Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
~~001. letter~~	~~Charles A. Banks to Don Pettus, RE: RTC Referral No. C0004~~ (2 pages)	~~10/16/1992~~	~~P6/b(6)~~
~~002. list~~	~~House Banking Committee members;~~ RE: Personal note [partial] (1 page)	08/02/1995	P6/b(6)
003a. paper	RE: Committee/White House Contacts (1 page)	n.d.	P5 433
003b. paper	RE: Clinger Meeting (3 pages)	06/06/1995	P5 434

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 23482

FOLDER TITLE:
Whitewater - General, 1995 [2]

Debbie Bush
2006-0320-F
db777

RESTRICTION CODES

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

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

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

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

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

I. Committee/White House Contacts

-- All formal requests for interviews and documents need to be in writing and go to MIKVA

-- All staff contacts go to YAROWSKY

II. Interview Request

-- Need to have seven (7) days notice

-- Minority Staff need to be present as well as Counsel's Office representative and private counsel

III. Document Request

-- (We will not meet June 7th deadline)

-- No matchup between Travel Office inquiry and all persons from whom documents sought

-- Many of the documents sought raise serious privacy concerns (SF 50's, financial disclosure and conflicts forms)

-- If Committee can explain purposes for such requests, we can work to tailor requests to get at legitimate oversight interests

Clinger Meeting (6/6/95)

1. I wanted to meet with you to find out where you are going on the Travel Office.

   a. last time we discussed this matter, it was my impression that it was unlikely the Committee would be having any hearings at all on the subject.

      i. what has changed?

      ii. what are you looking at?

         (1) the management of the Travel Office in the Bush Administration (1988-92)?
         (2) the circumstances related to the firing of Billy Dale?
         (3) 1993 White House internal management review?
         (4) 1994 GAO audit?

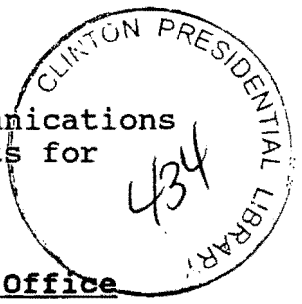
   b. we don't question your oversight authority but we would like to hear what have renewed your interest in yet another inquiry into this subject

      i. particularly, when any inquiry carries with it the real risk of interfering with the criminal trial in September

2. Once we understand were you are going, we can work with you to develop sensible arrangements to assist you in this inquiry.

   a. We started off well: by working out the arrangements for Committee staff to review Travel Office documents at NEOB previously reviewed by GAO for its 1994 Report to Congress.

   b. However, events of past week have caused confusion: separate oral and written staff contacts of White House personnel have occurred without going through Counsel's office. We need to stop that.



3. Goal: to have a more regularized system of communications between Committee and the White House for requests for interviews or documents.

   a. **All formal written Committee requests for interviews/documents should go to Counsel's Office (MIKVA)**

   b. **All staff contacts should go through assigned counsel (YAROWSKY)**

4. For White House staff interviews

   a. **Committee should notify Counsel's Office and try to provide seven (7) days notice**

   b. At interviews, we expect that

      (1) **minority staff be present as well (to avoid duplicative interviews later)**

      (2) **representative from Counsel's Office be present,** as well as

      (3) at the interviewee's request, **private counsel**

   c. we will have to consider carefully how to advise White House witnesses to respond to questions that may could intersect with the issues involved in the Billy Dale trial.

5. White House Document Request(s)

   a. the 5/31/95 Clinger request seeks documents from 38 named White House staff and every other staff member of the Counsel's Office **since the first day of the Clinton Administration**

   b. **there is no reason for such an overbroad request**: it would even capture a new counsel coming aboard next week

   c. what is it that the Committee is after from these persons, and how each related to the Travel Office?

      i. Ira Magaziner?

d. Request **seeks "SF-50s", financial disclosure forms and conflict of interest documents** from this entire universe of persons

   i. What is the purpose of gathering such data on such a great number of people?

   ii. **Such a request raises a host of privacy issues**

   iii. **If Clinger can tell you the purposes behind the request**, we can work with you to develop a targeted approach that can be satisfied

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. draft	RE: Summary of Authorities Governing Executive Branch Employee Communications with Federal Agencies - Attorney Work Product (26 pages)	07/25/1994	P5	435
002. draft	RE: Memorandum for Ms. Cherburne and Cheston - Attorney Work Product (35 pages)	07/11/1994	P5	436

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cheryl Mills
OA/Box Number: 24594

FOLDER TITLE:
[Binder] Materials re: RTC [Resolution Trust Corporation] Contacts [3]

Debbie Bush
2006-0320-F
db2031

RESTRICTION CODES

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

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PRIVILEGED AND ~~CONFIDENTIAL~~
ATTORNEY WORK PRODUCT
DRAFT -- July 25, 1994

MEMORANDUM FOR MSS. SHERBURNE AND CHESTON

Summary of Authorities Governing Executive
Branch Employee Communications With Federal Agencies

At your request, I have outlined the provisions of statutes, regulations, executive orders, and Office of White House Counsel policy statements that may relate to communications at issue between White House staff and Treasury and RTC officials. Following a brief overview, the contents of each authority are summarized in **boldface type**, with comments in regular type interspersed. Emphasis has been added unless otherwise noted.

INTRODUCTION

In 1993 and early 1994, the Office of White House Counsel (herein "OWHC") produced a series of memoranda setting forth rules for White House staff communications with federal agencies. These policy statements, summarized in Sections 1 through 5 below, identify certain types of agency matters for which White House staff communications with agencies may be prohibited, at least without OWHC clearance. Some parts of the policy statements appear to prohibit certain communications outright, but later clarifying statements may make even these subject to authorization by OWHC. Taken together, the policy statements can be read generally to provide that

(a) WH staff may not communicate with federal agencies regarding adjudicative and investigative matters without OWHC clearance, and such contacts are discouraged; and

(b) WH staff may communicate freely with agencies regarding general policy matters unless the staff member has a personal interest in the subject of the communication. In that case, OWHC clearance is required. Clearance may also be required if the discussion concerns policies relating to a specific adjudicative or investigative matter.

One OWHC memorandum also identifies certain personal interests that may disqualify an employee from communicating with an agency about a matter. The rules for communications with independent

regulatory agencies are stricter in some respects than the rules for communications with executive agencies.

For the most part, the policy statements do not include the standards the OWHC would apply in granting clearances when called for by the policy statements. Presumably, the OWHC would apply standards of conduct set forth in applicable statutes and regulations to determine whether a communication was permissible. In addition, we understand that the OWHC would consider whether the agency with which communication is contemplated has its own internal policies governing communications with the White House staff and take such rules into account in determining whether the communications was appropriate. Other policy considerations, such as separation-of-powers issues, may also influence OWHC determinations.

The OWHC policy statements apparently require OWHC clearance for (or possibly, in a few cases, prohibit altogether) White House/agency communications that present the potential for violating regulations and statutes governing conduct of executive branch employees. The Office of Government Ethics' uniform standards of conduct for executive branch employees, 5 C.F.R. Part 2635, took effect on February 3, 1993. Pertinent provisions are summarized in Section 5 below. Applicable statutes and executive orders are summarized in Sections 6 through 9. The conduct regulated by these provisions generally consists of

(a) employee involvement in matters in which they have conflicts of interest;

(b) misuse of public information;

(c) representation of persons before the government in matters in which the government has an interest; and

(d) obstruction of agency proceedings.

Communications between executive branch employees and federal agencies may give rise to such prohibited behavior. The WH policies give the OWHC the opportunity to determine in advance whether a proposed communication would run afoul of any of the applicable standards. To the extent that the White House policy statements do not absolutely prohibit any contacts, they may be somewhat more lenient than the OGE regulations, which do flatly prohibit the use of public office for private gain and the unauthorized use of public information. Of course, the OWHC may determine that a contact should not occur based on the absolute OGE rules.

POLICY STATEMENTS ISSUED BY THE OFFICE OF WHITE HOUSE COUNSEL

1. **Prohibited Contacts With Agencies (2/22/93)**
(Nussbaum and Neuwirth)

a. Introductory statements

-- **Restrictions apply to communications of WH staff with "independent regulatory agencies," "executive agencies," and components of either.**

-- **Restrictions "apply with particular force" in cases of agencies with adjudicative, investigative, enforcement, intelligence, or procurement functions.**

-- **Violations may result in embarrassment and in legal sanctions against the individual.**

* The policy statement contains different rules for independent and executive agencies. The RTC cannot be categorized easily as either an independent or executive agency. It is not a "regulatory" agency in the sense that it has no supervisory authority over banks or thrifts of the type exercised by the OTS, the OCC, or the Federal Reserve Board. The RTC has certain limited investigative and enforcement powers, but no adjudicative authority.

* The statement provides special rules for certain communications with the Department of Treasury. Rules for executive agencies presumably would apply to WH/Treasury communications to the extent those rules are not inconsistent with the special rules.

* Legal sanctions would result only if a violation of policy also constituted a violation of a statute or regulation. Applicable statutes and regulations are outlined in Sections 1 and 2 above.

b. Regulatory agencies

-- **Generally, these agencies have rulemaking and/or adjudicative cases before them.**

i. Adjudicative proceedings

(1) Generally, there is no justification for any WH involvement in particular adjudicative proceedings at any agency.

* We should consider whether communication with one agency regarding an adjudicative proceeding constitutes "involvement" with the proceeding if a different agency is conducting the proceeding.

(2) Generally, no WH staffmember should contact any agency regarding any adjudicative matter pending before that agency.

* Sections (1) and (2) apply to both independent and executive agencies. These are general statements that appear to be qualified by the rules set forth below.

* Does the word "contact," as used here and in other provisions below, refer only to communications initiated by the WH, or also to communications initiated by agencies?

* When the WH/Treasury communications at issue occurred, were there relevant "adjudicative proceedings" pending before the RTC, OTS, or the Department of Treasury? Before any agency? At most, an investigation may have been pending, and possibly not even that. We need to determine how any activities of the RTC and DOJ when the communications at issue occurred should be characterized for purposes of the policy statement.

ii. Rulemaking proceedings

(1) Generally, WH staff should not contact any independent agency regarding rulemaking proceedings pending before that agency.

(2) WH staff should not contact any executive agency regarding rulemaking proceedings pending before it without first consulting with the Office of White House Counsel ("OWHC"). No such contacts with executive agencies should be considered, nor will they be approved, if they imply preferential treatment or undue influence on the decision-making process.

* Section (2) provides one of the few clues in the policy statements to the guidelines

the OWHC would apply in determining whether to grant clearances for contacts otherwise prohibited by these rules. We need to determine what standards the OWHC applied, or should have applied, in granting clearances, both generally and with respect to the communications at issue.

iii. Regulatory matters

If a WH staffmember receives inquiries regarding a "pending regulatory matter," he should "refer the inquiring party to the agency involved and express no opinion on the issues raised," and he must "avoid even the mere appearance of interest or influence." (Last two emphases in original.)

* It does not appear that this rule applies to inquiries concerning a regulatory matter from an agency involved in the matter, because (i) the requirement to refer the matter to the agency involved makes no sense in that instance, and (ii) other policy provisions state that WH staff may respond to agency inquiries in certain circumstances.

* This rule is facially absolute, but appears qualified by provisions below.

iv. Other discussions

If it appears necessary to discuss "general policy matters" with an independent regulatory agency, or to discuss any adjudicative or regulatory "action" with an executive agency, WH staff must first consult with the OWHC for clearance.

* This rule could be read to imply that WH staff could not discuss adjudicative or regulatory actions with an independent agency even with OWHC clearance, but provisions described below are to the contrary.

* We need to determine if the communications at issue were limited to "general policy matters" or concerned other matters, including adjudicative, investigative, or regulatory actions. As noted above, it is not clear whether the RTC is an independent or executive agency for purposes of the policy statements.

v. Independent regulatory agencies (general statement)

The memorandum lists examples of independent regulatory agencies that "should not be contacted by WH staff . . . without prior clearance from the OWHC," except for routine referrals of mail and administrative matters. The list includes the FDIC and the Federal Reserve System. It does not include the RTC.

* This rule can be read to mean that WH staff may contact independent agencies so long as they first obtain clearance from the OWHC. This is contrary to the stricter language set forth above (Sections i, ii, and iv), which suggests that WH staff should not make certain types of contacts with independent agencies under any circumstances.

* The White House Counsel was present at the three meetings at issue. We should consider whether his assent to and/or presence at each meeting constituted a "clearance." We also need to determine what standards the OWHC properly could apply in granting clearances, and whether under those standards it should have granted clearances for the communications at issue.

vi. Executive agencies (general statement)

The memorandum lists examples of executive agencies with "significant regulatory or adjudicative functions." WH staff should not contact these agencies regarding the exercise of those functions without prior clearance from the OWHC. Clearance generally will not be given for adjudicative actions, and will be considered on a case-by-case basis for regulatory actions. The list does not include the RTC or any other banking agency.

* This rule reinforces the statements in sections i and ii above that WH staff generally should not contact agencies regarding adjudicative matters. It gives limited insight into the guidelines the OWHC would apply if a clearance were sought.

vii. Other agencies

Rules on prior clearance from OWHC also apply to other agencies (and bureaus or divisions thereof) with "authority to issue binding regulations or to decide specific claims."

* RTC can issue regulations necessary to carry out its statutory mission to manage and resolve failed thrifts. It does not decide claims.

c. Investigative and intelligence agencies

i. Rules below apply to litigating, investigating, and adjudicative divisions of the Department of Justice. They also apply to other agencies with authority to

-- **investigate charges of misconduct;**
-- **conduct audits of specific programs; or**
-- **bring complaints before courts or other adjudicative bodies**

* There are also special rules for WH staff contacts with DOJ (Section c below). Where neither applied, rules for contacts with executive agencies presumably would apply.

* The RTC can do all of these to some extent.

ii. WH staff should confer with OWHC before <u>contacting</u> agencies "with respect to particular individuals." The WH staff is not bound by the Privacy Act, but should be sensitive to constraints the Act places on federal agencies.

* Again, it is not clear that this rule applies to communications with WH staff initiated by agencies, or what standard the OWHC would apply when consulted.

iii. Rules for contacting intelligence agencies. [N/A]

d. Procurement agencies [N/A]

e. Department of Justice

* Additional rules for DOJ contacts are found in section c above and in the rules for communications with executive agencies.

-- It is "imperative that there is public confidence in effective and impartial administration of the laws."

-- While persons may seek WH intervention in pending criminal or civil matters, "it undermines the administration of justice if the WH even appears to be interfering in such cases."

* We must determine if there was any "pending criminal or civil matter" when the contacts at issue occurred.

i. DOJ communications to the WH concerning particular pending DOJ investigations or criminal or civil cases must be directed to the White House Counsel ("WHC") [not merely the Counsel's Office, apparently]. If appropriate and necessary, such inquiries will be transmitted to the Office of Attorney General or the Deputy Attorney General. No other WH staffmember should discuss a pending civil or criminal matter with a private individual or organization or with the DOJ. Discussions regarding policy, legislative, and budgeting matters are permitted [apparently without OWHC clearance].

* No DOJ personnel participated in the contacts at issue. This rule is inapplicable if none of the participants were participating on behalf of an interested private individual.

* Under what circumstances would such communication be deemed appropriate and necessary?

ii. DOJ requests for formal legal opinions must be directed to the White House Counsel [not the OWHC], who will forward such requests to the OAG or the Assistant AG in charge of the Office of Legal Counsel.

f. Department of Treasury

-- Notes the "sensitive nature" of matters before some component agencies of Treasury.

* The RTC is not a component agency of Treasury. The Secretary of the Treasury does sit on the RTC's Oversight Board. We are researching the

relationships of the RTC, the Department of Treasury, and the other relevant banking agencies to one another.

i. Communications to the WH concerning pending investigations, cases, or adjudications must be directed to the White House Counsel [not the OWHC]. If appropriate and necessary, inquiries will be transmitted to Office of Deputy Treasury Secretary. Transmittal of inquiries regarding adjudications or "private rulings" is unlikely to be considered appropriate or necessary.

* Unlike the comparable rule for DOJ communications, this rule does not say that WH staff may not discuss pending investigations, cases, or adjudications with Treasury. It is not clear if this difference is deliberate. In the absence of other guidance, it would seem that rules for communications with executive agencies should be followed.

ii. Rules for requests for tax information. [N/A]

iii. Requests for information of a "routine nature" and "comments regarding policy" may be handled directly by WH staff and appropriate Treasury personnel.

* This rule would apply to the communications at issue to the extent they can be considered routine or policy-related, and not concerning the merits of any investigation, regulatory enforcement action, or adjudication.

g. Aviation agency rules. [N/A]

2. **Prohibited Contacts With Agencies (3/9/93) (Nussbaum and Neuwirth)**

-- **Statement is intended to clarify certain issues discussed in 2/22/93 memorandum.**

* The rules set forth in this memorandum appear facially stricter than some of the rules in the 2/22/93 memorandum. The 5/4/93 memorandum, described in section 3 below, can be read to relax the rules again to some extent.

a. Independent agency contacts

i. Adjudicative and investigative matters: general rule is WH staff should not contact any independent agency with respect to such matters.

* The word "general" in this rule suggests that there are circumstances in which such contacts may be made, presumably with proper clearance from the OWHC.

ii. Rulemaking matters: OWHC must be consulted in advance before discussing these.

iii. General policy matters and administrative and legislative issues: OWHC should be consulted in advance before discussing these.

iv. Responses to requests for information made by independent agencies: appropriate [apparently without OWHC clearance], if limited to the specific inquiry, unless --

(1) the WH staffmember or his or her relative, friend, or "business associate" has a personal interest in the matter;

* We need to determine what the statement means by "business associate." Presumably, the definition of "covered relationship" in the Standards of Ethical Conduct for Employees of the Executive Branch (at 5 CFR 2635.502(b)) should provide guidance here.

* We need to determine if any of the participants in the communications at issue or any of their relatives, friends, or

business associates had an interest in the relevant matter.

* Did any of the communications at issue constitute requests for information?

(2) the inquiry relates to a particular rulemaking matter and the WH staffmember is aware the private parties have been lobbying the WH with respect to that matter; [N/A]

(3) the inquiry relates to a particular adjudicative or investigative matter;

* Read in isolation, this language sounds like an absolute prohibition if any of the circumstances in subsections (1) through (3) exists. If so, it would seem that no OWHC clearance would be available for such communications. However, statements in the 2/22/93 and 5/4/93 memoranda suggest that no prohibitions on contacts are absolute, and that clearance from the OWHC can always be sought.

(4) the staffmember has discussions that would otherwise be prohibited without prior OWHC approval.

b. Executive agency contacts

i. Rules for independent agency contacts (Sections a.i. and a.ii. above) also apply to contacts with executive agencies concerning adjudicative, investigative, and rulemaking matters. The purpose of requiring prior clearance from the OWHC for discussion of rulemaking matters is "to ensure that no private parties are receiving preferential treatment, or having undue influence upon, the rulemaking process."

* This rule provides some guidance as to standards the OWHC should apply in granting clearances, at least with respect to communications concerning rulemaking. It could be argued that the OWHC should apply similar standards when considering whether to provide clearances for communications regarding investigative and adjudicative matters as well.

ii. **Generally, WH staff need no clearance to discuss general policy matters or administrative, executive or legislative issues with executive agencies. However, such contacts are inappropriate when**

(1) **the WH staffmember or his or her relative, friend, or business associate has a personal financial interest in the matter; or**

(2) **staffmember is or appears to be acting on behalf of a private party with a financial interest in the matter.**

* Again, this language is absolute, but other statements suggest OWHC may be able to grant a clearance in appropriate circumstances.

c. **Contacts with independent or executive agencies concerning specific individuals: confer with OWHC in advance.**

* Presumably, this rule should be read in conjunction with 2/22/93 statement and other rules in 3/9/93 statement regarding communications concerning adjudicative, investigative, rulemaking, general policy, and other matters, depending on the subject of the contact.

d. **Intelligence community contacts -- coordinate with NSA; where privacy issues involved coordinate with White House Counsel [not OWHC]. [N/A]**

e. **Procurement officers -- consult with OWHC in advance. [N/A]**

f. **Departments of Treasury and Justice -- see 2/22/93 memorandum. As stated there, WH staff may communicate directly with either concerning policy, legislative, and budget matters.**

g. **Aviation matters. [N/A]**

3. **White House Policy re Prohibited Contacts With Agencies (5/4/93) (Nussbaum and Neuwirth)**

* This statement characterizes and further comments upon the policies set forth in the 2/22/93 and 3/9/93

memoranda described above. By its terms, it qualifies the absolute language of portions of the 3/9/93 memorandum.

a. **The 2/22/93 and 3/9/93 memoranda stated that "certain communications are prohibited without prior approval from the White House Counsel's office." Examples of such communications are Department of Justice contacts concerning pending criminal or civil cases and investigations, and communications with other agencies concerning adjudicative, investigative, and rulemaking matters.**

* The WH staff communications that the 5/4/93 memorandum states require prior OWHC approval are among those that the 2/22/93 memorandum and the 3/9/93 memorandum appear to prohibit flatly. The 2/22/93 memorandum says that no WH staff except the White House Counsel should discuss pending civil or criminal matters with DOJ. Both earlier memoranda state that WH staff generally should not discuss adjudicative or investigative matters with independent agencies, and should not discuss matters in which they have a personal interest with any federal agency. In contrast, the 5/4/93 memorandum suggests (although it does not state explicitly) there is never an absolute prohibition, but that in some circumstances the staffmember must seek and receive OWHC clearance.

b. **Regulatory and rulemaking matters: Pending completion of a new regulatory review project that was expected to provide new guidance with respect to communications with agencies concerning pending regulatory and rulemaking matters, all communications with agencies concerning specific regulatory and rulemaking matters should be discussed in advance with Sally Katzen (Jack Quinn, before Sally was confirmed).**

* Unclear if the term "regulatory" matters was intended to include matters concerning enforcement of regulations. If so, we need to determine when this policy was lifted. If applicable, need to determine if it was complied with.

c. **Adjudicative, investigative, and international aviation matters: require clearance from OWHC. [N/A]**

* Again, this statement appears to qualify the statements in the earlier memoranda that WH staff generally should not communicate with agencies

concerning adjudicative or investigative matters. (Sections 2.a.i. and 2.b.i. above.)

d. Policy, legislative, or budgeting matters: direct communications between WH staff and agencies [independent or executive, apparently] are appropriate if they do not address particular pending adjudicative, investigative, or rulemaking matters.

* This is inconsistent with, and more lenient than, the 3/9/93 statement that communications with independent agencies concerning general policy, legislative, and administrative matters require OWHC clearance (Sections 1.b.i., 1.b.ii., 1.b.vii., 1.e.ii, and 2.a.iii above). Discussions of policy relating to specific investigations may continue to require OWHC clearance, however.

4. Policy Regarding Investigations and Investigatory Agencies (7/2/93) (Nussbaum and Sloan)

-- Intended to supplement memoranda of 2/22/93 and 3/9/93, and "to explain White House policy regarding investigations and investigatory agencies."

* This memorandum [may have been] [was] issued in connection with the Travel Office matter.

a. Contacts with investigatory agencies

-- WH contacts with investigative agencies may arise in three circumstances:

-- contacts regarding the initiation of an investigation;

-- contacts regarding a pending investigation or case; and

-- contacts regarding administrative matters.

i. Contacts with the FBI [an executive agency]

(1) WH reports of possible law violations or wrongful activities: communicate information to White House Counsel. If warranted, Counsel will contact the AG, Deputy AG, or Associate AG. If required, Counsel and

senior DOJ official involved will design and monitor continuing contact.

(2) Communications with the WH regarding pending investigations or cases: direct communications to White House Counsel. Counsel will handle in same way as initial reports (see Section (1) above).

* As the memorandum states, this is generally consistent with the 2/22/93 memorandum, except that the 7/2/93 memorandum adds the Associate AG to the persons whom White House Counsel may contact concerning DOJ investigations.

(3) Contacts regarding administrative matters:

(a) WH staff may deal with appropriate persons at DOJ and the FBI concerning "policy, legislation, budgeting, and appointments" matters, "just as with other Departments and agencies." Apparently, such contacts do not require clearance from the OWHC.

* It is not clear whether this rule applies only to executive agencies. If it applies to independent agencies as well, it is inconsistent with the statement in the 2/22/93 memorandum that WH staff must obtain OWHC clearance before discussing "general policy matters" with independent agencies (Section 1.b.iv. above). It is consistent with the 5/4/93 statement (3.d. above).

(b) The White House Counsel may communicate directly with the FBI concerning background investigations and clearances of government officials.

ii. Contacts with the IRS and the Department of Treasury [executive agencies]

(1) WH initiation of IRS investigation or audit: <u>never</u> appropriate for WH staff to initiate investigation or audit. Information should be communicated to the White House Counsel.

If appropriate and necessary, Counsel will communicate the information to the AG.

(2) Pending IRS or Treasury Department investigations: "As stated in prior memoranda, . . . a policy similar to the policy regarding the FBI is followed." WH staff should refer communications concerning a pending investigation to White House Counsel, who will communicate with the Deputy Secretary of the Treasury if appropriate and necessary. Counsel and Deputy Treasury Secretary will design and monitor any continuing contact.

* This statement suggests that the policies for WH communications concerning investigations are the same for DOJ and Treasury. However, the 2/22/93 memorandum states that WH staff must never discuss pending matters with DOJ, but does not say that with respect to the Treasury Department.

(3) Administrative matters: Rule for WH staff is the same as the rule for DOJ communications, Section i(c) above. White House Counsel may communicate directly with IRS about routine tax checks of prospective government officials.

b. White House Press Office disclosures

i. Generally, WH Press Office should not disclose ongoing investigations.

ii. In extraordinary circumstances, a disclosure may be determined to serve the public interest. In that event, Press Office disclosure should be made only with the approval of the White House Counsel and the Chief of Staff or Deputy Chief of Staff. Disclosures should be made, if possible, only after consultation between Counsel and senior officials of the investigative entity's Department.

c. Press Office contact with FBI

i. While WH Press Office routinely responds to inquiries and consults with spokespersons for

Department and agencies, it is essential to avoid appearance of interference with the FBI.

ii. If Press office wants to communicate with the FBI concerning public statements about a pending case or investigation, it should contact the White House Counsel. If the communication is appropriate, Counsel will notify the AG, Deputy AG, or Associate AG in advance. Counsel will design and monitor any continuing contacts with the senior DOJ official with whom he is dealing.

