
Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

97

Divider Title: _____

FOIA CONSULTATION PROCESS FOR WHITE HOUSE RECORDS

1. **Statement:** In processing requested records under the Freedom of Information Act, agencies frequently encounter records (or information contained in portions of records) that originated with another federal agency. As a matter of sound administrative practice, agencies generally make complete referrals of requested records to their agency of origination (which in turn responds directly to the FOIA requester). In some instances, an agency will merely engage in a consultation with the originating agency before responding to the request. In both cases the rationale is the same: the agency that originated the record or information almost always is in the best position to determine its possible sensitivity (i.e., exemption applicability) under the Act.

This process of inter-agency consultation is followed for records or information originating in any part of the White House as well. To facilitate that particular consultation process, the Department has traditionally issued a memorandum to all federal agencies that specifies the appropriate recipients of consultation communications at the White House--depending upon which White House component originated the record or information in question. This memorandum, which is prepared by OIP in close coordination with the Office of White House Counsel, also delineates between the White House components that are not directly subject to the FOIA (the "inner" advisory offices) and the ones (in the Executive Office of the President) that are.

As a general rule, the "inner" White House components will regard their records as subject to FOIA disclosure when located in the files of a federal agency, and will participate in the FOIA consultation process, even though such records would not be reachable through any FOIA request made to them directly. Significantly, their participation in this process leaves the consulting agency with the responsibility of responding directly to the FOIA requester with regard to all of the records involved.

This White House FOIA consultation memorandum was updated in 1993, as it had been several times in the past, to reflect the current White House configuration. (See attached FOIA consultation memoranda for 1993, 1992, 1988 and 1982.) Thereafter, it was misperceived by some persons as "restricting" FOIA access in a new way or in a manner inconsistent with the Attorney General's new FOIA policy.

Most significantly, Representative William F. Clinger, Jr., Ranking Minority Member of the House Government Operations Committee, treated it as such a new restriction in an exchange of correspondence with the Department--an exchange that also touched on the related non-FOIA status of Health Care Task Force records. (See attached correspondence.) Contrary to Representative Clinger's initial misperception, the FOIA consultation process itself does not involve the "return" of records to the White

House or their insulation from the disclosure requirements of the Act.

Additionally, a few members of the media initially reacted to the memorandum in a similar vein--with one reporter (Michael Isikoff, of The Washington Post) going so far as to suggest that the memorandum might have been issued as part of some larger effort to restrict access to Whitewater-related records. That fanciful suggestion was squarely addressed by OIP together with the Office of Public Affairs and it never reached print.

2. Status: All correspondence received from Representative Clinger on this subject has been responded to and all related media inquiries have been handled in coordination with the Office of Public Affairs.

3. Department Position: The Department has explained, both to Representative Clinger and to inquiring media representatives, that the issuance of this memorandum simply was a relatively routine updating of previous such memoranda on a longstanding practice of FOIA administration and that it does not place any FOIA restriction on the disclosure of White House records or information.

4. Judiciary Committee Member Interest/Positions: No member of the Judiciary Committee is known to have raised any question about the 1993 memorandum or about the handling of any White House-originated information in particular. To date, congressional interest in this subject has been expressed by Representative Clinger only.

5. Reference Materials: (a) November 3, 1993 FOIA consultation memorandum; (b) previous three such consultation memoranda; (c) correspondence exchanged with Representative Clinger (four letters).

The Associate Attorney General

Washington, D.C. 20530

November 3, 1993

MEMORANDUM

TO: Freedom of Information Act Administrative
and Legal Contacts at All Federal Agencies

FROM: Webster L. Hubbell *WLS*
Associate Attorney General

SUBJECT: White House Records or Information Found In
Agency Files: FOIA Consultation Procedures

The purpose of this memorandum is to set forth the procedures to be followed by all federal agencies for the handling of any White House-originated record or information that is found responsive to an access request made under the Freedom of Information Act, 5 U.S.C. § 552 (1988).¹

In processing FOIA requests, agencies searching for responsive records occasionally find White House-originated records (or records containing White House-originated information) that are located in their files. These records raise special concerns, including questions of executive privilege, and require special handling--particularly in light of the White House's unique status under the FOIA.

