be subjected to multiple depositions

② public interest in full information

③ whether privilege has been **waived** by Cutler

⇒ they fully appreciate concerns

(*) Pres. has been treated differently

(2)

- Monison v. Olsen sticky issues

- BG: subpoena is an option
- AD →
- BG: subpoena is diversion

1 possible solution is
(A) distinguishing Wash phase from Ark phase

- emission doing this on rolling basis
- Congress completed its airing of WH-Treasury contacts issue
- certain documents treated as highly ~~restricted~~

(2) are they seeking WH-Treasury contacts only?

⇒ we would want Foster document part as well

MONDAY ⇒ get in touch
- message for KWS: avoid sideshow

(1) CONVERSATION W/ STEIN ON 12-22

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

W+C

- no agreement beforehand + no discussion

[redacted]

- turned over portions dealing w/ death
- decided [based on a Watergate opinion [redacted]] that you should consult w/ W+C

[redacted]

- decided not to turn over
- October: call from W+C

[not turning over anything, so why turn over]

⇓

keep in mind that can't turn this over if turn over

preparing notes
→ docs used in preparation for summer hearings — all w/ counsel's office documents

(2)

- want you to GJ

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	4345
CONNECTION TEL	9 1 501 221 8707
CONNECTION ID	OIC LR
START TIME	01/26 17:06
USAGE TIME	06'42
PAGES	11
RESULT	OK

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
Suite 490N
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
telephone (202) 514-8688
facsimile (202) 514-8802

TO: Bill Duffey

Company Name: _____

Fax Number: _____

Message:

SENDER: Brett Kavanaugh

Number of Pages: 11 (including this cover sheet)

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

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.[1] 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, [redacted]. Third, 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 [redacted] 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

[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."

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 Ahdaya 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").

[redacted]

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).[3]

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."[4]

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.[5]

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

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[5] 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.

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

[redacted]

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.

[redacted]

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

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

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October 11, 1994

CONFIDENTIAL

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

By Hand

Dear Judge Starr:

Judge Mikva and I thought it prudent to follow up with a formal request my September 30 conversation with Mark Stein. I told Mr. Stein I understood there had been a recent Congressional request for your office to alter its position with regard to the confidentiality of the transcripts of the sworn testimony given by the President and Mrs. Clinton to the Independent Counsel on June 12, 1994.

Shortly before the House and Senate Banking Committee hearings on certain Whitewater matters last July, there was a request for Congressional access to these transcripts which was identical to the present request.

[redacted]

The Independent Counsel inquired what the legal position of the President and Mrs. Clinton was with respect to the release of these transcripts. At a meeting with Mr. Stein on July 25, 1994, Lloyd N. Cutler, Esq., White House Counsel, Joel I. Klein, Deputy White House Counsel, and I informed Mr. Stein of the Clintons' position and laid out the constitutional, legal, and policy reasons why such disclosure was inappropriate. The Clintons had cooperated fully with the Independent Counsel's requests for information, voluntarily appearing to give sworn testimony and answering all questions, without any claim of privilege of any kind. This testimony was responsive to the questions of the Independent Counsel [redacted] While the Clintons have emphasized their willingness to provide information to Congress in appropriate ways, [redacted]

Subsequent to our meeting on July 25, 1994, Mr. Stein telephoned me to state that the Independent Counsel had determined, quite correctly, I believe, that it would be inappropriate to disclose the transcripts to Congress. The hearings then proceeded in both the Senate and the House.

As I told Mr. Stein in our recent telephone conversation, I do not believe any events have occurred which should cause your office to alter its previous decision. Should it consider doing so, I respectfully request the right to be heard, as we were last July, with respect to the relevant constitutional, legal, and policy considerations.

It is not my purpose here to set forth in detail these considerations, but I think it appropriate to sketch very briefly some of the relevant precedents. Serious constitutional questions are presented whenever the Congress seeks to compel or secure testimony from the President or from executive officials.

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> the need for the tapes premised solely on an asserted power to investigate and inform cannot

> justify enforcement of the Committee's subpoena . . . There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.

Id. Because the Congressional request for the President's and First Lady's testimony is similarly premised upon a general and unparticularized need to "investigate and inform," the Congress is not entitled to these materials.

Moreover, Rule 6(e), of the Federal Rules of Criminal Procedure, That rule prohibits, of course, the public disclosure of "matters occurring before the grand jury," except pursuant to court order. The rule against disclosure is so well established that most reported cases do not involve the revelation of grand jury testimony but rather concern exhibits or expert reports prepared for the use of the grand jury. Acknowledging the "'necessarily broad' scope of Rule 6(e)," Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 584 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia ruled that, for purposes of an FOIA request, "the touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation', such matters as '"the identities of witnesses or jurors, the substance of testimony . . . and the like,"'" id. at 582. The United States Court of Appeals for the

Third Circuit has similarly held that Rule 6(e) prohibits disclosure of witness interviews conducted outside the grand jury's presence for the purpose of presentation to the grand jury: "No meaningful distinction can be drawn between transcripts and witness interviews conducted outside the grand jury's presence but presented to it." In re Grand Jury Matter, 697 F.2d 511, 512 (3rd Cir. 1982).

[redacted]

Sincerely,

David E. Kendall

David E. Kendall

cc: Mark Stein, Esq.