* This policy statement, like those above concerning "continuing contacts" between the WH and investigative agencies, appears to present the possibility that White House Counsel could delegate to another WH staffmember the function of having contacts with the investigative agency if Counsel and the senior agency official so agreed. If this is correct, it contradicts the statement in the 2/22/93 memorandum that WH staff should not discuss pending investigative matters with the DOJ. See Section 1.e.ii. above. If the policy applies to independent investigative agencies as well, it constitutes an exception to the statement in the 3/9/93 memorandum that WH staff generally should not contact independent agencies regarding investigative matters. See Section 2.a.i. above.

5. **White House Policy re Prohibited Contacts on Rulemaking Matters (3/11/94) (Quinn and Klein)**

* Because it deals with rulemaking matters, this statement is relevant to the present matter only in that it reaffirms the applicability of the three earlier memoranda summarized above.

a. Contacts with executive branch agencies concerning pending rulemaking

i. Executive branch agency contacts are permissible when the purpose of the communication is not to influence the outcome of the pending proceeding.

ii. When the purpose is to influence the outcome, person making the contact should obtain approval from his supervisor and OIRA.

b. Contacts with members of the public concerning an executive branch agency rulemaking.

i. Written communications must be forwarded to the affected agency for inclusion in the public docket.

ii. Non-written communications should not be forwarded to anyone.

c. Contacts regarding investigative and adjudicative matters, and contacts with independent agencies.

-- Refer to prior memoranda on such contacts.

STATUTES, REGULATIONS, AND EXECUTIVE ORDERS GOVERNING CONDUCT OF EXECUTIVE BRANCH EMPLOYEES

6. Standards of Ethical Conduct for Executive Branch Employees, 5 CFR Part 2635 (including regulations implementing 18 U.S.C. Sections 205 and 208(a))

a. Use of public office for private gain

i. "An employee shall not use his public office for his own private gain . . . nor for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity." 5 CFR 2635.702; see also 2635.101(b)(7).

-- Persons affiliated in "nongovernmental capacity" include "persons with whom the employee has or seeks employment or business relations." Sec. 702.

* Could any involved White House staff be considered to have an affiliation with the Clintons in a nongovernmental capacity? "Employment or business relations" refers to nongovernmental activities.

* By meeting with Treasury or RTC representatives, did White House staff confer any benefit on private individuals? Who initiated the contacts? What did each participant understand to be the purpose of the contacts?

ii. OGE states that "issues related to an individual employee's use of public office for private gain tend to arise when the employee's action benefits those with whom the employee has a relationship outside the office; the language of Sec. 2635.702 is intended to pinpoint this conduct without unreasonably limiting employees in the performance of their official duties." 57 Fed. Reg. 35030 (August 7, 1992)

* Were all actions of White House staff in connection with Treasury contacts taken in furtherance of official duties and not to benefit the Clintons personally, financially or otherwise?

b. Use of public office to coerce a benefit

i. A public official may not "use . . . his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity." 5 CFR Sec. 2635.702(a).

* Did White House staff intend to induce Treasury or RTC personnel to provide a benefit for the Clintons?

c. Disclosure of nonpublic information

i. An employee is prohibited from using nonpublic information to further the private interests of himself or another, whether through advice or recommendation, or by knowing unauthorized disclosure. 5 CFR Sec. 2635.703(a); Sec. 101(b)(3).

ii. "Nonpublic information is information that an employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public." 5 CFR Sec. 2635.703(b). Includes information that is routinely exempt from disclosure under statute, regulation or executive order, has been designated as confidential by an agency, or has not been disseminated to the general public and is not authorized to be made available to the public on request. Id.

* Was the information disclosed by Treasury and RTC representatives public? Information contained in a press inquiry may be nonpublic. Information that has been published, presumably, is not. It should also be considered whether release of the information had been authorized.

* Did the White House staff believe that the information they were receiving was public? What was the basis for that belief?

* The regulation does not prohibit the mere receipt of nonpublic information. It prohibits the unauthorized disclosure and use of the information. Need to consider whether WH staff knew or had reason to know information they received from Treasury or RTC was nonpublic. Also need to know what they did with the information -- e.g., to what third parties did they provide it, for what reasons, and to whose benefit?

d. Not giving preferential treatment/impartial performance of official duties

i. An employee "shall act impartially and not give preferential treatment to any private organization or individual." 5 CFR Sec. 101(b)(8).

* By meeting with White House staff, did Treasury representatives give preferential treatment to the Clintons? Need to know what standard RTC practices were with regard to disclosure of information of the type provided to the WH staff.

ii. An employee should take "appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties." 5 CFR Sec. 2635.501(a). This is consistent with the general requirement that employees "shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards." Sec. 101(b)(14).

(1) An employee should not participate in a matter without authorization from the agency designee if the employee

(a) knows that a person with whom he has a covered relationship is or represents a party to the matter, and

(b) "determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." 5 CFR Sec. 2635.502(b).

* The regulation does not define the word "participate." However, other provisions of the regulation apply only in the case of "direct and substantial" participation. The absense of such language here suggests that participation may be only indirect and need not be "substantial" for the provision to apply. Merely attending a meeting or taking notes of a conversation, however, may not be considered "participation" in a matter.

(2) Employees have "covered relationships" with:

(a) persons with whom the employee has or seeks a business, contractual, or other financial relationship (other than a routine consumer transaction);

* Employees do not have "covered relationships" with friends and relatives.

(b) persons whom the employee has served within the past year as agent, attorney, consultant, contractor, or employee; and persons for whom the employee's spouse, parent, or dependent child is, to the employee's knowledge, serving or seeking to serve in such capacity. Sec. 502(b)(1).

* Need to determine if any of the WH staffmembers involved in the communications at issue had covered relationships with either of the Clintons. The term "person" is defined to exclude government employees acting in their official capacity. 2635.102(k). Therefore WH staff do not have a "covered relationship" with the

President by reason of their employment at the White House.

(3) The agency designee may determine that the employee's participation is proper because the employee's impartiality is not likely to be questioned, Sec. 502(c), or that the appearance problem is outweighed by the interest of the Government in the employee's participation, Sec. 502(d). The determination need not be in writing unless the employee requests it. Sec. 502(c)(6).

(4) An employee who is concerned that circumstances other than those specifically described in section 502(a) would raise a question regarding his impartiality also should use the authorization process. Sec. 502(a).

* Need to determine basis for OGE clearance of Altman participation.

* Did WH staff raise the question of appearance of impartiality with the OWHC or other agency designee before the communications at issue? (According to Kathy Whalen, the Counsel to the President is the OWHC designee, and Beth Nolan is the alternative designee.)

e. Seeking other employment

i. An executive branch employee may not participate "personally and substantially" in a matter that he knows would have a "direct and predictable effect" on the financial interest of himself or any person with whom he is seeking employment. 5 CFR 2635.604 (a); see also 18 U.S.C. Sec. 208(a).

(1) "Direct and predictable effect" means that a decision or action has a close causal link to any expected effect of the matter on the financial interest. Sec. 402(b)(1).

(2) "Personally and substantially" means direct and significant participation (including active supervision of a subordinate). May arise from decision,

approval, disapproval, recommendation, investigation, or the rendering of advice.

ii. An employee is seeking employment if he

(1) is engaged in negotiations for employment (meaning he has had discussions or communications with another person "mutually conducted with a view toward reaching an agreement regarding possible employment with that person");

(2) has made certain unsolicited communications regarding possible employment;

(3) has made a response other than rejection to an unsolicited communication regarding possible employment. Sec. 603(b)(1).

iii. Authorizations available

(1) The OGE may authorize an employee engaged in employment negotiations to participate in a matter otherwise prohibited by 5 CFR 2635.603(a) and 18 USC Sec. 208(a). Sec. 605(a).

(2) The agency designee may authorize an employee seeking employment as defined in (2) and (3) above to participate in a matter otherwise prohibited by 5 CFR 2635.603(a). Sec. 605(b).

iv. An employee may not "tak[e] official action" in a matter that has a direct and predictable effect on the financial interests of a person by whom he is employed or with whom he has an arrangement concerning future employment unless authorized by the OGE. Sec. 606(a).

* What constitutes "official action"? Not defined.

* Need to determine if any WH staffmember involved could be said to have been seeking employment from, or to have had an arrangement concerning future employment with, either of the Clintons in their personal capacities. (Again, "person" does not include a federal employee acting in his/her official capacity.)

* Availability of authorization by the "agency designee" in certain instances may help. We understand the designees for the White House staff was the White House Counsel and Beth Nolan.

f. Knowingly making unauthorized commitments or promises purporting to bind the government is prohibited. 2635.101(b)(6).

* This provision would be most likely to apply to one of the Treasury or RTC officials.

g. Unauthorized use of government property.

i. An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes. 2635.704 (a).

(1) Government property includes government records. 704(b)(1).

(2) Authorized purposes are those purposes for which government property is made available to members of the public or those purposes authorized in accordance with law or regulation. 704(b)(2).

* This provision could be implicated if any of the WH staff received government documents from RTC or Treasury and used them for other than official purposes.

h. Improper use of official time.

Unless otherwise authorized, an employee shall use official time in an honest effort to perform official duties. An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform unofficial, unauthorized duties. 2635.705.

7. <u>Representations of persons in matters affecting the Government</u>, 18 U.S.C. Sec. 205(a).

a. A government employee shall not, other than in the proper discharge of his official duties, act as agent or attorney for anyone before a government agency in a

matter in which the U.S. is a party or has a direct and substantial interest.

* Need to determine if any of the WH communications at issue were pursuant to the proper discharge of official duties and, if not, whether those involved could be said to have been acting as agents or attorneys for the Clintons in their personal capacities. It may be that for purposes of this statute a person must have granted agency or representational authority to the government employee, and the employee cannot take on such authority for himself -- need to confirm.

8. **Obstruction of agency proceedings, 18 U.S.C. Sec. 1505.**

Imposes criminal penalties on one who "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes" any pending proceeding before a U.S. agency or department or a Congressional inquiry or investigation, or endeavors to do so.

* Need to determine if any of the communications at issue could be said to have influenced, obstructed, or impeded any "pending proceeding" before a U.S. agency, or to have been intended to do so.

9. **Additional General Guidelines for Executive Branch Employees**

a. **Code of Ethics for Government Service, P.L. 96-303, 94 Stat. 855 (4/3/80).**

i. **Employees must never discriminate unfairly by dispensing special favors or privileges to anyone.**

ii. **Employees must never use information gained confidentially in the performance of government duties as a means of making private profit.**

b. **Principles of Ethical Conduct for Government Officers and Employees, Executive Order 12731 (10/17/90)**

i. **Public service is a public trust; employees must place loyalty to the Constitution, the laws, and ethical principles above private gain.**

ii. **Employees shall not allow the improper use of nonpublic government information to further any private interest.**

iii. **Employees shall not use public office for private gain.**

iv. **Employees shall act impartially and not give preferential treatment to any private organization or individual.**

v. **Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or these ethical standards.**

Sharon E. Conaway

PRIVILEGED AND ~~CONFIDENTIAL~~
ATTORNEY WORK PRODUCT
DRAFT/July 11, 1994

MEMORANDUM FOR MSS. SHERBURNE AND CHESTON

Subject: Authority for Withholding from Congress OWHC Documents Relating to Hearing Preparation and Internal Inquiry

You have asked me to research the law governing the ability of the Office of the President to withhold from the House and Senate Banking Committees documents of the Office of White House Counsel relating to preparation for the Committees' upcoming hearings, and to the pending OWHC inquiry into the conduct of White House staff in connection with the subject matter of those hearings.

CONCLUSIONS

This memorandum supports a conclusion that the best approach for us in refusing to produce OWHC work product to Congress would be the following:

(1) We should assert that principles underlying the executive privilege justify withholding OWHC work product from Congress. (A formal assertion of the privilege, by or at the direction of the President, is not appropriate unless and until Congress issues a subpoena.) It is standard practice for the

White House and other executive agencies to assert executive privilege principles in withholding deliberative and investigative documents from Congress. The executive privilege covers more types of documents than the attorney-client and work product privileges, and may well be sufficient to prevent disclosure to a congressional oversight committee. The Court of Appeals for the D.C. Circuit has imposed a heavy burden on a congressional committee to overcome a President's general assertion of executive privilege for confidential materials. Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

(2) We should also make clear that OWHC documents pertaining to hearing preparation and the internal inquiry are attorney work product and, in some instances, attorney-client communications. There is good support for the position that, even if the Senate or House Committees could make the particularized showing of need required to overcome the generalized executive privilege, our attorney-client and work product privileged materials would be entitled to heightened protection, subject to the same rules afforded such materials in the common law. Arguments that Congress may overlook common law privileges are inapplicable, we can assert, because the Constitution affords to the President those privileges necessary for him to perform his constitutional duties, including both a

generalized executive privilege protecting confidential deliberations and heightened protection for attorney-client communications and attorney work product.

(3) We should keep in mind two rulings of the Court of Appeals for the D.C. Circuit in United States v. AT&T, the only case I have found since Senate Select Committee v. Nixon concerning Executive Branch resistance of a congressional demand for documents. In the 1976 and 1977 AT&T rulings, the court declined to rule on the branches' respective rights. Instead, it required the congressional subcommittee seeking the documents and the Department of Justice to negotiate a compromise, sending them back once to renegotiate and finally setting certain rules only when the parties again had reached an impasse. The court held that the Constitution contains an implicit mandate for each branch to seek "optimal accommodation" of the needs of both branches in inter-branch conflicts. In light of this ruling, if the congressional Committees insist on disclosure of OWHC work product we should make a good faith effort to negotiate an accommodation. However, AT&T need not be read to require us readily to compromise important Executive Branch interests.

DISCUSSION

1. Introduction

In the course of (a) preparing for the upcoming congressional hearings, and (b) conducting an internal inquiry into the conduct of White House staff with regard to the subjects of those hearings, the Office of White House Counsel is generating and collecting information and documents that the Office of the President wishes to keep confidential. We believe that the congressional Committees will ask for production of OWHC documents. This memorandum discusses the grounds on which the Office of the President may refuse to provide such documents.

With few exceptions, OWHC documents generated or collected in connection with hearing preparation and the internal inquiry should be eligible for protection under the executive privilege. That privilege generally protects (with some qualifications discussed below) pre-decisional and deliberative documents of the Office of the President and other Executive Branch agencies, and documents concerning investigations conducted by the Executive Branch. It is possible, but not certain, that any final report or policy statement the Office of the President issues or adopts might not be covered by the executive privilege. Obviously, if

the White House intends to submit any final report to Congress, no protection would need to be sought for it.[1]

Many of the documents collected and generated by the OWHC should also be eligible for protection under the attorney-client and/or attorney work product privileges. While these materials may be protectible by means of a generalized assertion of executive privilege alone, there are good arguments that such items are entitled to heightened protection afforded by the attorney-client and work product privileges. Communications between the President or White House staff and attorneys in the Office of White House Counsel are attorney-client privileged if made in confidence for the purpose of giving or receiving legal advice, and if the privilege has not been waived.[2] Materials prepared by or at the direction of OWHC attorneys in anticipation

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[1] According to the OLC, the "deliberative process" privilege does not protect documents containing "final opinions, statements of reasons supplying the bases for decisions, or policies actually adopted, or documents that otherwise constitute the 'working law' of an agency." 6 Op. O.L.C. at 493. Issues of waiver are discussed briefly in Section 3 below.

[2] See, e.g., Note, "The Attorney-Client Privilege in Congressional Investigations," 88 Col. L. Rev. 145, 145 (1988) (citing cases). In Upjohn v. United States, 449 U.S. 383 (1981), the Court held that employee statements to employer counsel during internal corporate investigations were subject to the attorney-client privilege (unless waived by the employer). I have seen nothing to suggest that that rule should extend to internal investigations by government agencies as well.

of litigation should be afforded work product protection.[3] (This memorandum does not analyze in detail the various types of documents and information being generated or collected by the OWHC, and the types of protection that may be available for each. This exercise may be desirable if Congress presses a demand for such materials.)

The Executive Branch has a long history of declining to provide Congress documents relating to investigations or deliberations by Executive Branch agencies and officials. In 1982, the Office of Legal Counsel at the Department of Justice ("OLC") collected numerous examples of refusals by executive branch officials to provide information in response to congressional requests, including information relating to executive branch investigations. These examples date from 1792 to 1981. The OLC concluded that its study:

> "demonstrates convincingly that throughout this nation's history, the Chief Executive and those who assist him in 'tak[ing] care that the laws be faithfully executed,' have on certain occasions exercised their constitutional obligation to refrain

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[3] There is little question that these materials are being prepared in anticipation of litigation. Case law supports the argument that congressional hearings, like other proceedings in which "evidence or legal argument is typically presented . . . by parties contending against each other," constitute "litigation" for purposes of the work product rule. American Law Institute, Restatement of the Law Third, The Law Governing Lawyers, at 9 (Tent. Draft No. 6, March 22, 1993).

from sharing with the Legislative Branch information the confidentiality of which was vital to the proper constitutional functioning of the Executive Branch."[4]

During the past 20 years, courts have imposed some constraints on the President's ability to withhold documents on executive privilege grounds. Nonetheless, Congress bears a heavy burden to justify obtaining presidential documents for use in oversight hearings.

2. General Executive Privilege

Refusals by the President and Executive Branch officials to provide investigative and deliberative materials to Congress are usually based on the "executive privilege." The executive privilege protects material the disclosure of which would significantly impair the performance of the President's lawful duties.[5] The privilege is based on the constitutional doctrine of separation of powers, the President's Article II powers, and

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[4] 6 Op. O.L.C. 782, 782 (1/27/83; see also Nixon v. Sirica, 487 F.2d 700, 730-37 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (listing instances in which Presidents have refused to provide information to Congress based on executive privilege).

[5] See Senate Select Committee on Presidential Campaign Activities, 498 F.2d 725, 727 (D.C. Cir. 1974) (upholding presidential assertion of executive privilege for documents "that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President").

his duty to "take care that the laws are faithfully executed."[6] OLC has asserted that the President's duties include the authority to "supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance." 6 Op. O.L.C. 626, 628 (11/5/82).

a. Use of the Executive Privilege to Protect Executive Branch Investigative Materials from Congress

In 1982, the OLC collected numerous cases in which Executive Branch officials refused to provide confidential materials relating to executive branch investigations and internal inquiries to Congress, dating from the early 19th century to the early 1980s. These examples include both refusals based on instructions from the President (true "executive privilege" assertions) and refusals based on assertions by executive branch officials of protection for deliberative, investigative, or law enforcement materials. A list of the most pertinent cases for our purposes is attached as Appendix 1 to this memorandum.

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[6] U.S. v. Nixon, 418 U.S. 683, 705-06 (1974); see also "Confidentiality of the Attorney General's Communications in Counseling the President," 6 Op. O.L.C. 481, 484 (8/2/82).

In one more recent episode, Congressman Dingle asked the Justice Department for documents relating to the Department's investigation of its own environmental division. Michael Small at the OLC reported that the Justice Department resisted the request on deliberative process grounds. The Department turned over the documents after Congress subpoenaed them, however. The reason may have been the Attorney General's desire to accommodate Congress in the matter and/or the White House's decision not to invoke the executive privilege.

While the OWHC internal inquiry is not strictly speaking a "law enforcement" activity, the concerns that drive the Justice Department's policy of providing law enforcement investigative files to Congress only in "extraordinary circumstances" apply to our situation as well. See 9 Op. O.L.C. 86 (9/24/85). OLC has articulated the following reasons for maintaining the confidentiality of investigative files:

-- "[E]ffective and candid deliberations among the numerous advisers who participate in a case . . . would be rendered impossible if the confidential deliberative communications were held open to public scrutiny." Id. at 91. This concern applies to both open and closed investigations. Id.

-- "Persons who ultimately are not prosecuted may be subjected to prejudicial publicity without being given an opportunity to cleanse themselves of the stain of unfounded allegations." Id.

-- Inappropriate political pressures may affect the decision of what steps to take with respect to persons under investigation. Id.

-- Congressional access to closed files may lead Congress to seek to reopen files or otherwise alter determinations made by the Executive. Id.

b. Procedures for Asserting the Privilege

As a matter of custom, only the President may formally assert the executive privilege. This limitation on the exercise of the privilege stems from the practice of Presidents Kennedy and Johnson, and at least some subsequent presidents have also followed the procedure.[7] According to OLC, in a 1982 policy statement President Reagan directed that "executive privilege cannot be asserted without specific authorization by the President, based on recommendations made to him by the concerned agency head, the Attorney General, and the Counsel to the President."[8] It is not appropriate to assert the executive

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[7] 13 Op. O.L.C. 185, 194 (6/19/89); 6 Op. O.L.C. 481, 483 & n.4 (8/2/82); see also Common Cause v. NRC, 674 F.2d 921, 935 (D.C. Cir. 1982) (stating in dicta that only the President may assert executive privilege).

[8] 13 Op. O.L.C. at 193 (describing November 4, 1982, Memorandum for the Heads of Executive Departments and Agencies, "Procedures Governing Responses to Congressional Requests for Information" (11/4/82) (the "1982 Reagan Memorandum")).

privilege unless Congress has issued a subpoena. 13 Op. O.L.C. at 185.

Formal assertions of executive privilege are relatively rare. 13 Op. O.L.C. 185, 193-944 (6/19/89); 12 Op. O.L.C. 213, 224 (8/16/88). The 1982 Reagan Memorandum articulated long-standing Executive Branch policy, stating:

> "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."

Quoted in 13 Op. O.L.C. at 193-94.

The Department of Justice often declines to provide investigative and deliberative documents in response to congressional requests (before any subpoena has been issued) on the basis of the "deliberative process" or "law enforcement" privileges. Both are included within the broader "executive privilege" and grounded in the Constitution.[9] (It may be that

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[9] See 13 Op. O.L.C. 185, 186-90 (6/19/89). The OLC has explained that the question of protecting confidential Executive Branch information and documents:

the Justice Department avoids using the term "executive privilege" because only the President can formally assert that privilege.) The Executive Branch often attempts to negotiate an accommodation if Congress insists on pressing a demand for investigative or deliberative materials, thus avoiding the need formally to assert the privilege.[10]

If negotiations have failed and Congress has subpoenaed documents from the Executive Branch, it should be decided whether the President will assert the executive privilege. The OLC has opined that criminal contempt proceedings cannot be brought against an executive official who refuses to provide materials to Congress because the President has asserted the executive privilege. Without a formal assertion by the President, an

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> "is not strictly speaking just one of executive privilege. While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional request for information, the Executive Branch is not necessarily bound by the limits of executive privilege."

Id. at 186.

[10] 13 Op. O.L.C. at 194. In United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977), the court held that the Constitution requires the executive and legislative branches to attempt to resolve conflicts arising from congressional information requests.

executive official may be subject to such proceedings. According to the OLC, if the privilege has been asserted, Congress would be most likely to bring an action in U.S. District Court to enforce its subpoena.[11]

c. Parameters of the Executive Privilege

According to the OLC, historically the President has "largely determined for himself" the nature and scope of the executive privilege. 9 Op. O.L.C. 86, 87 (9/24/85). OLC explained that "[t]he assertion of executive privilege has always been a practical undertaking that is not governed by fixed rules but by considerations of prudence that take into account political factors such as public reaction." Id. at 93. While presidents since Washington have asserted the executive privilege, courts only began considering the privilege to any

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[11] 10 Op. O.L.C. 68, 84-87 (4/28/86). In Senate Select Committee v. Nixon, the Senate Committee brought an action in U.S. District Court to enforce a subpoena directing President Nixon to produce tapes of his conversations with White House officials. 498 F.2d 725 (D.C. Cir. 1974). The court in Nixon v. Sirica held that federal courts have jurisdiction to review claims of executive privilege in order to determine whether they justify the nondisclosure of documents subject to subpoena. 487 F.2d 700, 704, 713-14 (D.C. Cir. 1974). See also United States v. Nixon, 418 U.S. 683, 692-97 (1974) (whether President must comply with subpoena is justiciable question). The court in Sirica approved the President's use of an application for a writ of mandamus to seek review of the U.S. District Court's order enforcing a subpoena against him. 498 F.2d at 707.

significant extent in 1973, with the Supreme Court's ruling in U.S. v. Nixon and other lower court cases. Case law defining the privilege is not extensive, and there are few cases concerning efforts by the Executive Branch to resist congressional subpoenas. As noted above, we understand that the Department of Justice and other executive agencies usually negotiate and resolve conflicts over Congress' frequent document requests, and that therefore few such disputes go to court.

The executive privilege for deliberative and investigative materials such as the OWHC documents at issue here is not absolute, but it is "presumptive."[12] Information for which the President asserts the privilege on general confidentiality grounds is presumed to be protected, and the party seeking its production bears the burden of demonstrating that its need

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[12] United States v. Nixon, 418 U.S. at 708; 13 Op. O.L.C. 185, 188 (6/19/89). Presidential documents relating to military, diplomatic, and national security secrets are subject to a more or less absolute privilege. See 418 U.S. at 706, 710-11; see also Nixon v. Sirica, 487 F.2d at 714, 721 (no assertion of executive privilege overrides court's authority to consider whether the privilege was properly asserted, but national security issues are entitled to special deference); but see United States v. AT&T, 567 F.2d 121, 128 (D.C. Cir. 1977). However, a "President's generalized interest in confidentiality," while weighty and "entitled to great respect," does not receive the same high degree of deference. Id. at 710-12.

outweighs the Executive's interest in confidentiality.[13] In the case of a congressional committee, before a court may even weigh the interests of the committee in obtaining presidential information, the committee must show that the material it seeks is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Under Senate Select Committee, only upon such a showing may the President be required either (i) to assert particularized claims of confidentiality or (ii) to submit the material at issue for in camera review. If material is submitted for review, the court must weigh the interests at stake and determine if any portion of the material should be disclosed.[14]

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[13] United States v. Nixon, 418 U.S. at 713; Senate Select Committee, 498 F.2d at 730-31.

[14] Id. at 730-31 (proper showing must be made "before a generalized showing of confidentiality can be said to fail, and before the President's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, together with particularized claims that the Court will weigh against whatever public interests disclosure might serve"). See also Agosto v. Barcelo, 594 F. Supp. 1390, 1399 (D.P.R. 1984) (citing Senate Select Committee for rule that legislative body must bear the affirmative burden of showing that its need for the information [from the executive branch] is so great that the Court should disturb the status quo between the two branches and order disclosure"), vacated on other grounds, 748 F.2d 1 (1st Cir. 1984).