By its terms, the FOIA applies to "the Executive Office of the President," 5 U.S.C. § 552(f), but this term does not include either "the President's immediate personal staff" or any part of the Executive Office of the President "whose sole function is to advise and assist the President." Meyer v. Bush, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); see also, e.g., Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971). This means, among other things, that the parts of the Executive Office of the President that are known as the "White House Office" are not subject to the FOIA; certain other parts of the Executive Office of the President are.

In coordination with the Office of the Counsel to the President, the Department of Justice has determined that agencies should implement the following FOIA procedures regarding all

¹ This memorandum supersedes the Department of Justice's January 28, 1992 memorandum on this subject.

White House-related records or information found in their files. Please note that these procedures prescribe "consultations," which do not involve a transfer of administrative responsibility for responding to a FOIA request, as distinct from complete record "referrals."² In all instances involving White House records or information, your agency will be responsible for responding directly to the FOIA requester once the process of consultation is completed.

1. Records originating with any part of the "White House Office"³ should be forwarded to the Office of the Counsel to the President for any recommendation or comment it may wish to make, including any assertion of privilege, prior to your response to the FOIA requester. Please be sure to advise the White House Counsel's Office of any sensitivity that these records have from the perspective of your agency and whether you believe any FOIA exemption applies. If after considering the possibility of discretionary disclosure in accordance with the Attorney General's FOIA Memorandum of October 4, 1993 you believe that a FOIA exemption applies, you should mark each record accordingly to facilitate review by the Counsel's Office of your proposed response.

All such consultation communications should be forwarded to the White House Counsel's Office at the following address:

Office of the Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

² See FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures") (further discussing differences between these two procedures).

³ The "White House Office" includes, among other components, the Offices of the President, Cabinet Affairs, Chief of Staff, Communications, First Lady, Counsel to the President, Intergovernmental Affairs, Legislative Affairs, Management and Administration, Operations, Political Affairs, Presidential Personnel, Public Liaison, Scheduling and Advance, Staff Secretary, Correspondence, Visitors, Policy Development, Domestic Policy Council, Environmental Policy, Council of Economic Advisors, National Economic Council, Assistant to the President for National Security Affairs and Deputy Assistant to the President for National Security Affairs, Assistant to the President for Science and Technology, and the President's Foreign Intelligence Advisory Board. The White House Office also includes task forces and working groups created by the President or an official in the White House Office, and reporting to the President or an official in the White House Office, including, for instance, the National Performance Review.

Please note that many records originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as, or appear to be, drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning records likely to be in the public domain should be referred to the White House Counsel's Office as well.

It is possible that a record originating in the White House Office (or in the Office of the Vice President--see below) will be one over which the White House Office (or the Office of the Vice President) has retained control, in which case it will not be an "agency record" subject to the FOIA even though it is located by a federal agency in response to a FOIA request. Accord, e.g., Goland v. CIA, 607 F.2d 339, 345-48 (D.C. Cir. 1978) (honoring "retention of control" by non-FOIA entity), cert. denied, 445 U.S. 927 (1980); see also Paisley v. CIA, 712 F.2d 686, 692-95 (D.C. Cir. 1983); Holy Spirit Ass'n v. CIA, 636 F.2d 838, 840-42 (D.C. Cir. 1981). Any such records should be identified for special handling.

2. Any record originating with the Office of the Vice President or any of its component offices, offices which likewise are not subject to the FOIA, should be forwarded for consultation purposes to the Office of the Counsel to the Vice President, Old Executive Office Building, Room 269, Washington, D.C. 20501.

3. All records originating with other offices within the Executive Office of the President (EOP)--including the Office of Administration; the Office of Management and Budget; the Office of Science, Technology and Space Policy; the Office of the U.S. Trade Representative; the Council on Environmental Quality; and the Office of National Drug Control Policy--should be forwarded to the FOIA officers of the relevant individual EOP offices. This, again, is for consultation purposes only; agencies remain responsible for responding directly to the FOIA requester once these EOP consultations have been completed. For your convenience, a contact list for these EOP offices is attached.

