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WH Counsel

CP

THE WHITE HOUSE
WASHINGTON

March 8, 1995

Dear Judge Starr:

You have raised concerns about guidance given by the Office of White House Counsel to present and former White House officials on the assertion of privileges in connection with questioning by attorneys from your Office. The President has cooperated to an extraordinary degree with your and Special Counsel Fiske's investigation of Madison Guaranty, Whitewater Development Corporation, and related matters, even when the investigation has touched on areas traditionally protected by executive privilege. Whenever your scrutiny has turned to the conduct of White House officials, the President has willingly disclosed all privileged communications that are part of the conduct under review. Specifically, the White House has provided all documents reflecting such communications with respect to contacts between White House and Treasury Department officials, the death of Deputy Counsel Vincent Foster, and the handling of documents in Mr. Foster's office after his death. The White House Counsel's Office also has advised present and former White House employees who may be questioned by your Office that we have waived all privileges applicable to communications involved in such conduct. We made this voluntary waiver in order to promote and encourage the thorough, efficient, and prompt completion of the investigation of the conduct of White House officials. It is difficult to imagine what more the President responsibly could do to accommodate your work.

Although the President has taken the extraordinary step of waiving applicable privileges to permit your unfettered review of White House conduct in those defined areas, the institutional interests of the Presidency do not permit the wholesale waiver of all privileges applicable to executive communications, which your letter suggests you expect. The White House responsibly cannot instruct officials who appear before the grand jury that they are free to answer any and all questions they may be asked about unrelated executive communications into which your broad-ranging inquiries may probe. Similarly, the White House responsibly cannot permit the waiver of privileges (executive, attorney-client and work product) that apply to the ongoing communications

of White House attorneys and advisors regarding the matters that have come within the ambit of your investigation, but that are not part of the specific conduct described above.

The doctrine of executive privilege, which then Assistant Attorney General, now Chief Justice William Rehnquist has called "an absolutely essential condition for the faithful discharge by the executive of his constitutional duties,"¹ enables the President to encourage deliberation and debate among his advisors and call on them for candid and informed advice. Like every President before him, the incumbent President must take care to safeguard executive privilege, or he will risk weakening the institution of the Presidency -- for the future as well as the present. It cannot be that the President must surrender entirely a fundamental element of executive power in order to satisfy his pledge of cooperation as to the particular subjects under investigation.

Let me turn to the areas enumerated in your letter in which you assert your inquiry is being impeded by privilege assertions. You refer to witnesses who declined to testify about matters that caused distress to Mr. Foster and activities in the White House on the night of July 20, 1993. The White House Counsel's Office advised present and former White House officials appearing before the grand jury that they were free to answer all questions relating to Vincent Foster's death and the handling of documents in Mr. Foster's office, except to the extent those questions called for discussion of ongoing work by White House attorneys and others regarding matters apart from the actual conduct under review. It may be that witnesses who were questioned about matters relating to these areas were uncertain about the application of our guidance to certain of your questions. I am confident that any confusion regarding the application of our guidance can be resolved by consultation among your Office, the White House Counsel's Office, and the attorneys for individual witnesses; I am sure that a reasonable balance can be struck between your Office's responsibility to discover all facts relevant to your investigation and the President's responsibility to preserve executive privilege where no waiver is justified.

¹ Executive Privilege: The Withholding of Information by the Executive; Hearing Before the Subcomm. on Separation of Powers of Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. 435 (1981) (Statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice).

You also state that witnesses refused to answer questions regarding the firing of employees of the White House Travel Office and the White House Travel Office Management Review. We were not aware that you had any interest in the Travel Office matter except as it related to the motivation for Mr. Foster's suicide. As I am sure you know, in addition to the review by the White House, the Travel Office matter has been reviewed by the General Accounting Office and other public entities. Consistent with the waiver of privilege described above, the White House Counsel's Office advised counsel for witnesses that their clients could discuss all official matters, including the Travel Office, to the extent they related to Mr. Foster's death. If you intend to extend your inquiry beyond those parameters, I invite you to raise the issue with the White House Counsel's Office so that we may evaluate whether a further waiver of privilege is appropriate and instruct witnesses and their counsel accordingly.

Finally, you state that a witness or witnesses refused to answer questions regarding the RTC criminal referrals. The President has not asserted, and does not intend to assert, any privileges that would prevent a full examination of the conduct of White House officials as it relates to these referrals. Without some clarification of the circumstances, I cannot comment regarding whether privileges were appropriately asserted in the instance to which you allude in your letter.

The protection of institutional privileges under these circumstances is a serious and difficult matter for witnesses who must appear before the grand jury without lawyers to assist them. We told witnesses and their counsel that we would be available for consultation if any questions about our guidance arose in the course of their grand jury appearance. We understand that your Office declined to pursue such consultation at the time these issues did arise. We remain available for this purpose or, if you wish, to meet with you before a witness testifies so that we can be more precise in our guidance regarding the assertion of privilege.