Senate Select Committee did involve factors that could be cited to distinguish it from our case. The House Committee on

The Department of Justice has taken the position that "the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances."[15] So long as Congress is exercising its proper generalized function of "ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not," Congress should rarely need Executive Branch deliberative materials. 5 Op. O.L.C. at 30-31. In fact, the Attorney General noted, "Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on

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the Judiciary already had copies of the tapes for use in its inquiry into presidential impeachment. The court took this circumstance into account in denying the tapes to the Senate Committee, stating that the Committee's oversight need for the tapes was, "from a congressional perspective, merely cumulative."

[15] 5 Op. O.L.C. at 30 (Memorandum of Attorney General for President Reagan, recommending assertion of executive privilege in face of Congressional subpoena). See also 9 Op. O.L.C. 86, 92 (9/24/85) ("Congress has had to engage in long and hard negotiations for access to documents over which there was a claim of executive privilege.").

the Executive Branch's function of executing the law." Id. at 31.[16]

While the Senate Select Committee sets a tough standard for Congress to meet in obtaining documents from White House, it is important to take note of the rulings in United States v. AT&T, which call for the executive and legislative branches to accommodate one another's interests in disputes over congressional demands for documents.[17] In these cases, the House Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce issued a subpoena for production of documents in the possession of AT&T. The documents consisted of letters from the Department of Justice to

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[16] The Attorney General concluded that Congress' interest in obtaining information for oversight purposes is considerably weaker than its interest for purposes of specific legislative proposals. Id. at 30. Even with respect to efforts by Congress to obtain presidential information for legislative purposes, however, the D.C. Circuit has stated that "[t]here is a clear difference between Congress' legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions." Senate Select Committee, 498 F.2d at 732. The court suggested that to overcome the presumption that confidential presidential documents are privileged for legislative purposes, the Committee must point to "specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the [materials at issue] . . . ." Id. at 733.

[17] United States v. AT&T Co., 567 F.2d 121 (D.C. Cir. 1977), reh'g denied, 567 F.2d 121, 133 (D.C. Cir. 1977); United States v. AT&T Co., 551 F.2d 384 (D.C. Cir. 1976).

AT&T asking AT&T to tap specified telephone lines for foreign surveillance purposes. The House Subcommittee wanted the documents in connection with an investigation into abuses of warrantless wiretapping. The Justice Department sued to enjoin AT&T's compliance with the subpoena.

The D.C. Circuit initially declined to rule, instead requiring the parties to negotiate a compromise although previous negotiations had ended in a stalemate. 551 F.2d 384. After further negotiations failed, the court held that the matter was justiciable, and that neither branch had an absolute right on which a ruling could be based. 567 F.2d 134. The court ordered the parties to submit a sample of unexpurgated documents at issue for in camera review so that the U.S. District Court could determine if the Department's expurgations and privilege assertions were appropriate. The court held that counsel for the Subcommittee could attend the review.[18]

We could argue that the accommodation reached in AT&T would be inappropriate in our case. The documents at issue in AT&T were direct evidence concerning the matter before the Subcommittee, not attorney work product of the Department. We

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[18] Id. at 130-34. The Department had already agreed to provide expurgated copies of some documents to the Subcommittee.

could assert that our documents should be absolutely protected even from in camera review (at least to the extent they contain attorney-client communications or attorney opinions and mental impressions), on the grounds that the Committees have no right to such information even upon a showing of need. Under AT&T, however, a court might require an in camera review to confirm our assertions concerning the protected nature of the documents.[19] We could also argue that documents of the Office of the President deserve more deference than documents of other entities within the Executive Branch.[20]

The executive privilege is far more likely to give way in the face of an assertion of need by a prosecutor or grand jury for evidence in criminal proceedings than by a congressional committee. The D.C. Circuit held that President Nixon must submit materials subject to a grand jury subpoena for in camera

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[19] The court rejected the Department of Justice's argument that documents relating to national security, which typically are afforded the highest degree of protection under the executive privilege, should be subject to absolute executive discretion and immune from in camera review. 567 F.2d at 128.

[20] See United States v. Nixon, 418 U.S. 683 708 ("[i]n no case of this kind would a court be required to proceed against the president as against an ordeinary individual") (quoting United States v. Burr, 25 F. Cas., at 192). The court in Nixon did, however, require in camera review of the President's tapes to determine whether they were relevant to a pending criminal proceeding.

review so that the trial court could determine whether "the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury." Nixon v. Sirica, 487 F.2d 700, 718 (D.C. Cir. 1973) (emphasis in original). In United States v. Nixon, the Supreme Court held that the U.S. District Court did not err in requiring the President to submit tapes and documents reflecting conversations with his staff for in camera review pursuant to a subpoena issued by the Special Prosecutor in a pending criminal matter. An executive privilege based only on the "generalized interest in confidentiality . . . must yield to the demonstrated, specific need for evidence in a pending criminal trial." 418 U.S. 683, 713 (1974). The high court ruled that the trial court should require the production of all relevant and admissible material. Id. at 714.[21]

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[21] The application of the Nixon cases to work product of the President's counsel generated after the conclusion of an episode that has raised allegations of wrongdoing is unclear. In both U.S. v. Nixon and Nixon v. Sirica, the courts considered whether the President must produce tapes containing conversation potentially constituting direct evidence of criminal conspiracy. Accordingly, the courts held that the interests of the grand jury and Special Prosecutor in the tapes probably overrode the President's interest in confidentiality (at least to the extent of subjecting the tapes to in camera review). There would seem to be a serious question whether that rule should extend to materials such as ours, which contain only attorney opinions, analysis of law and facts, and factual material gathered after the conduct at issue had concluded.

The executive privilege does not protect information or documents disclosure of which would not implicate or hinder the Executive Branch's decisionmaking processes. 6 Op. O.L.C. at 486. Hence, the deliberative process prong of the privilege does not protect "factual, nonsensitive materials," described by OLC as materials that do not contain "advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes." Id. While the deliberative process privilege (at least at common law) does not extend to "purely factual" materials, documents are protected "if the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are 'inextricably intertwined' with the policymaking process." 6 Op. O.L.C. at 494 (citing cases). In this sense, the rules for what constitutes deliberative material are similar to the rules for what constitutes attorney work product (except that deliberative material covered by the executive privilege need not have been prepared by or at the direction of an attorney or in anticipation of litigation). See ALI, Draft Restatement of the Law -- The Law Governing Lawyers (T.D. 6), at 7.

3. Attorney-Client and Work Product Privileges

The Office of the President also may properly assert the attorney-client and work product privileges in refusing to produce materials that satisfy the common-law requirements for those privileges. Those privileges may provide a higher degree of protection than the general executive privilege for confidential presidential information. Common law attorney-client and work product privileges are available to government agencies.[22] In addition, it can be argued that the privileges are available to the Office of the President under the Constitution, based on the same principles that underlie the general executive privilege. By asserting that the President's attorney-client and work product privileges are constitutionally based, we may be able to sidestep a pending dispute concerning

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[22] Common law attorney-client and work product privileges are among the exemptions that permit government agencies to withhold documents from the public under the Freedom of Information Act. 5 U.S.C. Sec. 552; N.L.R.B. v. Sears, 421 U.S. 132 (1975). FOIA provides that these exemptions do not authorize agencies to withhold documents from Congress. The Office of the President, including the Office of White House Counsel, are not subject to FOIA, however. Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993); National Sec. Archive v. Archivist of the United States, 909 F.2d 541, 544 (D.C. Cir. 1990); see also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980). Therefore, the provisions of that statute should not operate to require the White House to provide privileged documents to Congress, any more than they require private persons to do so.

whether Congress can disregard common law privileges in conducting investigations.

The Department of Justice and other Executive Branch agencies generally have not asserted attorney-client or work product privileges as independent bases for withholding deliberative or investigative materials from Congress. Instead, these agencies typically base their refusals on other components of the executive privilege (formally through the President or informally on their own, according to the circumstances), such as constitutionally-based "deliberative process" or "law enforcement" privileges. Attorney-client communications and work product are covered by these privileges.[23]

For some time, OLC has had a concern that asserting the attorney-client or work product privilege instead of or in addition to the executive privilege "might invite additional restrictions on the doctrine of executive privilege, on the ground that the limitations applicable to the attorney-client privilege logically extend to any privilege claimed by the

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[23] The OLC has explained that "[u]nlike the attorney-client privilege, which focusses exclusively on communications of a legal advisory nature, executive privilege may be claimed for any nonfactual, sensitive deliberative communications for which there exists a sufficiently strong public interest in disclosure." 6 Op. O.L.C. at 490.

Executive." Memorandum, "Possible Reliance on the Attorney-Client Privilege by the Counsel to the President" (4/2/73) (unpublished). When the 1973 OLC memorandum was written there were few (if any) court decisions limiting the scope of the executive privilege, which had been "tailored through practice to fit the needs of the Presidency." In contrast, the attorney-client privilege had been "limited by numerous court decisions."[24] The OLC therefore concluded in 1973 that the doctrine of executive privilege "provides a more effective and more satisfactory basis for nondisclosure of confidential information."

Today, however, a line of cases has imposed limitations on the general executive privilege that may make it advisable for the President in appropriate circumstances to claim the added protection afforded by the attorney-client and work product privileges, as articulated under common law. As discussed in Section 1 above, except when asserted with respect to matters of national security and defense (and possibly not even then), the

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[24] For example, the OLC noted that the attorney-client privilege "applies only to the extent that [the attorney] has received confidential communications from his client." In contrast, "the President may assert executive privilege regardless of whether the aide involved is a lawyer and regardless of whether the advice being offered is of a legal nature."

executive privilege is qualified. The privilege can be overcome if the party seeking disclosure can show a sufficiently strong and specific need for the information or documents at issue. While courts have held that congressional committees face a heavy burden to justify overcoming the executive privilege, it is conceivable that a committee could succeed in doing so. Further, we should bear in mind that production of executive privilege material to a prosecutor or grand jury might well be required in any future criminal proceeding, however remote the possibility of such a proceeding may be.[25]

Common-law attorney-client and work product privileges are not subject to some of the limitations imposed on the generalized executive privilege. At common law, the attorney-client privilege is an absolute bar to disclosure, so long as is not waived.[26] The privilege for work product containing attorney opinions and mental impressions is also very strict, giving way only if it is placed in evidence in litigation or used to further

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[25] See United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Sirica, 498 F.2d 700 (D.C. Cir. 1973).

[26] See American Law Institute, "Restatement of the Law: The Law Governing Lawyers," Tentative Draft No. 6, at 5 (March 22, 1993).

crime or fraud.[27] It would be unreasonable for presidential documents to which those privileges applied to receive less protection than similar documents of private persons. A 1981 statement of Assistant Attorney General Harmon articulated why materials relating to the provision of legal advice to the President should receive heightened protection:

> "[T]o whatever extent the customary attorney-client privilege applies to government attornies, we believe that the reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that 'he shall take care that the laws be faithfully executed.' Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be 'candid, objective, and even blunt or harsh,' see United States v. Nixon, 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs, but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give,

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[27] See, e.g., id. at 33-39. Ordinary work product not containing attorney opinions or mental impressions presumably would be afforded only qualified protection, similar to that afforded by the general executive privilege for confidential information. Id. at 25-33.

candid legal advice and opinions free of the fear of compelled disclosure."[28]

Asserting attorney-client and work product privileges before Congress does create the risk of bringing to a head an ongoing dispute concerning whether Congress need recognize those privileges. Some Members of Congress have claimed -- as recently as last fall -- that common-law based attorney-client and work product privileges asserted by both private persons and government actors may be disregarded by Congress.[29] There are

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[28] Harmon, Assistant Attorney General, OLC, "Memorandum to All Heads of Offices, Divisions, Bureaus and Boards to the Department of Justice" (May 23, 1977), quoted in 6 Op. O.L.C. at 490 n.17. See also 6 Op. O.L.C. at 490 (Attorney General's communications with the President may demand greater confidentiality than those of other Cabinet advisers to extent involve legal advice and law enforcement).

[29] The bases for these assertions include that (a) the broad grant of investigative power to Congress mandates that it be able to obtain disclosure of such information when necessary; (b) Congress need honor only constitution- and statute-based privileges, not privileges under common law (such as attorney-client and work product); (c) Parliament does not honor the attorney-client privilege, and congressional procedures are based on those of Parliament, and (d) the attorney-client privilege only protects the disclosure of materials in adversarial ("trial-like") situations, and congressional hearings are non-adversarial. See Cong. Rec. S14634-S14639 (Oct. 28, 1993) (statement of Senator Lott opposing confirmation of Janet Napolitano as U.S. Attorney for Arizona on grounds she withheld information about her representation of Anita Hill in Senate confirmation hearings; publishing memorandum in support of position that "Congress may reject claims of attorney-client privilege at its discretion"); Cong. Rec. H666-H699 (Feb. 27, 1986) (contempt of Congress proceedings against two attorneys who

good arguments against this assertion, and other Members of Congress and others have upheld the absolute right of witnesses to assert the attorney-client privilege before Congress.[30] In recent years, Members have been vocal on both sides of the issue, on which no court has ruled.

Congressional challenges to assertions of the attorney-client privilege have included the following:

-- Last fall, Senator Lott opposed the confirmation of Janet Napolitano as the U.S. Attorney for Arizona on grounds she withheld information from the Senate confirmation committee about her representation of Anita Hill on attorney-client privilege grounds. Senator Lott placed in the Congressional Records a memorandum supporting the position that "Congress may reject claims of attorney-client privilege at its discretion." Cong. Rec. S14634-S14639 (Oct. 28, 1993). Seventeen other senators (including Senators Patty Murray and John Kerry, on the Senate Banking Committee) moved to close the debate on Ms. Napoliatano's nomination, stating

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declined to provide information and documents concerning their representation of Ferdinand Marcos to the House Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs); Memoranda of the American Law Division, Library of Congress, "Availability of Attorney-Client Privilege Before Congressional Committees" (June 1983).

[30] I have not detailed these arguments in this memorandum, because it may well be possible to sidestep them if we can prevail in an argument that the President's attorney-client and work product privileges are constitutionally based. For articulations of these arguments, see Note, "The Attorney-Client Privilege in Congressional Investigations," 88 Col. L. Rev. 145 (1988); Lewin, "Memorandum Submitted on Behalf of John M. Fedders in Response to Memorandum of September 3, 1982, from the Congressional Research Service" (Feb. 17, 1983), reprinted in, "Attorney-Client Privilege," H.R. Committee Print 98-I (June 1983).

"it is clear that the privilege is here," and noting that her violation of the privilege could subject her to disbarment.

-- In 1986, the House held an attorney in contempt after rejecting his attorney-client privilege claim. The contempt citation was based on a finding that the privilege was inapplicable, and would not be recognized in court. However, some members argued that the privilege should not be recognized even if valid under common law. In debate, Congress Fascell stated that Congress could require the production of attorney-client privileged information when legislative needs outweighed the reasons given for nonproduction. ___ Cong. Rec. H666, H669-70 (Feb. 27, 1986). Three other Congressmen dissented, stating that such a policy would "eviscerate" the privilege. Id. at H671.

-- In 1985, the Subcommittee on Government Activities and Transportation or the House Committee on Government Operations, in response to Amtrak's assertion of work product protection for certain information, reportedly stated that "[w]hen a claim of privilege that is not of constitutional origins is asserted before a congressional investigating committee, it is within the discretion of the committee whether to uphold the claim." See Note, "Congressional Investigations," at 159 n.101.

-- John Fedders, Director of the SEC Enforcement Division, asserted the attorney-client privilege at the direction of his former client when testifying before the House Subcommittee on Oversight and Investigations in 1982. The Subcommittee challenged his rejection, and an exchange of legal memoranda on the issue ensued. In June 1983, Representative Dingell reportedly stated regarding the matter, "[T]he position of the Subcommittee has consistently been that the availability of the attorney-client privilege to witnesses before it is a matter subject to the discretion of the Chair."[31]

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[31] See Note, "The Attorney-Client Privilege in Congressional Investigations," 88 Col. L. Rev. 145, 159 n.100 (1988), citing Hamilton, "Attorney-Client Privilege in Congress," 12 Litigation 3 (1986).

Despite such remonstrations, however, Congress apparently has never held a witness in contempt for refusing to answer based on an assertion of attorney-client or work product privilege that would have been valid in a court of law.[32]

Examples of congressional recognition of the attorney-client privilege are also numerous:

-- The Senate Ethics Committee recently permitted Senator Packwood to redact attorney-client privileged material from the diaries that the Committee subpoenaed. See Senate Select Committee on Ethics v. Packwood, 845 F. Supp. 17, 19 (D.D.C. 1994). Regarding this agreement, Senator McConnell stated: "This was not a matter of being charitable. The Committee was legally obligated to permit the masking of such material." 139 Cong. Rec. S14725, S14733. Senator Packwood emphasized that to the extent communications were privileged "they cannot be turned over to the Committee. Obviously, if you could, you could never tell your lawyer anything." 139 Cong. Rec. at S14736.

-- Senator Durenberger announced that he had taken the "unprecedented step" of waiving the attorney-client privilege for communications in order to provide them to a Senate committee in connection with a congressional inquiry. 136 Cong. Rec. S10557, S10574 (July 25, 1990); 136 Cong. Rec. S7865, S7865 (June 13, 1990).

-- Senator Mitchell stated, in connection with a Senate investigation of an insurance company's activities: "The question of the application to Congressional investigations of common law evidentiary privileges, such as the attorney-client privilege, has been the subject of debate over the years. As a matter of actual experience, however, Senate committees have customarily honored the privilege when it

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[32] See Note, 88 Col. L. Rev. at 145, 148 n.24, 156.

has been validly asserted." 136 Cong. Rec. S7613, S7613 (June 7, 1990).[33]

-- During the Iran-Contra hearings, Oliver North's attorney successfully asserted the attorney-client privilege on North's behalf. See Note, "The Attorney-Client Privilege in Congressional Investigations," 88 Col. L. Rev. 145, 146 n.6 (1988) (citing N.Y. Times, July 10, 1987, at A8, col. 4).

-- The Senate Watergate Committee reportedly "treated the privilege as one of right." Hamilton, "Can Congress Make Lawyers Talk?," Wash. Post, March 25, 1986, at A17.

While there are good reasons to expect that we could survive a challenge to our absolute right to assert the attorney-client and work product privileges before Congress, it may be possible to sidestep the issue altogether. There should be a strong argument that the attorney-client and work product privileges are afforded to the Office of the President by the Constitution. Congress must honor constitutionally-based privileges.

The Supreme Court has long applied the rule of constitutional interpretation that "'that which was reasonably

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[33] See also 132 Cong. Rec. E3358 (Oct. 1, 1986) (Rep. Hubbard submitted National Law Review article by James Hamilton that generally supported position that Congress should have been entitled to certain documents that it sought in connection with Rehnquist confirmation as Chief Justice, but for which President Reagan successfully asserted the executive privilege; but noting that "[w]hile there is debate or this issue, a good argument can be made that Congress has no right at all to material protected by a valid claim of attorney-client privilege"); Note, "The Attorney-Client Privilege in Congressional Investigations," 88 Col. L. Rev. 145 (1988).

appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant.'"[34] It would certainly seem that the Constitution should not be read to afford to the President the same rights to protect the confidentiality of his attorney-client communications and attorney work product that common law provides to other persons, both public and private, so that the President may effectively carry out his Article II powers and duties. I have found no case that explicitly states that the Constitution affords the attorney-client and work product privileges to the President, but the OLC has asserted that those protections form part of the broader constitutionally-based executive privilege:

> "the interests implicated by the attorney-client privilege generally are subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege."

6 Op. O.L.C. at 494 n.24; see also id. at 490 & n.17, 497-98 n.32.

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[34] United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) (rule established in McCulloch v. Maryland, 17 U.S. 316 (1819) "'has been so universally applied that it suffices merely to state it'") (quoting Marshall v. Gordon, 243 U.S. 521 (1917)). It is pursuant to this rule, and the separation of powers doctrine, that courts have read the general executive privilege into the Constitution.

If is correct that the President's attorney-client and work product privileges are grounded in the Constitution, then congressional information requests must give way to proper assertions of those privileges by the Office of the President. Even Members of Congress challenging the right of witnesses to assert common-law privileges before it have conceded that Congress must recognize privileges based on the Constitution.[35]

Finally, a possible advantage of asserting general executive privilege protection for attorney-client and work product materials is that rules of subject matter waiver may not apply to the executive privilege. Concerns about privilege waiver are most likely to arise in connection with Mr. Cutler's presentation of the results of the OWHC internal inquiry to Congress. Under rules of subject matter waiver generally applicable to attorney-client privileged information and documents, if Mr. Cutler's report disclosed attorney-client communications of the Office of the President, protection for all other such communications with the same subject matter could be waived. While subject matter

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[35] See, e.g., Cong. Rec. H666, H670 (2/27/86) (statement of Mr. Fascell) (all branches of government follow "those specific privileges created by the Constitution"); Memorandum of American Law Division, Library of Congress at CRS-7 (June 1983) (prepared for House Subcommittee on Oversight and Investigations) (Congress' power to compel information is plenary "in the absence of a countervailing constitutional or [statutory] privilege").

waiver may not apply in all instances to attorney work product, some courts have applied it in instances where a party discloses a final report in an adversarial setting.[36]

Waiver rules for the executive privilege may be different. One federal appellate judge has expressed doubts as to "whether a waiver of executive privilege is to be analyzed as we do a waiver of other kinds of privileges." United States v. North, 910 F.2d 843 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part). Judge Silberman noted that the executive privilege "promotes institutional concerns different from the attorney-client privilege." In a different vein, the OLC has asserted that the deliberative process privilege (a component of the executive privilege) does not apply to final policy statements of federal agencies, but only to deliberative, pre-decisional materials.[37] It may be possible to argue that the

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[36] See ALI Draft Restatement, "The Law Governing Lawyers," at 47-48. However, courts have held that disclosure of a report to an agency in effort to resolve dispute and avoid adverse action does not waive work product protection for underlying material. Id. at 49-50. Further research is needed to determine which rule applies to submission of a report in a congressional oversight hearing.

[37] 6 Op. O.L.C. 481, 493 (8/2/82) (privilege does not protect documents reflecting "final opinions, statements of reasons supplying the bases for decisions, or policies actually adopted, or documents that otherwise constitute the 'working law' of an agency").

privilege would not, in any event, apply to a policy statement or report of the Office of the President, prepared specifically for presentation to Congress, and that presenting the report therefore would not waive any privilege with respect to underlying deliberative material or work product.[38]

Sharon E. Conaway

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[38] I have not had looked in detail at the question of waiver of the various privileges. A separate memorandum on this subject may be useful.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. draft	Sherburne; RE: Treasury/White House Contacts Chronolgy (20 pages)	06/26/1994	P5	437
002. draft	Sherburne; RE: Treasury/White House Contacts Chronolgy (20 pages)	06/26/1994	P5	438
003. draft	Sherburne; RE: RTC Contacts Notes Chronology (9 pages)	05/09/1994	P5	439
004. draft	RE: Memorandum Analyzing Treasury-White House Contacts - Attorney Work Product (23 pages)	07/25/1994	P5	440
005. draft	RE: Preliminary Analysis of White House Staff Contacts (24 pages)	07/25/1994	P5	441

COLLECTION:
Clinton Presidential Records
Counsel's Offce
Cheryl Mills
OA/Box Number: 24594

FOLDER TITLE:
[Binder] Materials re: RTC [Resolution Trust Corporation] Contacts [2]

Debbie Bush
2006-0320-F
db2030

RESTRICTION CODES

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

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

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

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

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

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Incomplete/Unverified
Sherburne - 6/26/94

Treasury/White House Contacts Chronology

03/02/89 FSLIC takes over MGSL as conservator.

11/00/89 McDougal is indicted with his brothers-in-law James Henly and David Henly for misapplication of loan proceeds related to MGSL in 1985-86.

06/07/90 McDougal acquitted.

11/30/90 RTC closes MGSL.

03/08/92 Gerth article in NYTimes identifying Clinton's Whitewater investment and ties to McDougal and his failed MGSL.

Per Leach materials, Gerth article provoked inquiries "from both RTC Investigations in Washington, D.C. and the former Director of the Tulsa Consolidated Office... The question was raised as to whether Whitewater's relationship with MGSL had been reviewed and were there any resulting losses or potential criminal activity document." This resulted in a two week review of the completed investigative findings to date.

03/00/92 Statute of Limitations runs on civil tort claims.

Per Leach materials, RTC Senior Investigative Specialist, John Walker, contacts KC office regarding Gerth article.

03/17/92 Illinois primary.

03/23/92 Per Leach materials, two week review found no mention of any Whitewater relationship with MGSL.

Lyons Report released.

03/25/92 Per Leach materials, Tulsa Investigations (they had custody of the records related to the McDougal and other related bank fraud prosecutions) pursued lead that a former MGSL employee had fabricated two years of minutes for an MGSL subsidiary. During same period,

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civil investigator reviews additional Madison records stored in Little Rock under the control of the post-receivership bank -- presumably looking for mention of Whitewater.

04/15/92 Per Leach materials, criminal investigation, previously scheduled for late 1992, rescheduled to 4/92.

05/01/92 Per Leach materials, Tulsa office closes, MGSL records transferred to KC.

07/30/92 Per Leach materials, criminal investigator (Lewis?) transfers to KC at end of July and resumed analysis of MGSL documents.

09/01/92 Per Leach materials, RTC per Richard Iorio (KC field investigations Officer) sends report of Apparent Criminal Irregularity (#C0004) re MGSL to Charles Banks, US Attorney in Little Rock and Steve Irons, FBI Supervisory Special Agent. (LATimes reported that the Republican-appointed Banks strongly argued that bringing criminal charges related to MGSL would have been prosecutorial misconduct.)

12/15/92 Per Leach materials, FBI SAC Don K. Pettus acknowledges receipt of the criminal referral and advises that further questions regarding referral should be directed to AUSA Floyd MacDodson.

01/07/93 Per Leach materials, MacDodson advises Lewis that he isn't sure the referral is still in the USAtty's office in Little Rock.