4. Responses to FOIA requests for any classified White House records or records originating with the National Security Council should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

Director of Information Disclosure
Office of Information Disclosure
National Security Council
Old Executive Office Building, Room 392
Washington, D.C. 20506

Records originating with the Assistant to the President for National Security Affairs or his deputy should continue to be

treated as records originating in the White House Office (see footnote 3 above).

If any question arises regarding these procedures, either generally or in any particular case, please do not hesitate to contact Margaret Ann Irving, Acting Deputy Director of the Justice Department's Office of Information and Privacy, at (202) 514-4251.

Attachment

cc: All Agency General Counsels

Executive Office of the President--Agencies Subject to the FOIA

Council on Environmental Quality
Deputy General Counsel
722 Jackson Place, N.W., Room 31
Washington, D.C. 20006

Office of Administration
Director, Administrative Services Division
Old Executive Office Building, Room 350
Washington, D.C. 20500

Office of Management and Budget
General Counsel
Old Executive Office Building, Room 262
Washington, D.C. 20503

Office of National Drug Control Policy
FOIA Officer
750 17th Street, N.W., 8th Floor
Washington, D.C. 20500

Office of Science, Technology and Space Policy
Executive Director
726 Jackson Place, N.W., Room 5013
Washington, D.C. 20500

Office of the U.S. Trade Representative
FOIA Officer
600 17th Street, N.W., Room 222
Washington, D.C. 20506



U.S. Department of Justice

Office of Policy Development

Office of the Director

Washington, DC 20530

January 28, 1992

MEMORANDUM

TO: Freedom of Information Act/Privacy Act
Legal and Administrative Contacts

FROM: Steven R. Schlesinger *Steven R. Schlesinger*
Director
Office of Policy Development

SUBJECT: White House Records in Agency Files:
Referrals and Consultations

In processing requests under the Freedom of Information Act or the Privacy Act of 1974, the search for responsive records occasionally turns up White House records located in agency files. Such White House records raise special issues because of the unique status of the White House under the FOIA. After consultation with the Office of the Counsel to the President with regard to such records, we have agreed that agencies should implement the following procedures. (This memorandum supersedes the Department's September 1, 1988 memorandum on this subject.)

1. Records originating with or involving the "White House Office"¹ should be forwarded to the Office of the Counsel to the President for any recommendations or comments it may wish to make prior to your final response to the requester. Please be certain to advise the Counsel's Office of any sensitivity that these records have for your agency and whether any FOIA exemptions apply. If you believe that FOIA exemptions apply, you should mark the documents accordingly to facilitate review by the Counsel's Office of your proposed response.

It is not necessary to follow this consultation procedure, however, if the record is going to be withheld on other grounds relating to the interests of your agency. For example, if you

¹ The "White House Office" consists of all offices over which the Office of Chief of Staff directly presides, including the Offices of Deputy Chief of Staff, Communications, Speech-writing, Research, Public Affairs, Media and Broadcast Relations, Press Secretary, Political and Intergovernmental Affairs, Counsel to the President, Presidential Advance Office, Domestic Affairs, Policy Development, Cabinet Secretary, Legislative Affairs, First Lady, Appointments and Scheduling, Private Sector Initiatives, Presidential Personnel, and Operations.

intend to withhold documents under Exemption 7(A) in connection with a pending law enforcement proceeding, you should simply assert the exemption as you would otherwise do. Moreover, drafts are ordinarily withheld under Exemption 5; they need not be sent to the White House for consultation.

All inquiries to the White House on records whose origins cannot be discerned should be referred to the White House Counsel's Office at the following address:

Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Please note that many documents originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning documents likely to be in the public domain should also be referred to the White House Counsel's Office.