The President's resolve to cooperate with your investigation remains firm. The White House Counsel's Office will continue to ensure that your Office has access to all relevant information needed for the prompt and complete review of the matters under investigation. But we cannot ignore, and thus erode, the longstanding and important institutional prerogatives of the Presidency. In previous discussions, you have assured us that it is not your intention or desire to weaken the institution of the Presidency for any temporal purpose. I trust that is still the

case. We are available to meet with you to discuss these matters if that would be helpful in reaching a resolution.

Sincerely,



Abner J. Mikva
Counsel to the President

BY HAND

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

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

1001 Pennsylvania Avenue, N.W., Suite 490N

Washington, D.C. 20004

telephone (202) 514-8688

facsimile (202) 514-8802

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White House Assembling Whitewater Legal Team

Starr Issues New Subpoenas for Documents

By Susan Schmidt and Ann Devroy
Washington Post Staff Writers

A new legal team is being assembled in the White House counsel's office to help defend the administration's conduct in the Whitewater matter and to monitor the progress of various investigations, according to administration sources.

The team is being put together as independent counsel Kenneth W. Starr, who last week beefed up his own staff, is issuing a new wave of document subpoenas in Little Rock, Ark., and bringing a parade of witnesses before a grand jury in Washington. Senate Banking Committee Chairman Alfonse M. D'Amato (R-N.Y.) said last weekend that he hopes to begin a new set of Whitewater hearings within 90 days.

White House counsel Abner J. Mikva has deputized an assistant, Jane Sherbourne, a former law partner of Mikva's predecessor Lloyd Cutler, to assemble the Whitewater legal team, according to a senior administration official.

The official said the team will involve a minimum of four full-time lawyers and possibly more if demands increase. The official said it was unclear whether the lawyers will be detailed to the White House from within government or hired from outside in temporary or permanent positions.

Mikva said yesterday that it is unclear now how many lawyers will be needed, beyond the two added in recent weeks. "It may expand to four or more but we do not know yet," he said.

"We are not sure how extensive the Senate hearings are going to be," said one source familiar with the White House effort, or how complex the requests will be from Starr's office. The source said the White House is anticipating "a barrage of document requests" from both quarters and needs personnel to respond to those, as well as to monitor the investigations into acts by White House officials while they were in government.

A key battle for the White House is expected early next month, when the Senate takes up a resolution establishing the scope of its continuing Whitewater investigation. Republicans are expected to seek the creation of a special investigative subcommittee with unrestricted authority; Democrats will try to limit areas of inquiry and defer to requests from Starr to steer clear of matters he is still examining.

Each of the White House officials involved in the Whitewater controversy has his or her own lawyer and is responsible for those legal bills. But White House officials say they need legal experts to answer questions about the actions of administration employees.

"We need a significant amount of new legal help in the White House," an official said. In addition to lawyers, a public spokesman on Whitewater also is being sought in the hope that those issues can be segregated from the broad White House business. Sources said that Clinton agreed to White House Press Secretary Michael McCurry's suggestion that the Whitewater team have its own spokesman.

Senate Republicans want to resume Whitewater hearings that began in the last Congress with a look at White House aides' handling of documents in deputy counsel Vincent Foster's office in the hours and days after his July 1993 suicide. They are especially interested in a file on President and Hillary Clinton's Whitewater Development Corp. investment that was removed by White House aides and taken to the Clinton's residence.

One of the aides who went through Foster's office the night of his death was Patsy Thomasson, director of the White House administrative office. Her lawyer said yes-

terday she has received a subpoena from Starr's Little Rock office for any records in her possession on a long list of people and companies, including Whitewater.

Also on the list were James B. McDougal and his former wife Susan, the Clintons' Whitewater business partners and also the owners of Madison Guaranty Savings and Loan, the failed Arkansas thrift. Their ties to the Clintons are at the heart of the independent counsel's investigation.

Whitewater prosecutors also issued a subpoena to a top Clinton campaign aide who was fired from his White House job after commandeering two military helicopters for a golf outing, the Associated Press reported. The subpoena was issued to David Watkins, director of the White House Office of Administration until his dismissal last fall, and it asked him to turn over any documents in his possession concerning Whitewater, Madison Guaranty and several Arkansas banks.

Shortly before his death, Foster prepared three years of Whitewater tax returns for the Clintons and handled the sale of their half-interest in the company. The White House expects Starr to call officials who handled Foster's papers before a grand jury here in the coming weeks.

Starr's office is also taking testimony from officials of the Resolution Trust Corp., which investigated Madison's failure and sent criminal referrals mentioning the Clintons to the Justice Department. Starr is trying to determine whether the White House made efforts to derail the Madison investigation, either at the RTC or at the Justice Department.

Senate Republicans are interested in pursuing the same line of inquiry in hearings that D'Amato is predicting will begin in early May.