3/7/93 Jean Hanson starts as consultant

03/23/93 Altman faxes Nussbaum a portion of the 3/9/92 NYT Whitewater article (follow-up to 3/8/92 Gerth story) (Fax in Nussbaum file)

03/24/93 Altman faxes Nussbaum the complete 3/9/92 NYT Whitewater article (Fax in Nussbaum file)

05/03/93 Per Leach materials, Jean Lewis says she learned from AUSA Bob Roddey that almost immediately after receiving the referral in September 1992, Banks forwarded it to DOJ/DC; the Little Rock US Attorney's computer system had no record of the referral.

3/23/93 - Stephens [+ other old USAtts 2 asked to resign] removed as US Atty. DiGenova [+ others] quoted in media as critical of St. unprof'l attacks on Rosty (then rep'd by Stein[illegible]).
early [late March] 4/[illegible]93 articles - Stephens blasts Clinton.

05/04/93 Altman letter to Gonzalez recommending that the S/L for civil lawsuits against S&L wrongdoers not be extended beyond 2/28/94

Per Leach materials, Lewis sends letter to Richard Pence (Acting USAtty) requesting information on the status of the referral.

05/10/93 Per Leach materials, letter to RTC/KC from Richard Pence (Acting USAtty) advising that Chuck Banks had forwarded the referral to OLC, the Executive Office of US Attys after determining that his office had a conflict of interest.

05/13/93 Senate votes to pass RTC Completion Act.

Per Leach materials, Jean Lewis contacts DOJ/OLC re status of criminal referral.

Per Leach materials, Jean Lewis contacts DOJ/OLC and is advised that they have no record that the criminal referral had been submitted; decides to resubmit referral through U.S. attorney's office in Little Rock with a copy to Acting AAG, Daniel Koffsky. Lewis also reports learning that the referral was sent to the Executive Office for the U.S. Attorneys -- she speaks to Donna Henneman, the Ethics Program Manager for that office who tells her she understood the referral had been declined, but would check further.

05/26/93 Per Leach materials, Henneman calls Lewis and reports that the referral had been sent to former Special Counsel Ira Raphelson and that she was checking with the Criminal Fraud Division to find out what happened to it after he left.

05/31/93 Per Leach materials, RTC supplements investigative manpower with 3 additional criminal investigators for purpose of completing the investigation of previously defined criminal allegations in the most expedient way possible.

06/08/93 Per Leach materials, Lewis reports that Henneman called her and said she located the referral in the Fraud section of the Criminal Division and that is has been sent back to Henneman for further disposition; Henneman also reports that the Criminal Division sent a memo to

Doug Frazier (Assoc. Deputy AG in Heymann's office) advising that there was no basis for requiring the USAtty in Little Rock to recuse herself; Frazier does not recollect the memo but asks for another copy it and the referral. Lewis says she has new information to support the referral.

06/23/93 Per Leach materials, Lewis says Henneman told her that Frazier sent the package back after he was appointed the new USAtty in one of the Florida districts; Frazier was replaced by Margolies.

Per Leach materials, Lewis reports that Henneman called Lewis again and reported that she spoke with Frazier who told her that he and Tom Muscato (Director of the Executive Office for U.S. Attorneys and had decided to return the referral the Little Rock because there was no basis for recusal.

06/29/93 Per Leach materials, Lewis says she learned from "a highly reliable and confidential source" that the referral was returned to Little Rock and the Acting USAtty, Richard Pence, intended to let it wait for Paula Casey to take office.

07/14/93 WJC nominates Stanley Tate to head RTC.

07/20/93 Foster suicide

FBI executes search warrant at the offices of Capital Management Services, Inc.

8/4- /93 Robides - DiGenova calls Stephens attack on Rocky outrageous.

09/00/93 Hale indicted along w/Charles Matthews and Eugene Fitzhugh w/defrauding the SBA

09/23/93 Per Leach materials, Jean Lewis says she called Henneman to determine whether Henneman wanted formal notification of the existence of the subsequent Madison referrals being submitted to the USAtty in Little Rock; Lewis says that Henneman requested a copy of the transmittal letters and a brief summary of the contents of the referrals.

09/24/93 Altman calls Gearan at 10:03 a.m. (per Gearan log).

~~09/29/93 Cliff Sloan calendar shows 4 p.m. meeting w/Ron Noble~~

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Roelle, Hanson, Altman re EB. Schloss tells Kats, not to mention HRC in EB.

09/28/93 Jean Hanson note to call Nussbaum

09/29/93 Nussbaum calendar shows 6:45 p.m. Waco Briefing

Jean Hanson meets w/Nussbaum and Sloan (some say for no more than 5 minutes) to inform him that RTC was making a criminal referral to DOJ in which Clintons names appeared on some checks made out to then-Governor Clinton's re-election campaign; Nussbaum or Sloan (or both) reported conversation to Lindsey

Per Leach materials, Lewis says that Henneman called Lewis requesting copies of the referrals and exhibits in order to determine whether to instruct the USAtty's office to act on them or if they should be forwarded to the Public Integrity Section of DOJ. Lewis says she asked Henneman to put the request in writing.

Per Leach materials, Lewis says that Henneman called Lewis back and withdrew her request for a copy of the referrals, reverting to her original request for the transmittal letters with a summary of the referrals.

9/30/93 Hanson do AT memo w/ EB noting talked w/ Sec + BN.

09/30/93 Hanson calls Sloan stating that Altman sent Nussbaum the 3/9/92 NYT article, that nine matters were contained in the criminal referral ("vital info suppressed"); that it included allegations involving diversion of Madison funds to Fullbright and Tucker as well as allegation of conspiracy to use bank funds for 1985 campaign contributions to WJC (campaign identified as co-conspirator); that Clintons mentioned in other charges as potential witnesses

Memorandum from Hanson to Altman re The Rose Law Firm attaching RTC Early Bird re Rose conflicts of interest; cover memo to Altman says Steve Katsanos has talked to Sue Schmidt; that Hanson has spoken w/Secretary and Nussbaum and Sloan.

DeVore calls Gearan at 5:30 p.m. (per Gearan log).

10/01/93 Jean Hanson note to call Christine Varney.

DeVore calls Gearan at 5:28 p.m. (per Gearan log).

10/04/93 WJC w/Lindsey, fly to Los Angeles; Lindsey tells WJC about criminal referral.

Lindsey notes of telecon with Jim Lyons -- "Gerth has all of the reports of examination in connection w/Madison Guaranty - RTC source - FIRIA (sic) - 9 criminal referrals".

Caputo notes of telecon with Lindsey re Isikoff and Gerth inquiries, Jim Lyons, WDC facts, David Hale.

10/05/93 WJC w/Lindsey, return to D.C.

10/06/93 Gerth interviews McDougal.

Jean Hanson note to call Bill Roelle re Sue Schmidt/Kansas City.

10/07/93 Hanson calls Sloan and Eggleston re Schmidt and Gerth questions re RTC referral and involvement of Foster, Seth Ward and others in Rose firm; also discussed leak by RTC in KC to Sue Schmidt. Sloan and Eggleston report conversation to Lindsey.

Lindsey notes of conversation w/Neil and Cliff (notes reflect mention of Schmidt questions, inquiries re Rose Law Firm undisclosed conflicts, and criminal referral -- "9 referrals - allegation JGT - diversion of funds - Senator Fulbright - Peacock - McDougal - 1985 - 1985 Clinton Committee").

Nussbaum called Gearan at 4:36 p.m. (per Gearan log).

Hanson note to call Roelle re criminal referrals

10/08/93 Nine new criminal referrals submitted to USAtty and FBI in Little Rock.

10/13/93 Nussbaum places call to Lindsey; inquires whether Lindsey free for 3:30 meeting tomorrow.

Per Leach materials, RTC provides OLC in the Executive Office of U.S. Attorneys with copies of transmittal letter and summaries of referrals.

10/14/93 Jean Hanson, Josh Steiner and Jack DeVore meet in Nussbaum's office beginning at 3:30 p.m. for 30 minutes w/Nussbaum, Gearan, Lindsey, Sloan and Eggleston re response to NYT inquiry about RTC criminal referral mentioning Clintons.

Lindsey notes of meeting (notes reflect mention of various reporters, Madison facts, procedure for making criminal referrals).

Gearan notes of meeting (notes reflect mention of Jean Lewis and referrals, various reporters, Madison facts).

DeVore calls Gearan at 5:45 p.m. (per Gearan log).

10/20/93 Lindsey file memorandum describing 10/14/93 meeting with Treasury officials.

Hanson calendar shows "Lunch w/Ellen Kulka, Old Ebbitt."

10/27/93 Per Leach materials, Lewis says that Henneman told Lewis to expect declination letter for the first referral from Casey.

Per Leach materials, declination letter to Lewis from Casey for first referral, concurring with opinion of DOJ attorneys in the Criminal Division that there is insufficient information in the referral to sustain many of the allegations or to warrant the initiation of a criminal investigation. Does not foreclose future prosecutions about matters covered in referral.

10/28/93 Press reports that WJC will nominate Ricki Tigert to head FDIC.

10/31/93 Sue Schmidt (WPost) reports that RTC made criminal referral to USA Paula Casey re MGSL transactions, including some involving Clinton campaign.

AP article reports Jeff Eller saying WH had not been notified about referral.

11/02/93 Jeff Gerth (NYTimes) reports criminal referral by RTC.

11/08/93 Paula Casey, U.S. Attorney in Little Rock, recuses herself.

11/09/93 DOJ (Acting AAG Keeney) announces that the criminal division at main DOJ would take over Hale and Madison Guaranty investigation.

11/10/93 Nussbaum/Eggleston memorandum to WJC re Casey recusal and the assignment of the investigation by Phil Heymann and John Keeney to three DOJ career prosecutors; proposed Qs&As.

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Per Leach materials, Jean Lewis notifies colleagues that Mike Caron, Senior Criminal Investigator, has replaced her as the lead investigator on Madison.

11/15/93 Per Leach materials, Lewis e-mail to Lee O. Ausen re impending meeting with Donald Mackay and his staff who are coming to KC to be "convinced that there either IS or IS NOT a very good case behind those referrals.... We have strong documentation to support the allegations. But what's beneath the surface, including where we looked and why, who's tied to who, who's in business with who, who got paid for what and where all the internal and external ties are, isn't in writing. It's in my head."

11/17/93 WJC nominates Ricki Tigert to head FDIC.

11/20/93 substantial disc. Senate flr among Bkg Comm members re extending s of l of probs w/ RTC. Vote on funding bill, w/ extension.

11/30/93 WJC's nominee to head RTC, Stanley Tate, withdraws his name from consideration.

FOIA requests by Baltimore Sun for the FDIC's Madison Guaranty examination reports and by the Washington Post for FDIC records concerning the retention of the Rose Law Firm in the FDIC case against Frost.

12/02/93 Office of the Comptroller of the Currency (Eugene Ludwig) faxes to Bruce Lindsey FOIA requests received by FDIC from Baltimore Sun and Washington Post for MGSL and Rose Law Firm; Steiner faxes same to Lindsey, having received the letters from the Comptroller's office

Lindsey receives faxes from Ludwig and Steiner of 11/30/93 FOIA requests to FDIC.

12/09/93 Leach letter to RTC requesting access to all documents related to MGSL and subs

12/23/93 WJC and HRC direct private counsel to provide to DOJ all records potentially relating to the WDC, including files of Vince Foster.

12/24/93 Treasury names Jack Ryan Acting Deputy Director of RTC and Ellen Kulka as General Counsel.

12/31/93 Renaissance Weekend conversation between WJC and Eugene Ludwig.

01/05/94 Lindsey issues statement that Kendall will begin delivering WDC docs to DOJ, including the Foster WDC file.

01/06/94 Per Leach materials, Lewis e-mail describing call from a reporter about handling of original criminal referral.

01/07/94 Hanson memorandum to Altman stating failure to understand why no lawyer from White House Counsel is on the new "team."

01/09/94 Moynihan calls for a special counsel

01/10/94 Congressional Republican letter to Altman re concern that the running of the SL may prevent final resolution of all allegations relating to MGSL.

01/11/94 Congressional Republican letter to Reno urging that she immediately seek agreements to toll civil and criminal S/L related to Madison and WDC.

Wolf/Lightfoot/Istook letter to Nussbaum (cc to Thomasson) asking whether public funds are being used to provide the President w/legal assistance related to WDC and MGSL

01/12/94 WJC requests Nussbaum to ask Reno for a special counsel; Reno agrees.

Report that FBI has served subpoenas on Leon Foust, the president of the First Bank of Arkansas in Wynne, Ark (formerly, the Bank of Cherry Valley).

01/14/94 Kendall provides DOJ w/documents responsive to subpoena

01/20/94 Reno appoints Fiske as Special Counsel

Next 1-2 days - Say includes civil juris too

McDougal and Betsey Wright expected to appear before grand jury; McDougal appearance postponed to 2/17

01/21/94 Gov. Tucker discloses that he has received a grand jury subpoena; subpoenas also issued to Fulbright, Steve Smith and Seth Ward II

01/24/94 WTimes reports on federal investigations of ADFA relationship to MGSL, POM and Pine Bluff Warehouse Co.

RTC's Peter Knight briefs D'Amato staff on MGSL document production and statute of limitations

01/25/94 D'Amato letter to Altman urging that actions be taken to ensure that S/L doesn't run on Madison claims.

01/26/94 Peter Knight conference call w/D'Amato staff on MGSL statute of limitations (could have been 1/27 or 28); agree that 2/28 is the operative date (give or take a day)

01/27/94 Bentsen's Weekly Report to McLarty, under item titled "Controversy", discloses that OTS has received four FOIA requests for MGSL documents and that Leach has requested staff access

01/28/94 Republican members of Senate Banking Committee write to Riegle requesting that the Committee investigate Madison-related issues. D'Amato ~~[illegible]~~ floor speech: 1) demanding hrg; 2) explaining they've been trying to get info from RTC re MG & S&L. Just

1/31

02/01/94 Altman letter responding to letter initiated by Senate Republican leadership concerning MGSL, acknowledging the 2/28 anniversary date of the federal takeover of Madison

Tigert confirmation hearing in Senate Banking Committee -- Republicans press her to recuse. D'Amato + Faircloth ask her to agree to recuse as condition confirmation. Refuses.

Altman and Hanson meet with Bentsen at 12:45 p.m. -- Hanson recalls Altman telling Bentsen about upcoming 2/2/94 meeting. Give S&L briefing + mention recusal?

02/02/94 Altman and Hanson meet with Nussbaum, Ickes, Williams, and Eggleston in McLarty's office (McLarty present only at beginning of meeting) at 5 p.m.; Altman reads from talking points, first addressing S/L issue and then recusal.

Steiner calls Gearan at 4:10 p.m. (Gearan log).

Klein notes that Hanson was waived in to see Williams at 1:20 p.m. and McLarty at 5 p.m.

Undated note from Ickes to McLarty (?) -- "would like to have meeting with you, Maggie, Bernie and Roger Altman and General Counsel from Treasury after 4:30 -- 1/2 hour." (Note created sometime between 1/6/94 and 2/3/94)

Per Leach materials, Jean Lewis says that FDIC lawyer, April Breslaw, contacted Lewis -- "April stated that Ryan and Kulka, the "head people", would like to be able to say that Whitewater did not cause a loss to Madison, but the problem is that so far no one has been able to say that to them." Lewis tells Breslaw that it is "my opinion and belief that Whitewater did, in fact, cause a loss to Madison because of the amount of the unauthorized loans that McDougal made, through the check kite, to entities in which he was a primary party and beneficiary."

02/03/94 Beth Nolan and Dennis Foreman have two telephone conversations re ethics issues ("to make sure ethics decision regarding a Presidential appointment is correct" -- BN)

Leach writes to Altman (1) urging that the RTC seek and review all WDC documents turned over by the White House to DOJ (attaching related memo about how Clintons benefited from the application of Madison resources to their WDC investment; (2) urging that Altman seek advice from the Treasury General Counsel and Ethics Office re recusal from any decisions concerning the resolution of Madison Guaranty -- "it would appear ethically questionable for a political appointee of Treasury to make decision for an independent federal agency when the President may be implicated in enforcement and civil actions"; and, (3) reiterating his request for all RTC documents related to Madison Guaranty.

Hanson places call to Nussbaum at 11:05 a.m. (per Nussbaum log)

Nussbaum and Hanson speak by phone; Nussbaum says RTC should consider turning investigation over to Fiske and Altman should get careful ethics review before deciding to recuse (Klein Memo)

Hanson notes "Maggie Williams - lunch".

Hanson faxes to Nussbaum (in two transmissions) a copy of Leach's 2/3/94 letter to Altman, with attachments (first page of memorandum missing), including two pages from the FHLBB examination report.

McClarty and Ickes call Altman, who decides he will not recuse himself (Kendall Chron)

Altman sees Ickes and Williams at White House and says he has decided not to recuse himself now (Kendall Chron). This could be the 2/3 meeting identified by Hanson in her 3/5 note to Foreman, correcting Q&As for Bentsen that mention only three WH/Treasury meetings.

02/04/94 Beth Nolan and Dennis Foreman have telephone conversation re ethics issues

Altman tells Ickes he has decided not to recuse himself (could have been 2/3); Williams and Griffin may have been present.

Altman calls Williams at 2:15 -- "Will try to reach you later."

02/07/94 Tigert sends letter to D'Amato saying she will recuse from all Clinton matters (Kendall Chron)

02/08/94 RTC reports no basis to conclude that Rose representation of the RTC in the Frost matter involved a conflict of interest

02/09/94 Foreman advises Nolan that "all are of opinion in end that it's Roger's choice -- OGE will back up agency call, whichever way it goes", notes that Altman still considering appearance issue.

Senate passes S/L extension -- extends S/L through life of RTC (12/31/95) for "fraud or intentional misconduct"

02/10/94 Nussbaum letter responds to 1/11 Wolf/Lightfoot/Istook letter, stating that no White House staff members are acting as lawyers for WJC and HRC where there is no official nexus.

Dole floor statement criticizing Altman's response to his letter requesting that Altman take action to ensure

S/L does not run on Madison claims; also demands Altman's recusal.

House passes S/L extension.

02/12/94 WJC signs S/L extension.

02/15/94 Mike Levy places call to Podesta at 6:45 p.m.

02/16/94 Mike Levy places calls to Podesta at 10:10 and 11:15 a.m.

02/17/94 Fiske announces intention to empanel grand jury.

FDIC reports no basis to conclude that Rose representation of the RTC in the Frost matter involved a conflict of interest.

Washington Post reports that RTC has retained Pillsbury, Madison.

Mike Levy places call to Podesta at 1:35 p.m.

02/18/94 Hanson note to call Neil Eggleston.

Mike Levy places call to Podesta at 2:21 p.m.

Fiske obtains superseding indictment against Hale, adding charges of false statements to the SBA.

02/22/94 Terzano talking points on congressional hearings on RTC based on conversation w/Howard Schloss; background states that "Treasury would like us to say as little as possible about this... Altman has tried to emphasize that he has had no contact with the White House over this matter."

Possible phone calls between Podesta (and probably Stern) and Steiner.

Mike Levy places call to Podesta at 7:30 (p.m.?)

02/23/94 Altman phones Ickes (and probably Stephanopoulos) to report his intention to announce recusal during his testimony the following day; Ickes says it is up to Altman; Altman wants to consult again w/Ickes later in the day

Later in the day, Ickes calls Steiner and tells him to tell Altman that Ickes has no further thoughts and repeats thoughts for Steiner

Nussbaum and Hanson speak by phone at 11:05

Phone calls between Podesta (and probably Stern) and Steiner. (Podesta phone logs show Steiner calls at 6:05 and 7:35 p.m.)

Jean Hanson responds to Leach 2/3/94 letter to Altman that she had advised Altman that neither his appointment at Treasury nor his detail to the RTC creates a recusal obligation and that RTC's Ethics Office and Treasury's Designated Agency Ethics Official, in consultation w/OGE advised Altman that he is under no legal obligation to recuse himself.

Hanson note to call Nussbaum; Eggleston

02/24/94 Altman testified before Senate Banking Committee; responding to question from Gramm, states "I've had one substantive contact w/WH staff, and I want to tell you about it." Describes meeting he and Jean Hanson requested w/Nussbaum to report on procedural aspects of how RTC would deal w/nearing expiration of S/L. (E01053); In response to follow-up questioning from D'Amato, Altman states than Nussbaum had an assistant w/him and that Ickes and Maggie Williams also attended; Altman said he requested the meeting that neither he or anyone from the WH counsel subsequently requested any other meeting (E01061-62); In response to follow-up questioning from Domenici, Altman said he had only one substantive contact and explicitly excludes casual encounters (E01070-72)

Jean Hanson present (behind Altman) during Altman's testimony

Altman places call to Nussbaum at 4:40 p.m. ("no mesg just wants to speak with him" per Nussbaum log).

Steiner places call to Podesta at 6:57 p.m.

Hanson note to call "Neil Eggleston - Pilsbury"

After hrg, Michelle Smith, Treas. spokeswoman, said RTA WH briefing was re S of L. (per NYT 2/25.)

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Kendall learns that Jay Stephens is handling Madison Guaranty investigation for RTC, informs Nussbaum.

02/25/94 Altman recuses himself; ~~[illegible]~~ says mtg not improper but calls bad judgment. WH supports propriety 2/2 mtg.

Altman calls Stephanopoulos to report he recused himself during a phone call from Howell Raines re upcoming damaging NYT story re Altman's contacts w/WH (Klein Memo)

Ickes and Stephanopoulos call Altman back to express surprise at recusal decision and advise him to write a letter to WJC explaining his decision; (Steiner notes apparently also say that Ickes and S told Altman WJC was upset about Stephens; Ickes does not remember this). (Klein Memo)

Altman talks to Steiner. (Kendall Chron)

Stephanopoulos call to Steiner stating WJC concerned about Stephens. (Klein Memo description of Steiner notes; Kendall Chron says the subject of the all was the Israeli Mosque Shooting)

Eggleston calls Hanson to determine whether the story about Jay Stephens is true.

Klein begins White House review of Altman testimony. (Kendall Chron) CF what he [illegible]

NYT rpts RA admission of contacts. D'Amato self righteous quotes.

02/28/94 Eggleston memo re "Whitewater -- FDIC and RTC Rose Law Firm Issue"

late Feb/early March - Dee Dee says nothing wrong w/ 2/2 mtg.

03/01/94 Leach letter to Hanson, Nussbaum, Potts, and Kuzinski requesting review of propriety of Treasury/White House contacts. Letter criticizes Altman's 2/23 response to Leach's 2/3 letter re Altman recusal; concern heightened by Altman testimony before Senate Banking on 2/24; raises issue of whether Altman's conduct violated federal ethics or RTC rules.

2/27 NYT editorial slams Altman

Ickes memo to HRC including Eggleston 2/28 memo and copies of the FDIC and RTC reports re Rose conflicts; HRC never read or kept it. (Klein Memo)

Altman writes to WJC explaining recusal, characterizing 2/2 meeting as "dumb" and saying that he had concluded

Rpts: ~~[illegible]~~ Treas. spokeswoman says re S of L. RA said he requested mtg and was given same kind briefing had been giving Cong. Ickes describes mtg as brief + re S of L.

that "ongoing criticism would be more harmful than any benefits associated with my remaining unrecused for four more weeks."

Podesta/Eggleston circulate transcript of 2/24 hearing testimony.

Steiner places call to Podesta at 1:45 p.m.

Altman places return call to Podesta, 5:30 p.m.

Podesta calls Altman re recollections of WH staff re T contacts inconsistent w/Altman testimony, including discussion of recusal at 2/2 meeting.

Steiner places call to Podesta at 6 p.m.

Steiner places call to Podesta 7:39 (p.m.?)

03/02/94 Altman writes to Riegle disclosing that he today learned of two conversations which did take place between T staff and WH personnel regarding the Madison Guaranty matter -- related to handling of press inquiries

WSJ publishes D'Amato's "A Whitewater Whitewash"

Steiner places call to Podesta, 12:30 p.m.
Dee Dee defends propriety 2/2 mtg.

03/03/94 Altman writes to Riegle re expanding the record of his testimony on contacts with WH on RTC matters

WJC responds to question following Rego event that he is concerned about the appearance of impropriety of meetings between T and WH and he has directed McLarty to prepare memo about how WH should respond to agency contacts to avoid both fact and appearance of impropriety.

Press reports re questions raised by Hubbell's former Rose Law Firm partners about his billing practices.

Fiske issues subpoenas to White House staff. — 3/4

Dee Dee Meyers talks to various White House; notes of conversation with Lindsey say "WH officials later recalled that Roger had raised issue of whether he

WBost and NYT 2 additional mtgs & LC T/C

McLarty firewall memo; ... matters

3/13 Dewey - As post preparing 1/31 story, BL told them he was aware of referrals only from press mtgs.

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should recuse. WH officials say they advised him to look at the legal ethical obligations and make decision. (subtext: If there is no legal obligation, dont [?])"

3/4/94 GJ subpoenas

03/05/94 Nussbaum resigns, effective April 5.

Gergen/Altman phone call re Riegle letter sent by Altman, Gergen notes say "recusal - [even] if viewpoints but no one ever objected - No one asked me directly not to do so"

Hanson writes note to Foreman on Q&As prepared for Bentsen that identifies a fourth meeting on 2/3.

03/08/94 LNC names Special Counsel to the President.

03/09/94 Altman letter to President faxed back to Altman from the White House with the "vintage Altman" notation.

3/10 NYT refers to ~~recusal as discussed WH-T mtg;~~

03/11/94 Altman writes to Riegle re expanding the record of his testimony on contacts with WH on RTC matters

3/19 WP article refers to mtg 1-2 days after 2/2 mtg between RA, HI and ? re recusal.

03/20/94 Hale pleads.

03/21/94 Altman writes to Riegle that he informed those in attendance at the 2/2/94 meeting that he was weighing the issue of recusal and that a few days after the 2/2 meeting, he had a phone conversation with McLarty on the subject of recusal. He also reported a phone call w/Ickes the night before his 2/24 testimony that he was stepping down from the RTC the next morning. Around the same time he bumped into Nussbaum in a White House corridor where Nussbaum told him they would soon be submitting a nominee for a permanent RTC head.

* 3/23 Wash. Post article refers to at least 3 convers. subseq to 2/2 mtg. Quotes McLarty as saying: RA was weighing issue; I said use own judgment. Article also notes RA 3/21 thought re recusal was after Post had raised it. Reports WH concern over who will handle, if not RA, and legal; and

Articles details follow up conversations w/ Ickes, Mack & Burton. [WH release article? RA previously referred to article?]