2. All records originating with other offices within the Executive Office of the President (EOP) must be referred to the proper EOP officer for consultation purposes only. Individual agencies should respond directly to the requester when these consultations have been completed. For your convenience, I am attaching a list of names and addresses of all other EOP components.

3. Classified White House records, "sensitive" ones involving foreign relations matters, and records originating with the National Security Council should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

Mr. Steven R. Tilley
Director of Information Disclosure
Office of Information Disclosure
National Security Council
Old Executive Office Building - Room 392
Washington, D.C. 20506

If you have any questions with regard to these procedures, please do not hesitate to contact Miriam Nisbet, Deputy Director of the Office of Information and Privacy, Department of Justice, at 514-4233.

Attachment

Executive Office of the President

Council of Economic Advisers
Special Assistant to the Chairman
Old Executive Office Building, Room 315
Washington, D.C. 20500

Council on Environmental Quality
Deputy General Counsel
722 Jackson Place, N.W., Room 31
Washington, D.C. 20006

Office of Administration
Director, Administrative Services Division
Old Executive Office Building, Room 350
Washington, D.C. 20500

Office of Management and Budget
General Counsel
Executive Office of the President
Washington, D.C. 20503

Office of Science and Technology Policy
Executive Director
726 Jackson Place, N.W., Room 5013
Washington, D.C. 20500

Office of the U.S. Trade Representative
FOIA Officer
600 17th Street, N.W.
Washington, D.C. 20506



Assistant Attorney General

Washington, D.C. 20530

September 1, 1988

MEMORANDUM

TO: Freedom of Information Act/Privacy Act
Legal and Administrative Contacts

FROM: Stephen J. Markman **STM**
Assistant Attorney General
Office of Legal Policy

SUBJECT: White House Records in Agency Files:
Referrals and Consultations

In processing requests under the Freedom of Information Act or the Privacy Act of 1974, the search for responsive records occasionally turns up White House records located in agency files which are responsive to the requests. Such White House records raise special issues because of the unique status of the White House under the FOIA. After consultation with the Office of the Counsel to the President with regard to such records, we have agreed that agencies should implement the following procedures:

1. Records originating with or involving the "White House Office"¹ should be forwarded to the Office of the Counsel to the President for any recommendations or comments it may wish to make prior to your final response to the requester. Please be certain to advise the Counsel's Office of any sensitivity that these records have for your agency and whether any FOIA exemptions apply. It is not necessary to follow this consultation procedure, however, if the record is going to be withheld on other grounds relating to the interests of your agency, for example, under Exemption 7(A).

¹ The "White House Office" consists of all offices over which the Office of Chief of Staff directly presides, including the Offices of Deputy Chief of Staff, Communications, Speechwriting, Research, Public Affairs, Media and Broadcast Relations, Press Secretary, Political and Intergovernmental Affairs, Counsel to the President, Presidential Advance Office, Domestic Affairs, Policy Development, Cabinet Secretary, Legislative Affairs, First Lady, Appointments and Scheduling, Private Sector Initiatives, Presidential Personnel, and Operations.

All inquiries to the White House on records whose origins cannot be discerned should be referred to the White House Counsel's Office at the following address:

Mr. Arthur B. Culvahouse, Jr.
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Please note that many documents originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning documents likely in the public domain should also be referred to the White House Counsel's Office.

2. All records originating with other offices within the Executive Office of the President (EOP) must be referred to the proper EOP officer for consultation purposes only. Individual agencies should respond directly to the requester when these consultations have been completed. For your convenience, I am attaching a list of names and addresses of all other EOP components.

3. Classified White House records, or "sensitive" ones involving foreign relations matters, should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

Ms. Nancy V. Menan
Acting Director, FOIA Unit
National Security Council
Old Executive Office Building
Room 395
Washington, D.C. 20506

If you have any questions with regard to these procedures, please do not hesitate to contact Miriam Nisbet, Deputy Director of the Office of Information and Privacy, Department of Justice, at 633-4233.