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Names

A. **Paula Casey** - USA/ARK

b. **Jack DeVore** - Treasury Legislative Affairs Director

B. **Jonathan Fiechter** - Acting Director of OTS

C. **Eugene Fitzhugh** - indicted w/Hale for defrauding SBA

D. **Dennis Foreman** - Treasury ethics lawyer

E. **Leon Foust** - President of the First Bank of Arkansas in Wynne Arkansas, formerly the Bank of Cherry Valley

F. **John C. Keeney** - DOJ career prosecutor; Acting AAG/Criminal in 11/93

G. **Ellen Kulka** - RTC General Counsel

H. **Mike Levy** - Legislative Affairs at Treasury -- prepared Altman for 2/24 testimony

I. **Andrew Hove** - Acting Chair of the FDIC

J. **Donald B. Mackay** - career lawyer in DOJ/fraud; appointed special prosecutor

K. **Charles Matthews** - indicted w/Hale for defrauding SBA

k. **Ron Noble** - Assistant Secretary of Treasury for Enforcement

x. **Ben Nye** - Special Assistant to Altman

L. **Bob Raymar**

M. **Bob Roelle** - EVP/CEO of RTC during period Altman was interim CEO; retired

N. **John Ryan** - RTC Deputy CEO

O. **Howard Schloss** - Treasury press office

P. **Stanley Tate** - Nominated to head RTC; withdrew

Q. **Ginny Terzano** - WH press office

R. **Ricki Tigert** - FDIC nominee being pressured to recuse by Senate Republicans

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Followup: Hanson may have met w/Ickes sometime following 2/2 meeting in Williams' office -- prosecutors asked Ickes if he said something troubling to her; Ickes has no idea although Williams remembered that Altman and Ickes met in her office and Altman said he was not going to recuse; she remembered that Hanson arrived late, after Ickes and Altman left

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Treasury/White House Contacts Chronology

03/02/89 FSLIC takes over MGSL as conservator.

11/00/89 McDougal is indicted with his brothers-in-law James Henly and David Henly for misapplication of loan proceeds related to MGSL in 1985-86.

06/07/90 McDougal acquitted.

11/30/90 RTC closes MGSL.

03/08/92 Gerth article in NYTimes identifying Clinton's Whitewater investment and ties to McDougal and his failed MGSL.

Per Leach materials, Gerth article provoked inquiries "from both RTC Investigations in Washington, D.C. and the former Director of the Tulsa Consolidated Office... The question was raised as to whether Whitewater's relationship with MGSL had been reviewed and were there any resulting losses or potential criminal activity document." This resulted in a two week review of the completed investigative findings to date.

03/00/92 Statute of Limitations runs on civil tort claims.

Per Leach materials, RTC Senior Investigative Specialist, John Walker, contacts KC office regarding Gerth article.

03/17/92 Illinois primary.

03/23/92 Per Leach materials, two week review found no mention of any Whitewater relationship with MGSL.

Lyons Report released.

03/25/92 Per Leach materials, Tulsa Investigations (they had custody of the records related to the McDougal and other related bank fraud prosecutions) pursued lead that a former MGSL employee had fabricated two years of minutes for an MGSL subsidiary. During same period,

civil investigator reviews additional Madison records stored in Little Rock under the control of the post-receivership bank -- presumably looking for mention of Whitewater.

04/15/92 Per Leach materials, criminal investigation, previously scheduled for late 1992, rescheduled to 4/92.

05/01/92 Per Leach materials, Tulsa office closes, MGSL records transferred to KC.

07/30/92 Per Leach materials, criminal investigator (Lewis?) transfers to KC at end of July and resumed analysis of MGSL documents.

09/01/92 Per Leach materials, RTC per Richard Iorio (KC field investigations Officer) sends report of Apparent Criminal Irregularity (#C0004) re MGSL to Charles Banks, US Attorney in Little Rock and Steve Irons, FBI Supervisory Special Agent. (LATimes reported that the Republican-appointed Banks strongly argued that bringing criminal charges related to MGSL would have been prosecutorial misconduct.)

12/15/92 Per Leach materials, FBI SAC Don K. Pettus acknowledges receipt of the criminal referral and advises that further questions regarding referral should be directed to AUSA Floyd MacDodson.

01/07/93 Per Leach materials, MacDodson advises Lewis that he isn't sure the referral is still in the USAtty's office in Little Rock.

03/23/93 Altman faxes Nussbaum a portion of the 3/9/92 NYT Whitewater article (follow-up to 3/8/92 Gerth story) (Fax in Nussbaum file)

03/24/93 Altman faxes Nussbaum the complete 3/9/92 NYT Whitewater article (Fax in Nussbaum file)

05/03/93 Per Leach materials, Jean Lewis says she learned from AUSA Bob Roddey that almost immediately after receiving the referral in September 1992, Banks forwarded it to DOJ/DC; the Little Rock US Attorney's computer system had no record of the referral.

05/04/93 Altman letter to Gonzalez recommending that the S/L for civil lawsuits against S&L wrongdoers not be extended beyond 2/28/94

Per Leach materials, Lewis sends letter to Richard Pence (Acting USAtty) requesting information on the status of the referral.

05/10/93 Per Leach materials, letter to RTC/KC from Richard Pence (Acting USAtty) advising that Chuck Banks had forwarded the referral to OLC, the Executive Office of US Attys after determining that his office had a conflict of interest.

05/13/93 Senate votes to pass RTC Completion Act.

Per Leach materials, Jean Lewis contacts DOJ/OLC re status of criminal referral.

Per Leach materials, Jean Lewis contacts DOJ/OLC and is advised that they have no record that the criminal referral had been submitted; decides to resubmit referral through U.S. attorney's office in Little Rock with a copy to Acting AAG, Daniel Koffsky. Lewis also reports learning that the referral was sent to the Executive Office for the U.S. Attorneys -- she speaks to Donna Henneman, the Ethics Program Manager for that office who tells her she understood the referral had been declined, but would check further.

05/26/93 Per Leach materials, Henneman calls Lewis and reports that the referral had been sent to former Special Counsel Ira Raphelson and that she was checking with the Criminal Fraud Division to find out what happened to it after he left.

05/31/93 Per Leach materials, RTC supplements investigative manpower with 3 additional criminal investigators for purpose of completing the investigation of previously defined criminal allegations in the most expedient way possible.

06/08/93 Per Leach materials, Lewis reports that Henneman called her and said she located the referral in the Fraud section of the Criminal Division and that is has been sent back to Henneman for further disposition; Henneman also reports that the Criminal Division sent a memo to

Doug Frazier (Assoc. Deputy AG in Heymann's office) advising that there was no basis for requiring the USAtty in Little Rock to recuse herself; Frazier does not recollect the memo but asks for another copy it and the referral. Lewis says she has new information to support the referral.

06/23/93 Per Leach materials, Lewis says Henneman told her that Frazier sent the package back after he was appointed the new USAtty in one of the Florida districts; Frazier was replaced by Margolies.

Per Leach materials, Lewis reports that Henneman called Lewis again and reported that she spoke with Frazier who told her that he and Tom Muscato (Director of the Executive Office for U.S. Attorneys and had decided to return the referral the Little Rock because there was no basis for recusal.

06/29/93 Per Leach materials, Lewis says she learned from "a highly reliable and confidential source" that the referral was returned to Little Rock and the Acting USAtty, Richard Pence, intended to let it wait for Paula Casey to take office.

07/14/93 WJC nominates Stanley Tate to head RTC.

07/20/93 Foster suicide

FBI executes search warrant at the offices of Capital Management Services, Inc.

09/00/93 Hale indicted along w/Charles Matthews and Eugene Fitzhugh w/defrauding the SBA

09/23/93 Per Leach materials, Jean Lewis says she called Henneman to determine whether Henneman wanted formal notification of the existence of the subsequent Madison referrals being submitted to the USAtty in Little Rock; Lewis says that Henneman requested a copy of the transmittal letters and a brief summary of the contents of the referrals.

09/24/93 Altman calls Gearan at 10:03 a.m. (per Gearan log).

09/27/93 Cliff Sloan calendar shows 4 p.m. meeting w/Ron Noble

09/28/93 Jean Hanson note to call Nussbaum

09/29/93 Nussbaum calendar shows 6:45 p.m. Waco Briefing

Jean Hanson meets w/Nussbaum and Sloan (some say for no more than 5 minutes) to inform him that RTC was making a criminal referral to DOJ in which Clintons names appeared on some checks made out to then-Governor Clinton's re-election campaign; Nussbaum or Sloan (or both) reported conversation to Lindsey

Per Leach materials, Lewis says that Henneman called Lewis requesting copies of the referrals and exhibits in order to determine whether to instruct the USAtty's office to act on them or if they should be forwarded to the Public Integrity Section of DOJ. Lewis says she asked Henneman to put the request in writing.

Per Leach materials, Lewis says that Henneman called Lewis back and withdrew her request for a copy of the referrals, reverting to her original request for the transmittal letters with a summary of the referrals.

09/30/93 Hanson calls Sloan stating that Altman sent Nussbaum the 3/9/92 NYT article, that nine matters were contained in the criminal referral ("vital info suppressed"); that it included allegations involving diversion of Madison funds to Fullbright and Tucker as well as allegation of conspiracy to use bank funds for 1985 campaign contributions to WJC (campaign identified as co-conspirator); that Clintons mentioned in other charges as potential witnesses

Memorandum from Hanson to Altman re The Rose Law Firm attaching RTC Early Bird re Rose conflicts of interest; cover memo to Altman says Steve Katsanos has talked to Sue Schmidt; that Hanson has spoken w/Secretary and Nussbaum and Sloan.

DeVore calls Gearan at 5:30 p.m. (per Gearan log).

10/01/93 Jean Hanson note to call Christine Varney.

DeVore calls Gearan at 5:28 p.m. (per Gearan log).

10/04/93 WJC w/Lindsey, fly to Los Angeles; Lindsey tells WJC about criminal referral.

Lindsey notes of telecon with Jim Lyons -- "Gerth has all of the reports of examination in connection w/Madison Guaranty - RTC source - FIRIA (sic) - 9 criminal referrals".

Caputo notes of telecon with Lindsey re Isikoff and Gerth inquiries, Jim Lyons, WDC facts, David Hale.

10/05/93 WJC w/Lindsey, return to D.C.

10/06/93 Gerth interviews McDougal.

Jean Hanson note to call Bill Roelle re Sue Schmidt/Kansas City.

10/07/93 Hanson calls Sloan and Eggleston re Schmidt and Gerth questions re RTC referral and involvement of Foster, Seth Ward and others in Rose firm; also discussed leak by RTC in KC to Sue Schmidt. Sloan and Eggleston report conversation to Lindsey.

Lindsey notes of conversation w/Neil and Cliff (notes reflect mention of Schmidt questions, inquiries re Rose Law Firm undisclosed conflicts, and criminal referral -- "9 referrals - allegation JGT - diversion of funds - Senator Fulbright - Peacock - McDougal - 1985 - 1985 Clinton Committee").

Nussbaum called Gearan at 4:36 p.m. (per Gearan log).

Hanson note to call Roelle re criminal referrals

10/08/93 Nine new criminal referrals submitted to USAtty and FBI in Little Rock.

10/13/93 Nussbaum places call to Lindsey; inquires whether Lindsey free for 3:30 meeting tomorrow.

Per Leach materials, RTC provides OLC in the Executive Office of U.S. Attorneys with copies of transmittal letter and summaries of referrals.

10/14/93 Jean Hanson, Josh Steiner and Jack DeVore meet in Nussbaum's office beginning at 3:30 p.m. for 30 minutes w/Nussbaum, Gearan, Lindsey, Sloan and Eggleston re response to NYT inquiry about RTC criminal referral mentioning Clintons.

Lindsey notes of meeting (notes reflect mention of various reporters, Madison facts, procedure for making criminal referrals).

Gearan notes of meeting (notes reflect mention of Jean Lewis and referrals, various reporters, Madison facts).

DeVore calls Gearan at 5:45 p.m. (per Gearan log).

10/20/93 Lindsey file memorandum describing 10/14/93 meeting with Treasury officials.

Hanson calendar shows "Lunch w/Ellen Kulka, Old Ebbitt."

10/27/93 Per Leach materials, Lewis says that Henneman told Lewis to expect declination letter for the first referral from Casey.

Per Leach materials, declination letter to Lewis from Casey for first referral, concurring with opinion of DOJ attorneys in the Criminal Division that there is insufficient information in the referral to sustain many of the allegations or to warrant the initiation of a criminal investigation. Does not foreclose future prosecutions about matters covered in referral.

10/28/93 Press reports that WJC will nominate Ricki Tigert to head FDIC.

10/31/93 Sue Schmidt (WPost) reports that RTC made criminal referral to USA Paula Casey re MGSL transactions, including some involving Clinton campaign.

11/02/93 Jeff Gerth (NYTimes) reports criminal referral by RTC.

11/08/93 Paula Casey, U.S. Attorney in Little Rock, recuses herself.

11/09/93 DOJ (Acting AAG Keeney) announces that the criminal division at main DOJ would take over Hale and Madison Guaranty investigation.

11/10/93 Nussbaum/Eggleston memorandum to WJC re Casey recusal and the assignment of the investigation by Phil Heymann and John Keeney to three DOJ career prosecutors; proposed Qs&As.

Per Leach materials, Jean Lewis notifies colleagues that Mike Caron, Senior Criminal Investigator, has replaced her as the lead investigator on Madison.

11/15/93 Per Leach materials, Lewis e-mail to Lee O. Ausen re impending meeting with Donald Mackay and his staff who are coming to KC to be "convinced that there either IS or IS NOT a very good case behind those referrals.... We have strong documentation to support the allegations. But what's beneath the surface, including where we looked and why, who's tied to who, who's in business with who, who got paid for what and where all the internal and external ties are, isn't in writing. It's in my head."

11/17/93 WJC nominates Ricki Tigert to head FDIC.

11/30/93 WJC's nominee to head RTC, Stanley Tate, withdraws his name from consideration.

FOIA requests by Baltimore Sun for the FDIC's Madison Guaranty examination reports and by the Washington Post for FDIC records concerning the retention of the Rose Law Firm in the FDIC case against Frost.

12/02/93 Office of the Comptroller of the Currency (Eugene Ludwig) faxes to Bruce Lindsey FOIA requests received by FDIC from Baltimore Sun and Washington Post for MGSL and Rose Law Firm; Steiner faxes same to Lindsey, having received the letters from the Comptroller's office

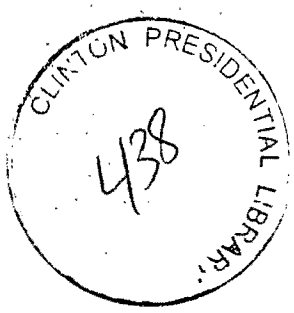
Lindsey receives faxes from Ludwig and Steiner of 11/30/93 FOIA requests to FDIC.

12/09/93 Leach letter to RTC requesting access to all documents related to MGSL and subs

12/23/93 WJC and HRC direct private counsel to provide to DOJ all records potentially relating to the WDC, including files of Vince Foster.

12/24/93 Treasury names Jack Ryan Acting Deputy Director of RTC and Ellen Kulka as General Counsel.

12/31/93 Renaissance Weekend conversation between WJC and Eugene Ludwig.



01/05/94 Lindsey issues statement that Kendall will begin delivering WDC docs to DOJ, including the Foster WDC file.

01/06/94 Per Leach materials, Lewis e-mail describing call from a reporter about handling of original criminal referral.

01/07/94 Hanson memorandum to Altman stating failure to understand why no lawyer from White House Counsel is on the new "team."

01/09/94 Moynihan calls for a special counsel

01/10/94 Congressional Republican letter to Altman re concern that the running of the SL may prevent final resolution of all allegations relating to MGSL.

01/11/94 Congressional Republican letter to Reno urging that she immediately seek agreements to toll civil and criminal S/L related to Madison and WDC.

Wolf/Lightfoot/Istook letter to Nussbaum (cc to Thomasson) asking whether public funds are being used to provide the President w/legal assistance related to WDC and MGSL

01/12/94 WJC requests Nussbaum to ask Reno for a special counsel; Reno agrees.

Report that FBI has served subpoenas on Leon Foust, the president of the First Bank of Arkansas in Wynne, Ark (formerly, the Bank of Cherry Valley).

01/14/94 Kendall provides DOJ w/documents responsive to subpoena

01/20/94 Reno appoints Fiske as Special Counsel

McDougal and Betsey Wright expected to appear before grand jury; McDougal appearance postponed to 2/17

01/21/94 Gov. Tucker discloses that he has received a grand jury subpoena; subpoenas also issued to Fulbright, Steve Smith and Seth Ward II

01/24/94 WTimes reports on federal investigations of ADFA relationship to MGSL, POM and Pine Bluff Warehouse Co.

RTC's Peter Knight briefs D'Amato staff on MGSL document production and statute of limitations

01/25/94 D'Amato letter to Altman urging that actions be taken to ensure that S/L doesn't run on Madison claims.

01/26/94 Peter Knight conference call w/D'Amato staff on MGSL statute of limitations (could have been 1/27 or 28); agree that 2/28 is the operative date (give or take a day)

01/27/94 Bentsen's Weekly Report to McLarty, under item titled "Controversy", discloses that OTS has received four FOIA requests for MGSL documents and that Leach has requested staff access

01/28/94 Republican members of Senate Banking Committee write to Riegle requesting that the Committee investigate Madison-related issues.

02/01/94 Altman letter responding to letter initiated by Senate Republican leadership concerning MGSL, acknowledging the 2/28 anniversary date of the federal takeover of Madison

Tigert confirmation hearing in Senate Banking Committee -- Republicans press her to recuse.

Altman and Hanson meet with Bentsen at 12:45 p.m. -- Hanson recalls Altman telling Bentsen about upcoming 2/2/94 meeting.

02/02/94 Altman and Hanson meet with Nussbaum, Ickes, Williams, and Eggleston in McLarty's office (McLarty present only at beginning of meeting) at 5 p.m.; Altman reads from talking points, first addressing S/L issue and then recusal.

Steiner calls Gearan at 4:10 p.m. (Gearan log).

Klein notes that Hanson was waived in to see Williams at 1:20 p.m. and McLarty at 5 p.m.

Undated note from Ickes to McLarty (?) -- "would like to have meeting with you, Maggie, Bernie and Roger Altman and General Counsel from Treasury after 4:30 -- 1/2 hour." (Note created sometime between 1/6/94 and 2/3/94)

Per Leach materials, Jean Lewis says that FDIC lawyer, April Breslaw, contacted Lewis -- "April stated that Ryan and Kulka, the "head people", would like to be able to say that Whitewater did not cause a loss to Madison, but the problem is that so far no one has been able to say that to them." Lewis tells Breslaw that it is "my opinion and belief that Whitewater did, in fact, cause a loss to Madison because of the amount of the unauthorized loans that McDougal made, through the check kite, to entities in which he was a primary party and beneficiary."

02/03/94 Beth Nolan and Dennis Foreman have two telephone conversations re ethics issues ("to make sure ethics decision regarding a Presidential appointment is correct" -- BN)

Leach writes to Altman (1) urging that the RTC seek and review all WDC documents turned over by the White House to DOJ (attaching related memo about how Clintons benefited from the application of Madison resources to their WDC investment; (2) urging that Altman seek advice from the Treasury General Counsel and Ethics Office re recusal from any decisions concerning the resolution of Madison Guaranty -- "it would appear ethically questionable for a political appointee of Treasury to make decision for an independent federal agency when the President may be implicated in enforcement and civil actions"; and, (3) reiterating his request for all RTC documents related to Madison Guaranty.

Hanson places call to Nussbaum at 11:05 a.m. (per Nussbaum log)

Nussbaum and Hanson speak by phone; Nussbaum says RTC should consider turning investigation over to Fiske and Altman should get careful ethics review before deciding to recuse (Klein Memo)

Hanson notes "Maggie Williams - lunch".

Hanson faxes to Nussbaum (in two transmissions) a copy of Leach's 2/3/94 letter to Altman, with attachments (first page of memorandum missing), including two pages from the FHLBB examination report.

McClarty and Ickes call Altman, who decides he will not recuse himself (Kendall Chron)

Altman sees Ickes and Williams at White House and says he has decided not to recuse himself now (Kendall Chron). This could be the 2/3 meeting identified by Hanson in her 3/5 note to Foreman, correcting Q&As for Bentsen that mention only three WH/Treasury meetings.

02/04/94 Beth Nolan and Dennis Foreman have telephone conversation re ethics issues

Altman tells Ickes he has decided not to recuse himself (could have been 2/3); Williams and Griffin may have been present.

Altman calls Williams at 2:15 -- "Will try to reach you later."

02/07/94 Tigert sends letter to D'Amato saying she will recuse from all Clinton matters (Kendall Chron)

02/08/94 RTC reports no basis to conclude that Rose representation of the RTC in the Frost matter involved a conflict of interest

02/09/94 Foreman advises Nolan that "all are of opinion in end that it's Roger's choice -- OGE will back up agency call, whichever way it goes", notes that Altman still considering appearance issue.

Senate passes S/L extension -- extends S/L through life of RTC (12/31/95) for "fraud or intentional misconduct"

02/10/94 Nussbaum letter responds to 1/11 Wolf/Lightfoot/Istook letter, stating that no White House staff members are acting as lawyers for WJC and HRC where there is no official nexus.

Dole floor statement criticizing Altman's response to his letter requesting that Altman take action to ensure

S/L does not run on Madison claims; also demands Altman's recusal.

House passes S/L extension.

02/12/94 WJC signs S/L extension.

02/15/94 Mike Levy places call to Podesta at 6:45 p.m.

02/16/94 Mike Levy places calls to Podesta at 10:10 and 11:15 a.m.

02/17/94 Fiske announces intention to empanel grand jury.

FDIC reports no basis to conclude that Rose representation of the RTC in the Frost matter involved a conflict of interest.

Washington Post reports that RTC has retained Pillsbury, Madison.

Mike Levy places call to Podesta at 1:35 p.m.

02/18/94 Hanson note to call Neil Eggleston.

Mike Levy places call to Podesta at 2:21 p.m.

Fiske obtains superseding indictment against Hale, adding charges of false statements to the SBA.

02/22/94 Terzano talking points on congressional hearings on RTC based on conversation w/Howard Schloss; background states that "Treasury would like us to say as little as possible about this... Altman has tried to emphasize that he has had no contact with the White House over this matter."

Possible phone calls between Podesta (and probably Stern) and Steiner.

Mike Levy places call to Podesta at 7:30 (p.m.?)

02/23/94 Altman phones Ickes (and probably Stephanopoulos) to report his intention to announce recusal during his testimony the following day; Ickes says it is up to Altman; Altman wants to consult again w/Ickes later in the day

Later in the day, Ickes calls Steiner and tells him to tell Altman that Ickes has no further thoughts and repeats thoughts for Steiner

Nussbaum and Hanson speak by phone at 11:05

Phone calls between Podesta (and probably Stern) and Steiner. (Podesta phone logs show Steiner calls at 6:05 and 7:35 p.m.)

Jean Hanson responds to Leach 2/3/94 letter to Altman that she had advised Altman that neither his appointment at Treasury nor his detail to the RTC creates a recusal obligation and that RTC's Ethics Office and Treasury's Designated Agency Ethics Official, in consultation w/OGE advised Altman that he is under no legal obligation to recuse himself.

Hanson note to call Nussbaum; Eggleston

02/24/94 Altman testified before Senate Banking Committee; responding to question from Gramm, states "I've had one substantive contact w/WH staff, and I want to tell you about it." Describes meeting he and Jean Hanson requested w/Nussbaum to report on procedural aspects of how RTC would deal w/nearing expiration of S/L. (E01053); In response to follow-up questioning from D'Amato, Altman states than Nussbaum had an assistant w/him and that Ickes and Maggie Williams also attended; Altman said he requested the meeting that neither he or anyone from the WH counsel subsequently requested any other meeting (E01061-62); In response to follow-up questioning from Domenici, Altman said he had only one substantive contact and explicitly excludes casual encounters (E01070-72)

Jean Hanson present (behind Altman) during Altman's testimony

Altman places call to Nussbaum at 4:40 p.m. ("no mesg just wants to speak with him" per Nussbaum log).

Steiner places call to Podesta at 6:57 p.m.

Hanson note to call "Neil Eggleston - Pilsbury"

Kendall learns that Jay Stephens is handling Madison Guaranty investigation for RTC, informs Nussbaum.

02/25/94 Altman recuses himself

Altman calls Stephanopoulos to report he recused himself during a phone call from Howell Raines re upcoming damaging NYT story re Altman's contacts w/WH (Klein Memo)

Ickes and Stephanopoulos call Altman back to express surprise at recusal decision and advise him to write a letter to WJC explaining his decision; (Steiner notes apparently also say that Ickes and S told Altman WJC was upset about Stephens; Ickes does not remember this). (Klein Memo)

Altman talks to Steiner. (Kendall Chron)

Stephanopoulos call to Steiner stating WJC concerned about Stephens. (Klein Memo description of Steiner notes; Kendall Chron says the subject of the all was the Israeli Mosque Shooting)

Eggleston calls Hanson to determine whether the story about Jay Stephens is true.

Klein begins White House review of Altman testimony. (Kendall Chron)

02/28/94 Eggleston memo re "Whitewater -- FDIC and RTC Rose Law Firm Issue"

03/01/94 Leach letter to Hanson, Nussbaum, Potts, and Kuzinski requesting review of propriety of Treasury/White House contacts. Letter criticizes Altman's 2/23 response to Leach's 2/3 letter re Altman recusal; concern heightened by Altman testimony before Senate Banking on 2/24; raises issue of whether Altman's conduct violated federal ethics or RTC rules.

Ickes memo to HRC including Eggleston 2/28 memo and copies of the FDIC and RTC reports re Rose conflicts; HRC never read or kept it. (Klein Memo)

Altman writes to WJC explaining recusal, characterizing 2/2 meeting as "dumb" and saying that he had concluded

that "ongoing criticism would be more harmful than any benefits associated with my remaining unrecused for four more weeks."

Podesta/Eggleston circulate transcript of 2/24 hearing testimony.

Steiner places call to Podesta at 1:45 p.m.

Altman places return call to Podesta, 5:30 p.m.

Podesta calls Altman re recollections of WH staff re T contacts inconsistent w/Altman testimony, including discussion of recusal at 2/2 meeting.

Steiner places call to Podesta at 6 p.m.

Steiner places call to Podesta 7:39 (p.m.?)

03/02/94 Altman writes to Riegle disclosing that he today learned of two conversations which did take place between T staff and WH personnel regarding the Madison Guaranty matter -- related to handling of press inquiries

WSJ publishes D'Amato's "A Whitewater Whitewash"

Steiner places call to Podesta, 12:30 p.m.

03/03/94 Altman writes to Riegle re expanding the record of his testimony on contacts with WH on RTC matters

WJC responds to question following Rego event that he is concerned about the appearance of impropriety of meetings between T and WH and he has directed McLarty to prepare memo about how WH should respond to agency contacts to avoid both fact and appearance of impropriety.

Press reports re questions raised by Hubbell's former Rose Law Firm partners about his billing practices.

Fiske issues subpoenas to White House staff.

Dee Dee Meyers talks to various White House; notes of conversation with Lindsey say "WH officials later recalled that Roger had raised issue of whether he

should recuse. WH officials say they advised him to look at the legal ethical obligations and make decision. (subtext: If there is no legal obligation, dont [?])"

03/05/94 Nussbaum resigns

Gergen/Altman phone call re Riegle letter sent by Altman, Gergen notes say "recusal - [even] if viewpoints but no one ever objected - No one asked me directly not to do so"

Hanson writes note to Foreman on Q&As prepared for Bentsen that identifies a fourth meeting on 2/3.

03/08/94 LNC names Special Counsel to the President.

03/09/94 Altman letter to President faxed back to Altman from the White House with the "vintage Altman" notation.

03/11/94 Altman writes to Riegle re expanding the record of his testimony on contacts with WH on RTC matters

03/20/94 Hale pleads.

03/21/94 Altman writes to Riegle that he informed those in attendance at the 2/2/94 meeting that he was weighing the issue of recusal and that a few days after the 2/2 meeting, he had a phone conversation with McLarty on the subject of recusal. He also reported a phone call w/Ickes the night before his 2/24 testimony that he was stepping down from the RTC the next morning. Around the same time he bumped into Nussbaum in a White House corridor where Nussbaum told him they would soon be submitting a nominee for a permanent RTC head.

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Names

A. **Paula Casey** - USA/ARK

b. **Jack DeVore** - Treasury Legislative Affairs Director

B. **Jonathan Fiechter** - Acting Director of OTS

C. **Eugene Fitzhugh** - indicted w/Hale for defrauding SBA

D. **Dennis Foreman** - Treasury ethics lawyer

E. **Leon Foust** - President of the First Bank of Arkansas in Wynne Arkansas, formerly the Bank of Cherry Valley

F. **John C. Keeney** - DOJ career prosecutor; Acting AAG/Criminal in 11/93

G. **Ellen Kulka** - RTC General Counsel

H. **Mike Levy** - Legislative Affairs at Treasury -- prepared Altman for 2/24 testimony

I. **Andrew Hove** - Acting Chair of the FDIC

J. **Donald B. Mackay** - career lawyer in DOJ/fraud; appointed special prosecutor

K. **Charles Matthews** - indicted w/Hale for defrauding SBA

k. **Ron Noble** - Assistant Secretary of Treasury for Enforcement

x. **Ben Nye** - Special Assistant to Altman

L. **Bob Raymar**

M. **Bob Roelle** - EVP/CEO of RTC during period Altman was interim CEO; retired

N. **John Ryan** - RTC Deputy CEO

O. **Howard Schloss** - Treasury press office

P. **Stanley Tate** - Nominated to head RTC; withdrew

Q. **Ginny Terzano** - WH press office

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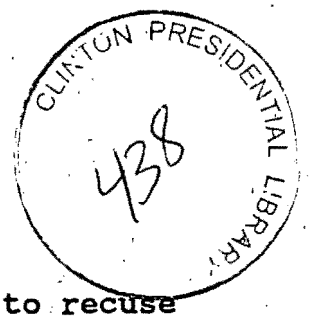

R. **Ricki Tigert** - FDIC nominee being pressured to recuse by Senate Republicans

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Followup: Hanson may have met w/Ickes sometime following 2/2 meeting in Williams' office -- prosecutors asked Ickes if he said something troubling to her; Ickes has no idea although Williams remembered that Altman and Ickes met in her office and Altman said he was not going to recuse; she remembered that Hanson arrived late, after Ickes and Altman left

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WORK IN PROGRESS
Based on Incomplete and Unverified Information
JSherburne 5/9/94

RTC Contacts Notes

1. Chronology

a. 03/23/93 Altman faxes Nussbaum the 3/9/92 NYT Whitewater article

b. 03/24/93 Altman faxes Nussbaum the 3/9/92 NYT Whitewater article

c. 05/04/93 Altman letter to Gonzalez recommending that the S/L for civil lawsuits against S&L wrongdoers not be extended beyond 2/28/94

d. 07/20/93 Foster suicide

7/22 FBI executes search warrant at the offices of Capital Management Services, Inc.

e. 07/23/93 Foster funeral

f. 07/26/93 Neuwirth finds note in Foster briefcase

g. 07/27/93 WH alerts DOJ to existence of Foster note

h. 09/00/93 Hale indicted along w/Charles Matthews and Eugene Fitzhugh w/defrauding the SBA

≈ 9-10/93 KC RTC sends crim. referrals to ~~[illegible]~~ DC ATC

i. 09/23/93 Donna Henneman, ethics program manager, sought copies of transmittal letters on the upcoming new batch of criminal referrals

j. 09/27/93 Cliff Sloan calendar reflects 4 p.m. meeting w/Ron Noble

k. 09/29/93 Jean Hanson meets w/Nussbaum and Sloan for no more than 5 minutes to inform him that RTC was making a criminal referral to DOJ in which Clintons names appeared on some checks made out to then-Governor Clinton's re-election campaign; Nussbaum or Sloan (or both) reported conversation to Lindsey

Henneman makes form request for copies of referrals;

l. 09/30/93 Hanson calls Sloan stating that Altman sent Nussbaum the 3/9/92 NYT article, that nine matters were contained in the criminal referral ("vital info suppressed"); that it included allegations involving diversion of Madison funds to Fullbright and Tucker as well as allegation of conspiracy to use bank funds for 1985 campaign contributions to WJC (campaign identified as co-conspirator; that Clintons mentioned in other charges as potential witnesses.

m. 10/06/93 Gerth interviews McDougal

n. 10/07/93 Hanson calls Sloan and Eggleston re Schmidt and Gerth questions re RTC referral and involvement of Foster, Seth Ward and others in Rose firm; also discussed leak by RTC in KC to Sue Schmidt. Sloan and Eggleston report conversation to Lindsey

o. 10/13/94 Nussbaum places call to Lindsey; inquires whether Lindsey free for 3:30 meeting tomorrow.

p. 10/14/93 Jean Hanson, Josh Steiner and Jack DeVore meet in Nussbaum's office beginning at 3:30 p.m. for 30 minutes w/Nussbaum, Gearan, Lindsey, Sloan and Eggleston re response to NYT inquiry about RTC criminal referral mentioning Clintons

q. 10/31/93 Sue Schmidt (WPost) reports that RTC made criminal referral to USA Paula Casey re MGSL transactions, including some involving Clinton campaign

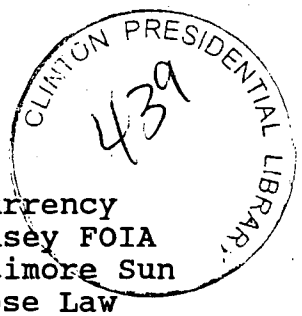
r. 11/08/93 Paula Casey recused

s. 11/10/93 Nussbaum/Eggleston memorandum to WJC re Casey recusal and the assignment of the investigation by Phil Heymann and John Keeney to three DOJ career prosecutors; proposed Qs&As

t. 11/09/93 DOJ (Acting AAG Keeney) announces that the criminal division at main DOJ would take over Hale and Madison Guaranty investigation

u. 11/10/93 Lewis(?) e-mail to Casey re being removed from the line of fire

v. 11/30/93 WJC's nominee to head RTC, Stanley Tate, withdraws his name from consideration



w. 12/02/93 Office of the Comptroller of the Currency (Eugene Ludwig) faxes to Bruce Lindsey FOIA requests received by FDIC from Baltimore Sun and Washington Post for MGSL and Rose Law Firm; Steiner faxes same to Lindsey, having received the letters from the Comptroller's office

x. 12/09/93 Leech letter to RTC requesting access to all documents related to MGSL and subs

y. 12/23/93 WJC directs private counsel to provide to DOJ all records potentially relating to ~~the MGSL investigation~~, WDC mtl's in Foster file

z. 01/05/94 Lindsey issues statement that Kendall will begin delivering WDC docs to DOJ, including the Foster WDC file.

aa. 01/09/94 Moynihan calls for a special counsel

ab. 01/10/94 Congressional republicans' letter to Altman re concern that the running of the SL may prevent final resolution of all allegations relating to MGSL

ac. 01/12/94 WJC requests Nussbaum to ask Reno for a special counsel; Reno agrees

report that FBI has served subpoenas on Leon Foust

ad. 01/11/94 Wolf/Lightfoot/Istook letter to Nussbaum (cc to Thomasson) asking whether public funds are being used to provide the President w/legal assistance related to WDC and MGSL

ae. 01/14/94 Kendall provides DOJ w/documents responsive to subpoena

af. 01/20/94 Reno appoints Fiske as Special Counsel

McDougal and Betsey Wright expected to appear before grand jury; McDougal appearance postponed to 2/17

ag. 01/21/94 Gov. Tucker discloses that he has received a grand jury subpoena; subpoenas also issued to Fulbright, Steve Smith and Seth Ward II

ah. 01/24/94 WTimes reports on federal investigations of ADFA relationship to MGSL, POM and Pine Bluff Warehouse Co.

ai. 01/25/94 D'Amato letter to Altman re actions taken to ensure that S/L doesn't run on Madison civil claim

aj. 01/27/94 Bentsen's Weekly Report to McLarty, under item titled "Controversy", discloses that OTS has received four FOIA requests for MGSL documents and that Leach has request staff access

Regnlo Comm Talking Pts on WDC

ak. 02/01/94 Altman letter responding to letter initiated by Senate Republican leadership concerning MGSL

al. 02/02/94 Altman and Hanson meet with Nussbaum, Ickes, Williams, and Eggleston in McLarty's office (McLarty present only at beginning of meeting); Altman reads from talking points, first addressing S/L issue and then recusal

am. 02/03/94 Leech writes Altman, asking that he seek counsel re whether he should recuse himself from matters regarding MGSL -- "it would appear ethically questionable for a political appointee of Treasury to make decision for an independent federal agency when the President may be implicated in enforcement and civil actions"; alleges HRC and WJC benefited directly and indirectly from application of Madison resources to Whitewater

Nussbaum and Hanson speak by phone; Nussbaum says RTC should consider turning investigation over to Fiske and Altman should get careful ethics review before deciding to recuse

Hanson faxes Leech letter w/attachments to Nussbaum; second fax of two pages from the FHLBB examination report (could have been attachments to Leech letter)

an. 02/03/94 Beth Nolan and Dennis Foreman have two telephone conversations re ethics issues ("to make sure ethics decision regarding a Presidential appointment is correct" -- BN)

Hanson places call to Nussbaum

ao. 02/04/94 Beth Nolan and Dennis Foreman have telephone conversation re ethics issues

Altman tells Ickes he has decided not to recuse himself (could have been 2/3); Williams and Griffin may have been present

2/5/94 Draft Nolan -> Nussb. [illegible] Fiske says Foster too. Andrews Cnsl re Ct's + DDC, MGS + L + Cap Mgt Services Inc. Pres in official cap. is client. Incl. responses to Cong/press.

ap. 02/08/94 RTC reports no basis to conclude that Rose representation of the RTC in the Frost matter involved a conflict of interest

Rose - MGS [illegible] '84-'5 re stock; used [illegible] audit. Rose - '89 [illegible] FDIC/RTC [illegible] Frost for accts malp MGS+L. Dennis + Act - RTC + OGE - Treas - no ethical/legal bar

aq. 02/09/94 Foreman advises Nolan that "all are of opinion in end that it's Roger's choice -- OGE will back up agency call, whichever way it goes", notes that Altman still considering appearance issue. Some concerned shldnt recuse to ensure fair [illegible] + thoughtful decis. (new GC/CEO). Message re [illegible] (FDIC [illegible])

Suit started 88 by MaD, [illegible] RTC [illegible] in Rose aft FDIC took MG over. No conflict re Seth Ward (WH's father in law)

ar. 02/10/94 Nussbaum letter responds to 1/11 Wolf/Lightfoot/Istook letter, stating that no White House staff members are acting as lawyers for WJC and HRC where there is no official nexus

2/15, 16, 17, 18, 22, t/c [illegible] (meeting [illegible] for 2/23 mtg.) TS/two days. Draft Treas [illegible]

as. 02/17/94 Fiske announces intention to empanel grand jury

FDIC reports no basis to conclude that Rose representation of the RTC in the Frost matter involved a conflict of interest

2/21/94 Terzano ABC News Qs w/BL notes - re WH. Klein will brief Rendall on [illegible]

at. 02/22/94 Terzano talking points on congressional hearings on RTC based on conversation w/Howard Schloss; background states that "Treasury would like us to say as little as possible about this... Altman has tried to emphasize that he has had no contact with the White House over this matter."

Possible phone calls between Podesta (and probably Stern) and Steiner

2/22, 23, 24, 28, 3/1, 3/2 t/c Steiner - [illegible] for hrg

au. 02/23/94 Altman phones Ickes (and probably Stephanopoulos) to report his intention to announce recusal during his testimony the following day; Ickes says it is up to Altman; Altman wants to consult again w/Ickes later in the day

Later in the day, Ickes calls Steiner and tells him to tell Altman that Ickes has no further thoughts and repeats thoughts for Steiner

Nussbaum and Hanson speak by phone at 11:05

Phone calls between Podesta (and probably Stern) and Steiner

Jean Hanson responds to Leech 2/3/94 letter to Altman that she had advised Altman that neither his appointment at Treasury no his

Howe - Acting Chairman FDIC (Clinton)
Kulka - RTC GC
Jack Ryan - RTC Acting CEO

detail to the RTC creates a recusal obligation and that RTC's Ethics Office and Treasury's Designated Agency Ethics Official, in consultation w/OGE advised Altman that he is under no legal obligation to recuse himself.

owns stock in Bank - Also Bentsen, Acting DTS [illegible] Jonathon Fiechter, FDIC Skip Howe, Phil Gramm

av. 02/24/94 Altman testified before Senate Banking Committee; responding to question from Gramm, states "I've had one substantive contact w/WH staff, and I want to tell you about it." Describes meeting he and Jean Hanson requested w/Nussbaum to report on procedural aspects of how RTC would deal w/nearing expiration of S/L. (E01053); In response to follow-up questioning from D'Amato, Altman states than Nussbaum had an assistant w/him and that Ickes and Maggie Williams also attended; Altman said he requested the meeting that neither he or anyone from the WH counsel subsequently requested any other meeting (E01061-62); In response to follow-up questioning from Domenici, Altman said he had only one substantive contact and explicitly excludes casual encounters (E01070-72)

Jean Hanson present (behind Altman) during Altman's testimony

Altman announces that he is stepping down from the RTC [huh?]

Altman places call to Nussbaum

aw. 02/25/94 Altman recuses himself

Altman calls Stephanopolous to report he has recused himself following call from Howell Raines re upcoming damaging NYT story re Altman's contacts w/WH

2/11/94 - legis passed, extends civil suits thru life RTC (12/31/95).

Ickes and Stephanopolous call Altman to expressing surprise at recusal decision, advising that he write a letter to WJC explaining his decision; (Steiner notes apparently also say that Ickes and S told Altman WJC was upset about Stephens)

Stephanopolous call to Steiner stating WJC concerned about Stephens (per Steiner notes)

Raymen ⇒ OS/HSC

ax. 02/28/94 Eggleston memo re "Whitewater -- FDIC and RTC Rose Law Firm Issue"

FDIC rpt (under request Howe) Found - No actual conflict re Frost / Seth Ward (Hubbell father in law) do was in Lit ⇒ firewall

The appearance prob under 94 (not 89) subs.

remo discusses RTC civil action. orig'ly by 2/28/94 at all. 12/17/93 is extended to 2/28/94. Late 93/early 94

Ck on status RTC + FDIC rpts do [illegible] Forwarded when?

2/24 by Howe and told ⇒ IG.

to BN, JH, Art Kingsbury, Bo Itts

ay. 03/01/94 Leech letter criticizing 2/23 response to his 2/3 letter re Altman recusal; Leech concern heightened by Altman testimony before Senate Banking on 2/24; raises issue of whether Altman's conduct violated federal ethics or RTC rules. Rego OGE + BN to review w/r mtg violated rules.

Ickes memo to HRC including Eggleston 2/28 memo and copies of the FDIC and RTC reports re Rose conflicts; HRC never read or kept it

Altman writes to WJC explaining recusal, characterizing 2/2 meeting as "dumb"

Podesta calls Altman re recollections of WH staff re T contacts inconsistent w/Altman testimony, including discussion of recusal at 2/2 meeting

D'Amato blast press rel; call for hrgs 3/2

az. 03/02/94 Altman writes to Riegle disclosing that he today learned of two conversations which did take place between T staff and WH personnel regarding the Madison Guaranty matter -- related to handling of press inquiries

WSJ publishes D'Amato's "A Whitewater Whitewash"

3/2, 3/3 mark memo to WH - contacts from/out re WOW ⇒ JC.

ba. 03/03/94 Altman writes to Riegle re expanding the record of his testimony on contacts with WH on RTC matters - no non public info disclosed; RTC had discussed subj w/ D'Amato; ethics ofc approved mtg; no subst.

WJC responds to question following Rego event that he is concerned about the appearance of impropriety of meetings between T and WH and he has directed McLarty to prepare memo about how WH should respond to agency contacts to avoid both fact and appearance of impropriety

Nolan/Mills memorandum to COS re contacts w/T officials (draft)

Bentsen refers to OGE

bb. 03/05/94 Nussbaum out

Gergan/Altman phone call re Riegle letter sent by Altman, Gergen notes say "recusal - [even] if viewpoints but no one ever objected - No one asked me directly not to do so"

bc. 03/21/94 Altman writes to Riegle that he informed those in attendance at the 2/2/94 meeting that he was weighing the issue of recusal and that a few days after the 2/2 meeting, he had a phone conversation with McLarty on the

subject of recusal. He also reported a phone call w/Ickes the night before his 2/24 testimony that he was stepping down from the RTC the next morning. Around the same time he bumped into Nussbaum in a White House corridor where Nussbaum told him they would soon be submitting a nominee for a permanent RTC head.

2. Names

   a. **Paula Casey** - USA/ARK

   b. **Jonathan Fiechter** - Acting Director of OTS

   c. **Eugene Fitzhugh** - indicted w/Hale for defrauding SBA

   d. **Dennis Foreman** - Treasury ethics lawyer

   e. **Leon Foust** - President of the First Bank of Arkansas in Wynne Arkansas, formerly the Bank of Cherry Valley

   f. **John C. Keeney** - DOJ career prosecutor; Acting AAG/Criminal in 11/93

   g. **Ellen Kulka** - RTC General Counsel

   h. **Levy** - Legislative Liaison at Treasury

   i. **Andrew Hove** - Acting Chair of the FDIC

   j. **Donald B. Mackay** - career lawyer in DOJ/fraud; appointed special prosecutor

   k. **Charles Matthews** - indicted w/Hale for defrauding SBA

   l. **Bob Raymar**

   m. **John Ryan** - RTC Deputy CEO

   n. **Howard Schloss** - Treasury press office

   o. **Stanley Tate** - Nominated to head RTC; withdrew

   p. **Ginny Terzano** - WH press office

   q. **Ricki Tigert** - FDIC nominee being pressured to recuse by Senate Republicans

3. Investigation Leads

   a. Nelson Schwartz of Baltimore Sun reports of source who said GS and BL pressured Altman not to recuse himself from the RTC investigation into Madison

b. Look for Altman talking points used at 2/2 meeting

c. Hanson may have met w/Ickes sometime following 2/2 meeting in Williams' office -- prosecutors asked Ickes if he said something troubling to her; Ickes has no idea although Williams remembered that Altman and Ickes met in her office and Altman said he was not going to recuse; she remembered that Hanson arrived late, after Ickes and Altman left

d. Follow up on Podesta/Stern calls to Steiner and Levy on 2/22-23

3/7/94 Draft CM memo to Mack re contacts (resp. to Leach 3/1 ltr + mm reg.), wh. 9/29, 10/14 or 2/2 mtgs re press inq + procedural issues discussed w/ Hill [illegible] rules, Discusses proper role WH cnsl, [incl. one office [illegible] matters that affect [illegible]/how do as Pres/press mtgs ...]; ethical & std conduct regs & crim conflict stats. => no viol.

[& wh. info told was publically avail? to Hill? & RA discussed w/ both Hill [illegible] [illegible] recusal*
* what did DX tell DA!]

PRIVILEGED AND ~~CONFIDENTIAL~~
ATTORNEY WORK PRODUCT
DRAFT #2/July 25, 1994

Memorandum Analyzing Treasury-White House Contacts
Under the Standards of Conduct for Executive Branch Employees

In this memorandum we analyze the principal Treasury-White House contacts concerning issues relating to Madision Guaranty Savings and Loan to determine whether the conduct of White House officials involved violated applicable ethical standards. We conclude that White House staff committed no ethical violations.[1]

A. Factual Findings

This memorandum analyzes the factual findings set forth in the "Chronology of Findings Related to Contacts Between the White House and Treasury Officials on the Subject of the RTC Investigation of Madison Guaranty Savings and Loan" ("Chronology of Findings"), submitted as an attachment to the Testimony of Special Counsel to the President Lloyd Cutler. It assumes familiarity with those findings.

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[1] This memorandum does not address the question whether, despite the absence of an ethical violation, the contacts may have reflected poor judgment or otherwise been inadvisable. That subject is addressed in the Testimony of Lloyd Cutler.

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DRAFT #2/July 25, 1994

B. Applicable Ethical Standards

Ethical conduct of executive branch employees, including White House officials, is governed by the Standards of Conduct issued by the Office of Government Ethics, 5 C.F.R. Part 2635.[2] Three of these standards are most relevant for our inquiry whether White House staff violated ethical standards in connection with contacts with Treasury officials regarding Madison Guaranty Savings and Loan.

1. Executive branch employees may not improperly use non-public information to further their own private interests or those of anyone else. 2635.703. OGE has confirmed to us that this standard is violated only by knowing or intentional conduct.

2. An executive branch employee may not use his public office for the private gain of himself or his friend, relative, or private business associate. 2635.702; see also 2635.101(b)(7) (general standard that "[e]mployees shall not use public office for private gain). In a slightly different formulation of the same basic rule, the standards also provide that an employee may

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[2] Earlier regulations at 3 C.F.R. Part 100 were superceded in pertinent part by the Standards of Conduct, which took effect on February 1, 1993. 57 Fed. Reg. 35006 (Aug. 7, 1992).

not use his Government position "in a manner that is intended to coerce or induce another person . . . to provide any benefit, financial or otherwise, to himself or his friend, relative, or private business associate. 2635.702(a). These standards also are violated only by conduct intended to confer a private gain or benefit.

3. An executive branch employee shall not "participate" in a matter without the prior approval of a designated ethics official if the employee "determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter." 5 C.F.R. 2635.501 and .502. This is the specific formulation of more general standards providing that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual," 5 C.F.R. 2635.101(b)(8), and that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards" in the mind of a reasonable person with knowledge of the reasonable facts. 2635.101(b)(14).[3]

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[3] The more general standards are to be applied in circumstances that the more specific standard does not cover. 2635.101(b).

A few other Standards of Conduct are theoretically applicable but do not even merit close analysis. The Standards of Conduct prohibit participation in matters in which an employee or his or her spouse, minor children, private business associates, or potential private employers have a financial interest. 2635.402; 2635.604(a). None of the White House staff has this type of connection with the Madison Guaranty and Whitewater matters. Therefore, these standards were not violated.

The Standards also prohibit the unauthorized use of government property, 2635.704, and the improper use of official time, 2635.705. White House staff received no Government documents or other property from Treasury staff, and therefore Standard 2635.704 does not even apply here.[4] While there is some question whether a few of the contacts had a strictly official purpose, there is no indication that White House staff were doing other than making an "honest effort to perform official duties." Nor did any White House staff member ask his or her subordinate to perform duties that the staff member knew

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[4] Section 704(b)(1) of the Standards defines "property" for purposes of this rule as tangible property and certain intangible interests and rights, but not mere information.

were unofficial, unauthorized duties. Therefore, there was no violation of Standard 2635.705.[5]

C. Analysis

The following analysis first applies the relevant ethical standards to the three principal sets of contacts discussed in the Testimony of Lloyd Cutler and described in more detail in the Chronology of Findings. It then briefly addresses the remaining contacts set forth in the Chronology. It concludes that White House staff participating in these contacts did not violate any applicable ethical standard.

1. Contacts Relating to Press Inquiries

In the Fall of 1993, a series of contacts between White House and Treasury officials relating to Madison Guaranty occurred. Treasury officials contacted the White House for the purpose of providing information about press inquiries relating to RTC criminal referrals that incidentally mentioned the Clintons as witnesses.

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[5] OGE has told us that there is no case law interpreting the Standards of Conduct, which only took effect on February 1, 1993. OGE confirmed that cases applying previous ethical standards are of limited use in analyzing the unique situation here.

a. Use of Non-Public Information to Further Private Interests

The receipt by White House officials from the Department of Treasury of information about press inquiries relating to RTC criminal referrals concerning Madison Guaranty Savings and Loan did not result in violations of the Standards of Conduct pertaining to improper use of nonpublic information.

The information that the White House received probably was nonpublic until news articles concerning the criminal referrals were published at the end of October. RTC's policy is that information about the fact and contents of RTC criminal referrals generally is confidential and not released to the public, but press leaks apparently are common. The White House understood that the information it was receiving either was about to be leaked to the press (on September 29) or was in the hands of -- and had come from -- reporters (by October 14). OGE takes the position that nonpublic information does not lose its nonpublic status for purposes of the Standards of Conduct if it is in the hands of the press but has not yet been published, and has told us that there is case law supporting this rule.[6]

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[6] Section 2635.703(b) defines nonpublic information as information an employee "knows or reasonably should know has not been made available to the general public."