Attachment

Executive Office of the President

Council of Economic Advisers
Special Assistant to the Chairman
Old Executive Office Building, Room 315
Washington, D.C. 20500

Council on Environmental Quality
Deputy General Counsel
722 Jackson Place, N.W., Room 31
Washington, D.C. 20006

Office of Administration
Director, Administrative Services Division
Old Executive Office Building, Room 350
Washington, D.C. 20500

Office of Management and Budget
General Counsel
Executive Office of the President
Washington, D.C. 20503

Office of Science and Technology Policy
Executive Director
726 Jackson Place, N.W., Room 5013
Washington, D.C. 20500

Office of the U.S. Trade Representative
FOIA Officer
600 17th Street, N.W.
Washington, D.C. 20506

Office of Legal Policy

Washington, D.C. 20530

OCT 6 1982

MEMORANDUM

TO: All FOIA/PA Directors

FROM: *MMN/pm* Miriam M. Nisbet, Deputy Director
Office of Information and Privacy

SUBJECT: White House Records in DOJ Files: Referrals and Consultations

We have consulted with Fred Fielding, Counsel to the President, with regard to White House records located in Department files which are responsive to requests under the FOIA/PA. The following procedures were set forth by Mr. Fielding:

1. All records originating with the Executive Office of the President (EOP) must be referred to the proper EOP officer for consultation purposes only. Individual DOJ components will respond directly to the requester when these consultations have been completed. For your convenience, I am attaching a list of names and addresses of all EOP components.
2. Records originating with or involving all other White House offices or personages (i.e., the President, Vice President, Special Assistants) should be forwarded to Mr. Fielding for any recommendations or comments he may wish to make prior to your final response to the requester -- unless you propose to withhold them on your own justification, for example under 7(A). Please be certain to advise Mr. Fielding's Office of any sensitivity that these records have for you and whether any FOIA exemptions apply. Attached is a letter with sample language for these consultations. Additionally, all inquiries to the White House or records whose origins cannot be discerned should be referred to that Office at the following address:

Mr. Fred Fielding
General Counsel
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

3. Classified White House records, or "sensitive" ones involving foreign relations matters, should be coordinated with Ms. Brenda Reger of the National Security Council at the following address:

Ms. Brenda Reger
Director, FOIA Unit
National Security Council
Old Executive Office Building
Room 395
Washington, D.C. 20506

If you have any questions with regard to these procedures, you may contact me on 724-7400.

Attachments

Executive Office of the President

Council of Economic Advisers
Special Assistant to the Chairman
Old Executive Office Building, Room 315
Washington, D. C. 20500

Council on Environmental Quality
Deputy General Counsel
722 Jackson Place, N. W., Room 31
Washington, D. C. 20006

Office of Administration
Director, Administrative Services Division
Old Executive Office Building, Room 350
Washington, D. C. 20500

Office of Management and Budget
General Counsel
Executive Office of the President
Washington, D. C. 20503

Office of Science and Technology Policy
Executive Director
726 Jackson Place, N. W., Room 5013
Washington, D. C. 20500

Office of the U.S. Trade Representative
FOIA Officer
600 17th Street, N. W.
Washington, D. C. 20506

EXAMPLE

The (component) of the Department of Justice has received a Freedom of Information Act request from (requester's name) for records pertaining to (subject).

The responsive files of the (your Office name) contain documents from (Office or council name). I am referring the enclosed records to you for any comments or recommendations you may have as to the sensitivity of this material prior to our response to the requester. Please return the documents to me at the following address:

(component address)

Should you have any questions, please telephone (staffer's name) on (your telephone number).

Enclosure(s)

Bill Clinger
William F. Clinger, Jr.
Republican Chairman



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 9 1994

Hon. William F. Clinger, Jr.
Ranking Minority Member
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515-6143

Dear Congressman Clinger:

This responds to your letter of February 8, 1994, to Associate Attorney General Webster L. Hubbell, in which you seek a copy of a memorandum he issued regarding the process of inter-agency consultation under the Freedom of Information Act for records originating in the White House. A copy of this memorandum, dated November 3, 1993, is enclosed.