The Standards do not prohibit the simple receipt of nonpublic information.[7] A violation results when an employee knowingly or intentionally uses nonpublic information to further the private interests of himself or any other person. We have found that no White House employee sought to obtain the information they received from Treasury, whether to further private interests or for any other purpose. Treasury initiated all of the contacts in which it provided information to the White House. Nor did any White House employee do anything with the information the White House received in an attempt to further any private interests:

-- The White House used the information it received only to prepare to respond to press inquiries, a proper official purpose.

-- Bruce Lindsey informed the President of the fact of the criminal referrals after learning of them from a source outside of the government, who learned about them from reporters making inquiries. Mr. Lindsey properly gave the President that information so that the President could avoid

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[7] Cf. Dirks v. SEC, 463 U.S. (1983) (the mere receipt of confidential information did not result in a violation of law) [N.B.: case is cited in Fried, Frank brief to OGE; I have not read it].

taking actions that could be politically embarrassing, such as making contact with the subjects of the criminal referrals. This practice was consistent with the practice of the Department of Justice in providing the President or other high government officials advance notice if an Independent Counsel is appointed to investigate a matter concerning the official.

-- The President did not use the information that he received about the fact of the criminal referrals to influence the handling of the referrals by the RTC or the Department of Justice, or do anything else with it to further his private interests.

-- After learning at the October 14 meeting that four cashiers checks representing contributions to the Clinton gubernatorial campaign were mentioned in the criminal referrals, Mr. Lindsey asked the Democratic National Committee office in Little Rock to send him copies of the checks. The DNC office faxed him copies, which it apparently obtained from its files. We have seen no indication that any files containing evidence relating to the Madison matter were disturbed in the course of this event. Mr. Lindsey received only a fax copy of the checks,

not an actual document taken from a DNC or other file. Mr. Lindsey used the information he received from the DNC solely for the purpose of responding to press inquiries relating to the Whitewater and Madison matters, for which he had primary responsibilty at the White House.

-- No White House official did anything else with the information that they received or took any action to influence the handling of Madison-related matters by federal agencies. For example, no one sought to have the criminal referrals held up at the RTC office in Washington; no one sought to have the Clintons' names removed from the referrals, where they were listed as witnesses; and no one sought to discuss the substance or merits of the referrals with the RTC, the Department of Justice, or any other agency in an attempt to alter them or affect the handling of them.

b. Use of Public Office for Private Gain or Benefit

The contacts relating to press inquiries did not result in any violation by White House officials of the Standards of Conduct prohibiting the use of public office for the private gain or benefit of an employee or persons with whom an employee has a close relationship outside the scope of the government.

As explained in Section a above, no White House official involved in those contacts, and no official who received information provided during those contacts, took any action to interfere with the handling of the criminal referrals or otherwise to obtain a private gain or benefit for the Clintons.

In addition, most of the White House officials involved in the Fall contacts did not have a relationship with the Clintons of the type (friend, family, or private business associate) to which this regulation applies. The regulation generally does not apply to co-workers in the government with whom an employee has become friendly unless the relationship extends to the private sphere of the employee's life. When OGE issued the Standards, it explained that "[i]ssues relating to an individual employee's use of public office for private gain tend to arise when the employee's actions benefit those with whom the employee has a relationship outside the office and the language of Section 2635.702 is intended to pinpoint this conduct without unreasonably limiting employees in the performance of their official duties." 57 Fed. Reg. 35006, 35030 (Aug. 7, 1992) (emphasis added). While it may be that Mr. Lindsey should be regarded as a "friend" of the Clintons for purposes of the regulation, it is clear that Mr. Lindsey did not attempt to obtain any private gain or benefit for the Clintons.

Congressman Leach has asserted that if an executive branch employee takes an action to benefit his superior within the Government, for example by obtaining information to give the superior a "heads up" about a criminal referral in which the superior is named, the employee is using his public office for his own private gain or benefit. Mr. Leach apparently reasoned that the employee who takes such an action may benefit because he may place himself in greater favor with his superior and advance his own career within the government.

Mr. Leach's assertion is not supported by a proper reading of the Standards of Conduct. First, according to OGE, the types of gain or benefit to which the Standards apply are concrete, tangible benefits, either financial or otherwise. Using ones public office to protect or enhance the reputation or job security of oneself or another does not give rise to an ethical violation. Second, the regulations clearly apply to <u>private</u> interests. It would be truly anomalous if an executive branch employee could commit an ethics violation by trying to please his superior simply because in doing so he promoted his own interest in advancing in his government job.

c. Impartiality Standard

No White House official violated the standard relating to impartiality of executive branch employees by participating in the contacts relating to press inquiries concerning criminal referrals. The Standards of Conduct prohibit executive branch employees from participating in a matter affecting the financial interests of another if the employee has a "covered relationship" with the other person, unless the employee has been authorized to do so by the designated ethics official for his or her agency.

As a threshold matter, none of the White House officials involved in the Fall contacts with Treasury could be said to have "participated" in the Madison Guaranty matter. The officials received information and used that information for the purposes of preparing to respond to press inquiries. Mr. Lindsey passed along to the President information he received from a private individual about the inquiries to give the President a heads-up. Neither of these actions comes close to being "participation" in the investigation of Madison by the RTC or the Department of Justice.

While further analysis is not required, it is also true that none of the White House officials involved had any of the family or private business relationships with either of the Clintons

that would trigger an inquiry whether the official should have participated in a matter in which the Clintons had a financial interest. The standards also prohibit unauthorized participation in a matter if the employee otherwise determines "that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter." We have made no finding that would give rise to any basis for a reasonable person to question the impartiality of the persons involved in the Fall contacts.

Finally, attorneys on the White House Counsel's staff participated in the contacts at issue at the direction of the White House Counsel, who is the designated ethics official for the Office of the President. For that reason, they could not be found to have violated the ethical standards.[8]

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[8] OGE stated when it issued the standards, "[t]he effect of an agency designee's determination or authorization will be to ensure that the employee is not subject to disciplinary action when the employee is acting according to that determination or authorization." 57 Fed. Reg. at 35008. "[E]mployees will not be disciplined for standards of conduct violations when they have acted in accordance with the advice of an agency ethics official." Id. at 35011.

2. Contacts Relating to Mr. Altman's Recusal

Another important contact occurred when White House officials met on February 2, 1994 with Mr. Altman and Ms. Hanson concerning (i) the RTC's procedural options in light of the expiring statute of limitations for Madison-related civil claims and (ii) Mr. Altman's possible recusal from Madison-related matters.

a. Use of Non-Public Information to Further Private Interests

The information that White House officials received at the February 2 meeting about the statute of limitations issue was not non-public. The options available to the RTC -- suing before the statute ran, failing to sue, or seeking a tolling agreement from the parties to the action -- represented standard litigation procedure and were available in any law library. Furthermore, no White House official used that information to further anyone's private interest.

The fact that Mr. Altman was considering recusing himself had not been publicly disclosed. However, again, White House officials did not use that information to further any private interest.

b. Use of Public Office for Private Gain or Benefit

White House officials did not seek to obtain any private gain or benefit in connection with the Treasury contact relating to the statute of limitations issue. It was appropriate for the White House to receive information about RTC's general procedural options: this was a heads-up on coming regulatory action concerning a high public official, similar to the heads up on the criminal referrals the previous Fall.

The only question that a White House official asked about this issue at the meeting came from Maggie Williams, who asked whether Mr. Altman intended to provide the same information to the private attorneys. He agreed such a briefing would be useful and said he would confer with RTC General Counsel Ellen Kulka about it. Ms. Williams' question was entirely reasonable, because the potential parties to Madison civil litigation and their attorneys would be the ones with whom the RTC would have to negotiate any tolling agreement in the coming weeks if the limitations period were not extended. She did not tell Mr. Altman to brief the private lawyers, and he did not understand her to be giving him an instruction. Even assuming that telling the private attorneys about RTC procedural options of which they no doubt were already well aware could be regarded as conferring

a private benefit, Ms. Williams did not intend to "coerce or induce" Mr. Altman into giving such a briefing. Therefore, she committed no ethical violation.

After Mr. Altman told the White House officials at the February 2 meeting (as they understood him) that he was considering recusing himself from Madison-related matters at RTC, Mr. Nussbaum expressed a view that Mr. Altman should consider whether he ought to recuse if he did not have a legal or ethical obligation to do so. Mr. Nussbaum's remarks were motivated in part by a concern that it would be unfortunate to develop a precedent in the Clinton Administration for recusals based on nothing more than the fact that the recusing individual was a political appointee. To this extent, his expression of an opinion as to the merits of Mr. Altman's recusal decision was based on promoting official White House policy interests, not on attempting to obtain any private benefit for the Clintons.

Mr. Nussbaum also observed to Mr. Altman that even were Mr. Altman to rely on a recommendation from Mr. Ryan and Ms. Kulka, his presence would have a positive effect on the care and professionalism with which they developed their recommendation. Mr. Nussbaum's remarks appear to have been motivated, at least in part, by his belief that Ms. Kulka had at times shown poor

judgment. He also stated, however, that the decision was Mr. Altman's to make.

Whether Mr. Nussbaum's statement of a preference that Mr. Altman not formally recuse himself on the basis of his belief that Mr. Altman's continued supervisory presence with respect to the Madison matter could enhance the care and professionalism with which career RTC officials handled it presents a closer question under the standard of conduct prohibiting use of public office to obtain private gain or benefit. However, several factors lead to a conclusion that the standard was not violated in this instance.

First, Mr. Nussbaum was, at most, trying to ensure that the Madison matter was handled competently and fairly, not trying to ensure that the matter's outcome was favorable to the Clintons. Under Mr. Nussbaum's reasoning, if Mr. Altman did not formally recuse himself, his general supervision would impose the same discipline on the handling of the Madison claim that it would impose on every other claim before the RTC. At most, he sought to maintain a level playing field for the Madison matter, not to tilt the matter in anyone's favor. It seems clear that basic fairness is not the type of private gain or benefit to which the regulation applies. Further, it is reasonable to conclude that

Mr. Nussbaum's expression of a preference regarding Mr. Altman's recusal, followed by his statement that the decision was up to Altman and he was not telling Altman what to do, did not amount to an effort to "coerce or induce" Mr. Altman to recuse himself for purposes of the Standards of Conduct.

Second, Mr. Nussbaum does not have the type of close relationship with the Clintons to which the standard applies. The ethical standard prohibits the use of public office for the private gain or benefit of an employee's friend, relative, or private business associate. As explained in Section C.1.b. above, the regulation does not apply to co-workers within the Government who are on friendly terms within the scope of their employment. Such was Mr. Nussbaum's relationship with the Clintons.

c. Impartiality Standard

Mr. Nussbaum did not violate the standard of conduct dealing with impartiality. Taking together the relevant facts, it is reasonable to conclude that Mr. Nussbaum's impartiality could not reasonably be questioned: (i) Mr. Nussbaum's preference with regard to Mr. Altman's recusal was based solely on (a) his concern that official White House policy on recusal by presidential appointees be followed and (b) his desire to ensure

that the RTC handled the Madison fairly and competently; (ii) he knew of and accepted Mr. Altman's decision not to make any decisions relating to Madison whether or not he recused; (iii) he did not ask Mr. Altman to make such decisions or otherwise to take any action to affect the way in which the Madison matter was handled; (iv) he made it clear to Mr. Altman that he was not telling him what to do, and the decision was up to Mr. Altman; and (v) Mr. Nussbaum does not have with the Clintons any of the "covered relationships" to which the regulation usually applies.

3. Contacts Relating to Mr. Altman's Recusal and Jay Stephens

On February 25, 1994, the day after Mr. Altman had testifed at the Senate Banking Committee's RTC Oversight Board hearing, Mr. Altman announced his decision to recuse himself. Two conversations, one between Messrs. Ickes and Stephanopolous and Mr. Altman, and the other between Mr. Stephanopolous and Mr. Steiner, ensued.

a. Use of Non-Public Information to Further Private Interests

When Mr. Ickes and Mr. Stephanopolous learned of Mr. Altman's recusal, Mr. Altman had already put in motion a press

release announcing the news, which therefore clearly was not nonpublic, at least so far as any of the participants in the conversation knew. Therefore, their conversation with Mr. Altman about the recusal could not violate the standard concerning the use of nonpublic information.

Information about the retention of Jay Stephens may have been nonpublic at the time of the February 25 conversations between Messrs. Ickes and Stephanopolous at the White House and Messrs. Altman and Steiner at Treasury. However, neither White House official used their information about the hiring of Mr. Stephens to further the private interest of the Clintons.

The White House officials did express their surprise and dismay that a political opponent of the President had been hired when it seemed clear that he had a disqualifying conflict of interest. During his conversation with Mr. Steiner, Mr. Stephanopolous also expressed these concerns, and may have asked if anything could be done about the Stephens appointment. Mr. Steiner answered in the negative and Mr. Stephanopolous did not pursue the issue. It is reasonable to conclude that neither White House official said anything with the intention of coercing or inducing the Treasury officials to alter what had been done -- which, indeed, they could not do. Mr. Stephanopolous was merely

"letting off steam." The officials' reactions were natural under the circumstances. It is clear that neither these two officials nor any other White House staff member made any effort to have Mr. Stephens removed from the Madision matter, or otherwise to affect the handling of that case in a way that would benefit the Clintons personally.

b. Use of Public Office for Private Gain or Benefit

As explained in Section a above, no White House official took any action to benefit the Clintons personally in connection with Treasury contacts relating to the retention of Jay Stephens to handle the Madison matter.

c. Impartiality Standard

The relevant facts would not reasonably support a conclusion that the impartiality of Mr. Ickes and Mr. Stephanopolous with respect to the Stephens matter reasonably could be questioned. There is a perfectly reasonable explanation for their expression of annoyance at the retention of Mr. Stephens, both because he has a glaring conflict of interest, and because they were also annoyed that Mr. Altman had announced his recusal to a New York Times editor before telling the White House on the very day that White House staff had been defending Mr.

Altman's previous decision not to recuse to the press. Moreover, neither White House official has the types of covered relationships with the Clintons that bring to bear the standard on impartiality. These contacts clearly resulted in no violation of ethical standards.

4. Other Contacts

The Chronology of Findings relates numerous other contacts between Treasury and White House officials relating at least tangentially to the Madison matter. Most of these contacts were initiated by the Treasury Department. While there was no clear official reason for a few of the contacts, most of them had a perfectly legitimate official purpose, including:

-- contacts between White House and Treasury staff to prepare for Mr. Altman's hearing testimony on the February 2 meeting between White House and Tresury officials;

-- staff contacts to discuss the need to correct or supplement Mr. Altman's testimony about the February 2 meeting;

-- conferences between Treasury and White House ethics officials for the sole purpose of ensuring that Treasury and the RTC, executive branch agencies, used the correct

standards in analyzing whether Mr. Altman was legally or ethically obligated to recuse himself; and

-- contacts between White House staff and Mr. Altman, an executive branch official answerable to the President, for the purpose of transmitting the information that he had decided to recuse himself from Madison matters.

None of these remaining contacts resulted in any White House official saying or doing anything (whether during the course of the contact or pursuant to it) to further the private interests of the Clintons or anyone else. In addition, none of the White House officials involved in these remaining contacts could conceivably have been viewed as "participating" in matters relating to Madison Guaranty pending at the RTC or the Department of Justice. Therefore, none of these contacts violated the standards of conduct.

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MEMORANDUM FOR THE FILE

Subject: Preliminary Analysis of White House Staff Contacts With Other Agencies Regarding Madison Guaranty

Counting each separate conversation, however brief, and one item of correspondence mentioned in the Draft Testimony as a contact, I identified up to 49 contacts. Many of these appear both innocuous and completely appropriate. None violated any applicable criminal statute or the OGE Standards of Conduct. Some were contrary to White House policies on contacts with agencies. Some were ill-advised because there does not appear to have been a legitimate purpose for the contact. This analysis applies only to the conduct of White House staff, not to the conduct of employees of any other agency.

A. Conclusions

Based on the information related to us in the interviews and set forth in the Draft Testimony, I have reached the following tentative conclusions:

1. No obstruction of agency proceedings. None of the contacts involved any White House communication that "corruptly, or by threats or force, or by any threatening letter or communication influence[d], obstruct[ed], or impede[ed]" any pending inquiry, or endeavored to do so. Therefore, there was no violation of 18 U.S.C. Sec. 1505.

2. No representation of persons in matters affecting the government. During none of the contacts did any White House staff member act as agent or attorney for the Clintons or any other private person. Therefore, there was no violation of 18 U.S.C. Sec. 205(a).

3. No participation in matters affecting a White House staff member's financial interest. None of the White House staff involved in the contacts (and none of their spouses, minor children, or non-governmental business associates) had any financial interest in the Madison Guaranty or Whitewater matters. None was seeking employment outside of the Government with either of the Clintons. Therefore, there could have been no violation of 18 U.S.C. Sec. 208(a) or OGE Standards .402 or .604(a).

4. No disqualification due to appearance of impartiality. None of the White House staff members involved in the contacts should have been disqualified from participating in matters relating to Madison Guaranty or Whitewater on the basis of their relationship with the Clintons. Thus, there was no violation of OGE Standards .501 and .502. A few contacts do raise reasonable questions whether these Standards of Conduct were satisfied, however. These are discussed in Section B below.

5. No use of public office for private gain or benefit; no use of non-public information to further private interests. No White House staff member did any of the following acts prohibited by the OGE Standards:

-- used his or her public office for the Clintons' private gain (Sec. .702);[1]

-- used his or her Government position, title, or authority in a manner intended to coerce or induce another person to provide any benefit, financial or otherwise, to the Clintons (Sec. .702(a));[2]

-- allowed the improper use of public information to further the private interest of the Clintons (Sec. .703).[3]

There is no indication that any White House staff member said or did anything with the intention of furthering the Clintons' private interests or obtaining a personal benefit for them. Specifically, no White House staff member said or did anything for the purpose of stopping or recalling the criminal

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[1] The provisions of Section .702 apply only to an employee's use of public office for the private gain or benefit of his or her friends, relatives, or non-governmental associates. However, there is no indication that any staff member took the actions prohibited by this Section. Therefore, it is not necessary to consider whether each White House staff member regarded either of the Clintons as a friend or had a non-governmental association with either of them.

[2] See note 1 above.

[3] The Standards of Conduct prohibit the use of nonpublic information to further the private interests of anyone.

referrals, having the Clintons' names removed from the referrals, influencing the manner in which the RTC or Department of Justice would conduct any investigation of the Madison or Whitewater matters for the benefit of the Clintons, or otherwise furthering the Clintons' private interests. While it is possible that some Treasury officials may have perceived that such an attempt was being made (and it is not clear that is the case), the Standards of Conduct require that the employee do the prohibited act intentionally or knowingly. Therefore, the White House employees did not violate the Standards. In addition, it seems clear that no private benefit accrued to the Clintons by reason of the contacts. While this fact alone would not determine whether the Standards had been violated, it contributes to a determination that no improper conduct occurred for purposes of the Standards.

Some contacts raise reasonable questions whether these Standards of Conduct were satisfied. These are discussed in Section B below.

6. No unauthorized use of government property or improper use of official time. OGE raised the question whether White House employees might have violated OGE Standards prohibiting the unauthorized use of government property or improper use of official time. White House staff received no non-public Government documents from Treasury staff, and therefore the OGE Standard at Section .704 is not involved. A few of the contacts may have been ill-advised because there does not appear to have been a legitimate official purpose for them. However, there is no indication that White House staff were doing other than making an "honest effort to perform official duties." No White House staff member asked a subordinate employee to perform duties that the staff member knew were unofficial, unauthorized duties. Therefore, there was no violation of the Standard at Section .705.

7. White House policies governing staff contacts with agencies were not always followed. In some instances, identified in Section B below, contacts between White House staff members and Treasury officials regarding the investigation of Madison by the RTC and/or the Department of Justice occurred without the advance approval of the White House Counsel. White House policies governing agency contacts required advance approval for such contacts. The policies stated that contacts with the Treasury Department regarding investigative matters should be made by the White House Counsel himself or by persons whom he

designated for on-going contacts. Some of the contacts at issue were handled in a manner consistent with these policies, but approximately nine others were not. Of those that were not, some probably should not have occurred because there appears to have been no official purpose for the contact.

Our investigation demonstrates a need for clearer articulation of White House policy on contacts and closer adherence to those policies by staff. In particular, it shows that staff must be on their guard to be sure that contacts initiated by other agencies do not result in discussions of substance unless and until the staff member obtains OWHC authorization for the contact.

B. Contacts that We Believe Present the Closest Questions[4]

Sixteen contacts raise reasonable questions as to whether the Standards of Conduct and/or White House policies were violated. Upon consideration, it appears that none of these contacts violated the Standards of Conduct. Some did violate White House policies, however, and some were ill-advised because there appears to have been no official purpose for the contact.

1. Contacts involving close friends of the Clintons.

The OGE Standards at Sections .501 to .503 provide that an employee shall not participate in matters without prior authorization from a designated ethics official "it he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter." The regulation identifies certain "covered relationships": an employee's non-governmental business associate (or that of the employee's spouse, parent, or dependent child), household member, or other relative with whom the employee has a close personal relationship. An employee's participation in a matter may be particularly questionable if a person with whom the employee has a covered relationship has a financial interest in the matter. A

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[4] Some contacts that the press or others may view as questionable (e.g., the Ludwig contacts) appear, upon analysis, to raise no questions of ethics or White House policy violations. These are discussed Section C below.

friendship is not a covered relationship. However, Standard of Conduct .702(d) requires employees to comply with Section .502 if their duties would affect the financial interests of a close friend. See 2635 .702(d); OGE Commentary [insert cite].

Based on the information we have collected, it is fair to conclude that a reasonable person with knowledge of the relevant facts would not have questioned the impartiality of the White House staff members involved in the contacts. None of the White House staff had covered relationships with the Clintons. **[JANE -- RIGHT?]** **[Two]** of the staff members involved were close personal friends of the Clintons: Lindsey and Maclarty. **[JANE -- RIGHT? WERE THERE OTHERS?]** Maclarty had minimal contacts with Treasury staff, did not initiate those that he had, and did not do or say anything that would raise a question regarding his impartiality. Lindsey had slightly more involvement in the contacts and the matters surrounding them. He had a legitimate reason for being involved because he was the point man for Arkansas-related matters affecting the Presidency. Lindsey did not do or say anything that could have led a reasonable person with knowledge of the facts to question his impartiality. In addition, Lindsey's involvement in the fall of 1993 occurred at the direction of Nussbaum, the White House ethics officer.

Relevant Lindsey and Maclarty contacts are as follows:

a. Following the 9/29/93 meeting between Nussbaum and Hanson, Nussbaum instructed that Lindsey be told about the contact. On 9/30/93 and 10/7/93, Sloan told Lindsey about press inquiries concerning the RTC criminal referrals after learning about them from Hanson. In addition, Lindsey attended the October 14, 1993 meeting regarding press inquiries. Lindsey had need to know: as point person handling Arkansas matters, might receive press inquiries, would need to know how to handle; Lindsey did nothing with the information. [1, 2, 3, 4]

b. Lindsey told WJC about the criminal referrals on 10/4 or 10/5/93. This was not a White House/Treasury contact, and was not triggered by such a contact; Lindsey told WJC after learning of press inquiries from Jim Lyons; President had need to know, so he could avoid doing anything inappropriate and so he would not be blind-sided

by press inquiries. When Lindsey told the President, Lindsey believed that the referrals had already been made. The President did nothing with the information to further his own interests. **[CONFIRM] [How deal with fact Lindsey got copies of checks from DNC? Why? What did he do with them?]**

c. After the February 24, 1994 hearing, Lindsey learned that ABC had asked Altman if the White House had pressured Altman to have the RTC brief Kendall on the statute of limitations issues, and telephoned Altman. Altman told Lindsey that the answer was no, and Lindsey suggested Altman call the reporter and tell him that. Lindsey did nothing intended to further the Clintons' personal interests, and his participation would not raise a question of loss of impartiality. His contact probably did not require OWHC clearance because it concerned the routine policy matter of how to respond to press inquiries concerning matters in which the White House had been involved. [36]

d. Maclarty may have attended the February 2, 1994 meeting. While Maclarty's friendship with the Clintons might raise a question under Section .502 and .702 whether he should have participated in such a meeting, it appears his participation was minimal at best, and he may not have attended at all. [15]

2. Nussbaum contacts with Department of Justice officials Hubbell regarding special counsel.

a. Nussbaum "speculated" with Hubbell regarding special counsel (selection of?), scope of inquiry. Hubbell was conflicted out of working on Madison/Whitewater matters. Nussbaum could not have obtained any benefit for the Clintons by talking to Hubbell, since Hubbell was powerless to work on those matters, and so doubtless did not intend to seek any benefit. Therefore, no violation of Standards. White House policies stated that discussions with DOJ about investigative matters could only be had by White

House Counsel, but only if appropriate and necessary. Thus, the contacts may not have been proper under the policies. In any event, it creates an appearance problem when a White House official speaks with a DOJ official about a pending investigation from which the official has been walled off due to a conflict of interest. [5]

b. Nussbaum spoke with Freeh at a dinner party regarding the selection of Fiske as special counsel; both approved of selection. Nussbaum made no effort to obtain any benefit for Clintons. He did not tell Freeh anything Freeh did not already know by saying that Nussbaum liked Fiske. No ethics violation, but may have violated White House policy. [6]

3. Supposed conversation between Williams and Altman in January 1994. According to Altman's diaries and his explanation of them, he inferred from something Williams told him during a meeting on another topic that the White House was trying to negotiate with the Justice Department about the appointment of a special counsel. She also told him that HRC opposed using a special counsel and was "paralyzed" by Whitewater. [7]

a. The fact and nature of this conversation are questionable. Williams denies she would have made the latter statement. In fact no one at the White House was negotiating with the Justice Department about the special counsel **[ARE WE SURE?]. [WHAT DOES WILLIAMS SAY ABOUT WHETHER THE CONVERSATION OCCURRED?]**

c. There is no violation of the Standards of Conduct. Even assuming that Altman's account is true, Williams did not ask him to do anything to benefit the Clintons, and he did not take any action to benefit the Clintons based on the conversation. In any event, Altman had no power to affect decisions regarding special counsel **[RIGHT?]**. While he might have had power to affect the way the RTC conducted its investigation of Madison, the conversation did not concern that topic.

d. Under the White House policies, assuming the account is true, Williams should not have had contact with a Treasury/RTC official concerning an investigative matter without first receiving authorization from the Office of White House Counsel. In addition, the contact was inadvisable because it had no official purpose.

4. Supposed Bentsen visit to Stephanopolous in January 1994. Altman's diaries state that Bentsen visited Steph. to argue for "lancing the boil." [8]

a. We have only the word of the Altman diaries that this visit occurred. **[IS THIS RIGHT?]** We cannot be certain what "lancing the boil" meant. **[ARE WE? DID WE ASK ALTMAN? ASK STEPH. ABOUT THIS?]**

b. There was no violation of Standards unless Steph. asked Bentsen to do anything to benefit the Clintons personally or took any other action to benefit them as a result of the meeting. **[DID HE?]**

c. If Steph. had advance warning of the meeting, he should have sought OWHC clearance for it. If he was caught unawares, he should not have had a substantive discussion with Bentsen before obtaining clearance. **[DID HE? WHAT STEPH SAY?]** Not clear what official purpose there would have been for such a meeting. Possibly it was appropriate for Bentsen, as head of RTC Oversight Board, to argue for White House support of appointment of special counsel to put to rest a sticky political issue.

5. February 2, 1994 meeting

a. Altman's provision of information to White House staff about the RTC's options if the statute of limitations were not extended raises questions. [15]

i. There appears to have been no violation of the OGE Standards: no one at the meeting

asked Altman to do anything that would benefit the Clintons, or took any action as a result of the information he provided (with the intention of benefitting the Clintons, or otherwise -- RIGHT?).

(1) The closest question is raised by Williams' question to Altman whether he would be providing the same information to the private attorneys (apparently referring to Kendall). This inquiry seems natural enough. It would seem that the information Altman was providing would have been more properly directed to Kendall than to the White House staff. In any event, while the statement could be read to imply that Altman <u>should</u> provide the information to Kendall in order to gain some advantage for the Clintons, there is no indication that is what Williams meant, and Altman did not understand it in that way. He said he assumed it would, and later checked with Kulka, who said the information would be provided but not at that time. Altman seems to have felt no pressure to take any further action.

ii. The meeting probably was set up contrary to White House policies. While the facts are not clear, it appears that the meeting was set up at Altman's request by Ickes and/or Maclarty. Apparently Nussbaum was summoned to the meeting without being told the subject. Under the policies, Nussbaum should have been told the subject in advance and consulted as to whether the meeting should take place.

iii. There is some question whether there was an official purpose for the meeting on statute of limitations issues. Arguably White House staff did not need to know what options the RTC faced in handling a specific matter -- Madison/Whitewater -- in the event the statute of limitations ran out. **[RIGHT?]**

However, because the Clintons' involvement in civil litigation against the RTC could affect the operation of the Presidency, and RTC decisions regarding such litigation would generate press inquiries, we can reasonably conclude that there was proper purpose for the meeting.

b. The exchange at the meeting concerning Altman's recusal also raises questions.

i. There appears to have been a miscommunication about recusal. Altman believes he told the White House staff that he had decided formally to recuse. The staff members who attended uniformly believed that Altman was saying he had been advised to recuse, but not on legal or ethical grounds, and that he was considering recusing.

ii. There was no violation of the OGE Standards. No one told Altman not to recuse, or to do or not do anything else that might benefit the Clintons personally.

(1) Nussbaum raised the question why Altman would recuse if he had no legal or ethical obligation to do so. This question was consistent with the recent White House policy decision that administration officials should not recuse themselves from matters unless such an obligation existed. Nussbaum could not have intended his statement to pressure Altman to change his mind about recusal because Nussbaum believed that Altman had not yet made up his mind. Altman himself says that it was implicit in the conversation that the decision was his.

(2) The Steiner diary entry is consistent with this analysis. To the extent that Nussbaum or anyone else at the meeting reacted negatively, it appears to have been based on the inconsistency of an

Altman recusal with White House policy and on Nussbaum's lack of confidence in the persons who would be left in charge of matters from which Altman recused himself. There is no indication -- and the diaries do not say -- that any White House staff person objected on the grounds (spoken or unspoken) that recusal would harm the Clintons' personal interests.

iii. Under the White House policies, advance OWHC authorization should have been sought for discussion of the recusal issue with Altman if anyone at the White House could have known in advance that it would be a topic of the meeting, because the recusal was based on an investigative matter at RTC. Since Altman apparently had not planned to raise the issue, however, White House staff could have had no opportunity to seek authorization.

iv. It does seem that the White House had a need to know whether Altman would recuse himself. The President appoints the CEO of the RTC, and the CEO serves at the pleasure of the President. The White House should be entitled to know if the CEO plans to relinquish his responsibility for certain matters. It would not be appropriate for the White House to try to influence his decision not to participate in matters involving the Clintons personally (which the White House did not do), but it would be appropriate for the White House to establish a uniform policy for recusals by administration officials and ask him to take it into consideration (which Nussbaum may have done).

(1) Nussbaum's questions appear sensible in light of the fact that the OGE Standards of Conduct did not require Altman to recuse himself simply because he was a friend of the Clintons, so long as a reasonable person with knowledge of the relevant facts would not believe that

his participation would result in a loss of impartiality.

6. Nussbaum call to Hanson regarding handling of civil matters relating to Madison by special counsel. Nussbaum called Hanson sometime after February 2, 1994. He suggested that the special counsel be asked to handle civil matters relating to Madison Guaranty, and asked how Kulka and Ryan had been appointed. [18]

   a. There was no violation of the Standards of Conduct. Nussbaum's inquiry about the special counsel apparently arose from his lack of confidence in Kulka and Ryan, not from any intention to benefit the Clintons personally. Further, it is not clear that having the special counsel handle the civil matters would have benefitted the Clintons.

   b. The White House policies permit the White House Counsel to have contacts with Treasury officials concerning investigative matters. Nonetheless, Nussbaum probably should have consulted with another ethics officer before having the contact about the handling of Madison matters, and probably should not have had the contact. It is not clear that the White House Counsel had a legitimate official purpose in contacting a Treasury official concerning the handling of a specific investigative matter.

   c. The inquiry about how Ryan and Kulka came to be appointed was appropriate. Nussbaum believed that the Presidential appointment process had been sidestepped, an appropriate subject of White House inquiry.

7. Second February "meeting". Altman stopped in briefly at a meeting of White House staff, told them he was not recusing himself, and left. [23]

   a. No Standards of Conduct violation. No White House staff member asked Altman to do anything, or did anything with the information that he provided, to benefit the Clintons.

b. It is not clear whether the gathering of staff was convened by Williams at Altman's request for the purpose of receiving his communication, or whether staff had collected for another meeting. If Williams did ask people to collect at Altman's request, she should have discovered the topic of the meeting and sought Nussbaum's approval in advance, because the topic related to an RTC investigation. One of the people she tried to contact was Nussbaum, but it is not clear that she told him the purpose of the meeting or sought his approval.

c. It was appropriate for the White House to be informed that the RTC CEO was recusing himself from certain matters.

8. Ickes inquiry of Hanson. Shortly after Altman's announcement that he was not recusing, Hanson arrived at the gathering of White House staff. Ickes asked her whom she had informed of her advice that Altman recuse, and she named a few people. Ickes said or implied that she should not tell others of her advice. (Hanson says she said she would recuse in Altman's place and would tell that to anyone who asked her.) [23 also]

a. No Standard of Conduct violation. Ickes did not ask Hanson to do anything that would benefit the Clintons personally. It was legitimate for the White House to seek to minimize the likelihood that an administration official would be criticized for failing to follow advice that was inconsistent with White House policy.

b. Under the White House policies, Ickes should have waited to have the contact until receiving authorization from the White House Counsel, because the contact related to an RTC investigation.

9. White House inquiries re: hiring of Jay Stephens. Three or four White House staff members called Steiner on three separate occasions during the period February 25-28, 1994, to ask about the retention of Jay Stephens, the former U.S. Attorney for the District of Columbia during the Bush administration [RIGHT?], as outside counsel to assist RTC in handling Madison matters. [37, 45, 46, 47]

a. No violation of Standards of Conduct. No White House staff member asked Steiner to do anything about the hiring of Stephens. They understood the hiring to be a done deal. They asked for an explanation of the procedures under which he had been hired, and/or expressed surprise at the hiring. No one (including WJC) said or did anything to have Stephens removed or otherwise to benefit the Clintons.

b. Under White House policies, Nussbaum should have been consulted before these contacts occurred, because they related to an RTC investigation.

c. There may have been no official purpose for White House inquiries about the handling of a specific RTC investigation. If the staff anticipated press inquiries about the matter, however, the inquiries may have been justified.

C. Contacts That White House Staff Handled Appropriately

Another 32 contacts violated no Standard of Conduct or White House policy. Aside from the questions discussed in Section B above about Lindsey's participation (which was not improper, Section B concludes), the four contacts in September and October of 1993 also do not raise any questions about improprieties. Aside from the possibly questionable discussions of the hiring of Jay Stephens, the 2/25/94 call from Stephanopolous and Ickes also raises no questions.

1. Four Hanson contacts with Nussbaum, his designees Sloan and Eggleston, and Gearan regarding press inquiries about the criminal referrals. [1, 2, 3, 4]

a. Contacts consisted of two meetings (9/29/93 and 10/14/93) and at least two phone calls. Treasury officials initiated them all. Subjects were reporting by Treasury of press inquiries and how Treasury planned to respond.

b. No violation of Standards of Conduct.

i. No White House staff member asked Treasury to do anything, or otherwise said or did anything intended to benefit the Clintons

(such as trying to stop or recall the referrals, or remove the Clintons' names from them). [See dicussion in Section B above re: Lindsey involvement.] The information that criminal referrals were being made was passed to the President only after Jim Lyons told Lindsey about additional press inquiries.

ii. It is not clear whether the White House received any non-public information from Treasury or Jim Lyons, but in any event the information was not used to further the President's personal interests. Hanson told the Treasury and RTC IGs that she understood from things that Devore had told her that the information that criminal referrals had been made by the Kansas City RTC office was public by September 30.

c. No violation of White House policies: the Treasury contact was properly handled by Nussbaum in the first instance. He properly designated White House staff members (Sloan and Eggleston) to handle further contacts. The 10/14 meeting was set up through him, and all participants had a need to know the information.

d. There was a legitimate purpose for the contacts and the provision of information about the criminal referrals to the President. The White House needed to be able to anticipate press inquiries, as did the President. In addition, the President needed to know about the referrals so that he could behave appropriately (e.g., if contacted by McDougal).

[Note: Do we know if the President did anything with the information about criminal referrals that he received from Lindsey?]

2. Three contacts involving George Ludwig.

a. These consisted of three White House/Treasury contacts:

i. WJC asked Ludwig for public information concerning MGSL. [9]

ii. Ludwig had no information. He asked White House staff if they had it (Castleton?). [10]

iii. White House staff (Castleton to Sloan to Eggleston) contacted Klein about Ludwig's inquiry. Klein apparently spoke with Ludwig and forestalled any further communication between Ludwig and WJC. [11]

b. No Standards of Conduct violations. WJC asked Ludwig only for public information. No substantive information passed between White House staff and Treasury. In fact, White House staff prevented any such exchange. No one at White House did or said anything to further the Clintons' private interests.

c. No White House policies were violated, at least in spirit. While strictly speaking Nussbaum should have been consulted about how to handle the inquiry from Treasury, contacting his deputy should have been appropriate if Nussbaum was unavailable during holiday week. **[WAS THAT THE CASE?]**

3. Seven Altman-initiated contacts regarding issues of statute of limitations and recusal, soon before and after the February 2, 1994 meeting.

a. Soon before and after the February 2, 1994, meeting, Altman initiated seven separate contacts with White House staff members on the subjects of the statute of limitations issue and his recusal.

i. In late 1/94, Altman mentioned S/L issue to Ickes, apparently in passing; we have no information that Ickes reacted to or did anything in response to that contact. **[FOLLOW UP ON THIS?]** [12]

ii. On 2/2/94, Altman called Maclarty to set up the 2/2 meeting; told Mack the meeting was to brief White House staff on procedural issue

of options facing RTC before statute of limitations ran on 2/28; Mack agreed to the meeting. [13]

iii. On 2/2, Altman also called Ickes re: setting up a meeting. [14]

iv. After the 2/2/94 meeting, Altman bumped into Nussbaum in the hall and told him he was probably not going to recuse; we have no information that Nussbaum reacted or did anything in response to receiving that information. **[FOLLOW UP ON THIS?]** [19]

v. On 2/3, Altman called Ickes, asked to speak with him; apparently did not identify subject, but was referring to recusal decision. [later spoke with Ickes in person at brief 2/3 "meeting"] [20]

vi. On 2/3 or 2/4, Altman called Maclarty, discussed not recusing; Altman thought he told Mack he was not going to recuse; Mack thought Altman said he was still considering not recusing; Mack told Altman the decision was up to him. [21]

vii. On 2/3, Altman called Williams, said he was not recusing, and asked her to assemble other staff members so he could speak with them; Williams agreed. [22]

b. No Standards of Conduct violations. No White House staff member did or said anything to further the private interests of the Clintons during or pursuant to these contacts. The White House did not seek out these contacts with Treasury. They were initiated by Altman.

c. No White House policy violations. Since Altman initiated these contacts, there was no opportunity to seek OWHC authorization for them. (As noted in Section B above, however, authorization should have been sought before meetings were set up at Altman's request because the meetings related to an RTC investigation.)

d. As discussed in Section B above, White House staff probably had a legitimate need for the information imparted to them through these contacts.

e. **[We should consider how to respond to question why Altman thought it was necessary to have so many White House contacts on the issue of recusal.** Altman told us that at the 2/2 meeting no one told him not to recuse and he did not have the impression anyone was particularly upset. But apparently he led Steiner to believe that the White House was very concerned. At the meeting, Nussbaum expressed concerns regarding consistency with W.H. policy on recusals by administration officials and with the competence of those who would be in charge if Altman recused. It seems likely that this was the source of any message Altman got and transmitted to Steiner that the White House cared about the issue. Altman's repeated contacts with the WH after the 2/2 meeting about recusal and stepping down probably reflect this understanding. There is no basis to believe that the WH was pressuring Altman not to recuse in order to benefit the Clintons personally.]

4. Contacts relating to ethics research on recusal issue.

a. After the 2/2/94 meeting, Hanson called Nussbaum and told him Leach had written a letter calling for Altman to recuse himself. She told Nussbaum that Treasury was doing research on ethics requirements for recusal. Nussbaum assigned Nolan to speak with the Treasury ethics person on that subject. It appears that Nolan had at least one contact with the Treasury ethics person thereafter. **[NEED TO CHECK W/NOLAN]** [16, 17]

b. No Standards of Conduct violation. Nussbaum and Nolan did nothing to further the private interests of the Clintons during or pursuant to the contact. **[Ask Beth if she conferred with the Treasury guy, and if so what they discussed.]**

c. No White House policies violation. Nussbaum was appropriate person to handle Treasury contact

relating to RTC investigation. (Contact was directly related to recusal, not investigation, but recusal would be based on possible conflict of interest in connection with an investigation. Conservatively viewed, the policies on investigative matters applied.) It was appropriate for Nussbaum to designate a White House staff member to handle continuing contacts.

d. Contacts were appropriate. Legitimate for White House to know status of Presidential appointee's recusal decision, and for White House staff to confer with Treasury about administration recusal policy.

5. Contact relating to Altman's replacement.

a. On 2/23/94, Nussbaum ran into Altman and told him that the Simons nomination would be going to the Hill shortly. [29]

b. No Standards violation: Information probably non-public, but no indication it was provided with intention of benefitting anyone personally, and not clear how it could have benefitted anyone.

c. No White House policy violations: contact was policy-related, so no authorization by ethics officer required under White House policies. Reasonable for administration official to be told status of his own replacement so he can plan for the future.

6. Contacts relating to how Altman would respond to questions at hearing regarding February 2, 1994 meeting.

a. Shortly before the 2/24/94 hearing, Treasury initiated about five contacts with White House staff concerning how Altman would testify at the hearing about his recusal and whether he would step down on 3/30.

i. On 2/16, Steiner stopped in to see Steph.; Steiner said he was concerned that recusal would come up at the hearings, and that Steiner continued to believe that Altman

should recuse; Steph. said that sounded sensible and he didn't see why it was a difficult issue; Steiner said he believed others in White House might disagree; Steph. offered to "shop" the issue, but Steiner discouraged him, saying he wanted to talk to Altman first; Steiner did not follow up and Steph. did nothing pursuant to the contact. [24]

ii. In the 2/20-23 timeframe, Steiner spoke to Podesta and Griffin about whether the White House cared if Altman stepped down on 3/30; **[we do not know how the White House staff members responded]**; Steiner had an "impression" that the White House was very concerned about the issue]; apparently the staff members did not ask Steiner to do anything and did nothing pursuant to the contact to further the Clintons' private interests. **[CONFIRM]** [25]

iii. On 2/23, Steiner spoke with Ickes regarding the question of Altman stepping down; Ickes said he would prefer Altman did not, but that it was Altman's call; Ickes also told Steiner that if Altman wanted to recuse he should do so. [26]

iv. On 2/23, Altman called Ickes, said he expected to announce at the hearing that he would step down on 3/30; Ickes asked Altman if there had been any change in circumstances since the 2/2 meeting and observed if there had not he saw no need to change the decision; but he said the decision was up to Altman; Altman wanted to discuss the matter further, but Ickes left a message with Steiner saying he had nothing further to say on the subject; Ickes may have thought Altman was talking about recusal. [28]

v. On 2/23, Steiner called Podesta and told him the issue of recusal was moot because Congress had extended the statute of limitations period and there would be no

other Madison-related decisions before Altman stepped down on 3/30. [31]

b. White House staff contacted Treasury four or five times concerning how Altman would testify about the 2/2/94 meeting.

i. On or about 2/12/94, Podesta called Steiner and told him that Altman needed to be prepared for questions about the 2/2 meeting. [30]

ii. Podesta or Stern asked Steiner for draft Q&A's in connection with the 2/24 hearing. [this may the same contact as i. above] [27]

iii. Steiner gave Stern a briefing book containing a Q&A about the 2/2 meeting, apparently in response to Podesta's or Stern's request; Podesta was satisfied with the answer. [32]

iv. Eggleston called Hanson and asked her to read the draft Altman Q&A regarding the 2/2 meeting; she did, and he thought the response was appropriate. [33]

v. Eggleston conferred with Levy about how the RTC oversight hearings generally were conducted. [34]

c. No violations of Standards of Conduct. No White House staff member said or did anything intended to benefit or further the private interests of the Clintons or anyone else.

d. No significant violations of White House policies.

i. The contacts initiated by Treasury did not result in conversations of any significant duration or substance. While under a strict reading of the policies the White House staff members involved should have sought and obtained OWHC authorization for contacts relating to Altman's decision whether to recuse (which related indirectly to an RTC

investigation), they handled these brief, unexpected contacts in a reasonable manner.

ii. The contacts initiated by White House staff members were intended to ensure that Altman accurately characterized before Congress a meeting that involved White House staff members. Contacts regarding this policy matter did not affect anyone's private interests, did not require OWHC approval, and were perfectly appropriate.

7. Contact relating to correction of Altman's testimony.

a. On 3/1/94, Podesta called Altman to raise concerns about the completeness of Altman's testimony regarding White House/Treasury contacts. [35]

b. No violations: not to further a private interest; contact was policy-related and decision to make it involved Nussbaum; proper subject of White House inquiry, since testimony concerned actions of White House staff.

8. Contacts relating to Altman's February 25, 1994 announcement that he was recusing.

a. Treasury-initiated contacts

i. On 2/25, Steiner called Podesta to tell him that Altman was again thinking of recusing. Podesta said he could not react until he checked with others. [42]

ii. A short time later, Steiner called Podesta to tell him that Altman had recused in a conversation with Raines. According to Steiner, Podesta asked if he was first to hear the news and was not delighted about the prospect of delivering it to others. [43]

iii. Steiner also called Steph. to tell him that Altman had recused. Steph. told us he reacted angrily. He thought Altman should not have let Raines dictate the decision, and

knew the White House had spent the morning defending Altman's failure to recuse at the hearing. Did not recall saying to Steiner that WJC was upset about the recusal or suggesting that Altman should reconsider. [49]

iv. Altman sent letter to WJC explaining decision to recuse and apologizing for controversy that had arisen. Altman said his intentions in having the 2/2/94 meeting were appropriate, but the meeting was "dumb" due to the appearance it created. [38]

v. Maclarty back Altman's letter with handwritten note -- "Vintage Altman. You are one of the nation's finest." [39]

vi. In late 2/94, Altman saw WJC at a function and apologized again; WJC said don't worry. [40]

vii. In late 2/94/early 3/94, during conversation with HRC in unrelated matter, Altman apologized. HRC said don't worry. [41]

viii. Steiner called Williams and asked her to have HRC call Altman to tell him she was not angry. [Unclear if HRC called, or if contact was made as described in vi. above.] [42]

b. White House-initiated contact

i. On 2/25, Ickes and Steph. called Steiner upon learning that Altman had recused. They expressed unhappiness about the way in which the recusal was handled. Said White House had spent morning justifying non-recusal and felt blind-sided. Apparently said or implied the President was not happy with the way the recusal was handled. No indication either asked Altman to reconsider the decision. Suggested Altman write letter to President explaining the decision, which Altman did. [37] [See Section B above for discussion of

portion of this contact relating to Jay Stephens.]

c. No violation of Standards of Conduct. No White House staff member said or did anything to influence Altman to change his decision on recusal. No one said or did anything to obtain any personal benefit for the Clintons. Neither did WJC or HRC.

d. No violation of White House policies. Contacts with White House staff related to manner in which administration had handled his announcement that he was recusing. Policy-related matter not requiring OWHC authorization. Legitimate concern of White House staff.

9. Miscellaneous

a. Devroy may have contacted Gearan to ask him about the 10/14 meeting. Gearan apparently mentioned this to Podesta in the 3/1 White House staff meeting regarding Altman's testimony. **[ASK GEARAN ABOUT THIS]** [48]

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Bruce Lindsey to File; RE: Whitewater Development Corporation (2 pages)	10/20/1993	P5 442
002. paper	RE: Roger Altman (1 page)	n.d.	P5 443
~~003. letter~~	~~Altman to Clinton; RE: Recusal and RTC (2 pages)~~	~~n.d.~~	~~P6/b(6)~~

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cheryl Mills
OA/Box Number: 24594

FOLDER TITLE:
[Binder] Materials re: RTC [Resolution Trust Corporation] Contacts [1]

Debbie Bush
2006-0320-F
db776

RESTRICTION CODES

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

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

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

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D. Coyle
(544-5)

Personal and ~~Confidential~~

MEMORANDUM

To: File

From: Bruce R. Lindsey

Date: October 20, 1993

Re: Whitewater Development Corporation

On Thursday, October 14, 1993, Bernie Nussbaum, Neil Eggleston, and Cliff Sloan of the White House Counsel's office, Mark Gearan and I met with Jack DeVore, Josh Steiner, and Jean Hanson of the Treasury Department. The purpose of the meeting was to discuss a telephone call that Jack had received the day before from Jeff Gerth of *The New York Times*.

Gerth informed DeVore that he is aware that a number of criminal referrals involving Jim McDougal and Madison Guaranty had been forwarded from RTC's Kansas City field office to its Washington office. (Apparently, the "normal" procedure is for a criminal referral to be sent from a field office directly to the appropriate U.S. Attorney's office. DeVore did not know why these referrals came to Washington instead.) Gerth stated that, to his knowledge, President Clinton was not a target of the referrals, although Governor Jim Guy Tucker might be.

One of the referrals, however, involved four cashiers checks -- each for $3,000, two made payable to the Clinton for Governor Campaign and two made payable to Bill Clinton. The checks were dated April 4 or 5, 1985. All four checks were deposited in the Bank of Cherry Valley. Gerth wanted DeVore to find out who had endorsed the checks. (A check of our campaign records turned up three cashiers checks for $3,000 each from J. W. Fulbright, Ken Peacock, and Dean Landrum, and a personal check for $3,000 from Jim McDougal, signed by Susan McDougal.)

DeVore confirmed with the RTC that the referrals had been received in the Washington office, but had already been forwarded on to the Little Rock U.S. Attorney's office. DeVore wanted to make it clear to Gerth that the referrals had been sent to Little Rock before his call. DeVore's inclination was also to confirm to Gerth the fact of the referrals. He indicated that such confirmation was normal procedure. We suggested that instead of confirming the referrals, DeVore should indicate "off the record" that whatever had been received in Washington had been forwarded to the U.S. Attorney's office prior to Gerth's call.

The RTC believes that the funds for the cashiers checks came from a loan from Madision Guaranty to a Republican, but supposedly the Republican was unaware that some of the loan funds had been diverted.

cc: Maggie Williams
Bill Kennedy
Mark Gearan

CONFIDENTIAL

ABC News has asked Roger Altman the following questions?

(1) Did Roger Altman put pressure on the RTC general counsel, urging her to brief the outside counsel (i.e., David Kendall), on the statute of limitations?

(2) Did the White House ask him to do it?

Altman was at a meeting at the White House that had to do with the Whitewater topic, where he was asked by a White House staff person, "Can you ask the RTC general counsel to brief the outside counsels on the statute of limitations." Roger's response was, "I don't know. I'll check." The White House person said something like, "You'd better do it quickly."

Roger then, in a regular meeting with the general counsel of the RTC, asked this question, and the response was, "Roger, I don't think it should happen now. I don't think it's the appropriate time." The signal was very clear that it was not appropriate that they should be having that conversation.

Altman's office in response to ABC has answered question (1) with "Roger Altman has regular conversations with Ellen Kulka, general counsel. This matter was discussed." They did not answer (2) and are looking for guidance from us on how to answer it.

The reporter's name is Aram Rallston. Howard Schloss is the Altman person who called her.

Jenny Terzano x62580

[illegible] No [illegible] for anyone

Kendall had practiced before RTC

– What happened?

① record – [illegible] [illegible]

Harold

Maggie

Bernie

② process – to follow between now and 2/28

③ Maggie – are you going to brief the attorneys on what this process is?

④ [illegible] but not now – [illegible]