For your background information, I am also enclosing copies of the similar memoranda that were issued by the Department of Justice in 1982, 1988, and 1992, to assist federal agencies in processing Freedom of Information Act requests for files that include White House-originated records. As you can see, it has been the consistent practice within the executive branch for federal agencies to forward copies of such records to the appropriate White House office, as designated in this periodically updated memorandum, for consultation purposes prior to responding to a FOIA request.

This longstanding administrative practice is essentially the same throughout the executive branch for records originating at any other agency. It ensures that the agency of origination is afforded an opportunity to advise of any current FOIA exemption applicability before a FOIA disclosure is made and that only the information that need be withheld under an applicable FOIA exemption is withheld from a FOIA requester. As the Department's 1993 memorandum specifically emphasizes, in all cases in which an agency consults with the White House in response to a FOIA request, the agency remains directly responsible for responding to that FOIA request as to all of the records involved.

I hope that this information is helpful in resolving any question about the nature of this Department of Justice memorandum and the administrative process of inter-agency consultation under the Freedom of Information Act. If you have further questions on this or any other matter, please do not hesitate to contact this office.,

Sincerely,

A handwritten signature in cursive script that reads "Sheila Anthony".

Sheila F. Anthony
Assistant Attorney General

Enclosures (4)

DONALD W. RIECKMAN
 CHAIRMAN
 BARBARA COLLINS, ELIZON
 BUCKLEY, OKLAHOMA
 WAZAMA, CALIFORNIA
 OLLANDER
 MAL, NORTH CAROLINA
 OS, CALIFORNIA
 OWENS, NEW YORK
 SODDUS TOWNE, NEW YORK
 JOHN M. STRATT, JR., SOUTH CAROLINA
 A. CONDT, CALIFORNIA
 WILLIAM C. PETERSON, MINNESOTA
 L. THURMAN, FLORIDA
 RICHARD L. RUSH, ILLINOIS
 H. S. MALONEY, NEW YORK
 THOMAS M. BARRETT, WISCONSIN
 RICHARD M. PATRICK, NEW JERSEY
 R. FLAKE, NEW YORK
 A. HAYES, LOUISIANA
 A. WASHINGTON, TEXAS
 BARBARA ANN COLLINS, MICHIGAN
 GORDON BROWN, FLORIDA
 MARJORIE MANDOLIS-NEWMYNT, PENNSYLVANIA
 LYNN C. WOOLLEY, CALIFORNIA
 CHIEF CLERK, TEXAS
 FRANK, MICHIGAN

ONE HUNDRED THIRD CONGRESS

Congress of the United States House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-8143

March 15, 1994

WILLIAM F. CLINGER, JR., PENNSYLVANIA
 RANKING MEMBER
 AL MCCABE, CALIFORNIA
 J. DENNIS HASTERT, ILLINOIS
 JON L. KYL, ARIZONA
 CHRISTOPHER SHAYS, CONNECTICUT
 STEVEN SCHIFF, NEW MEXICO
 C. CHRISTOPHER COLE, CALIFORNIA
 CRANE THURMAN, WYOMING
 ELIANA ROS-LENTINI, FLORIDA
 DYCK, NEW JERSEY
 WILLIAM H. DOLPS, JR., NEW HAMPSHIRE
 JAMES M. SAMPSON, NEW YORK
 STEPHEN MORRIS, CALIFORNIA
 DEBORAH FRYER, OHIO
 JOHN L. MITCHELL, FLORIDA
 RON PORTMAN, OHIO

FERNAND SANDERS, VERMONT
 HONORARY

MAJORITY - (205) 325-6051
 MINORITY - (205) 325-6074

RECEIVED
 DEPARTMENT OF JUSTICE
 94 MAR 15 P 6:00
 EXECUTIVE SECRETARIAT

Honorable Sheila F. Anthony
 Assistant Attorney General
 Office of Legislative Affairs
 U.S. Department of Justice
 Washington, D.C. 20530

Dear Ms. Anthony:

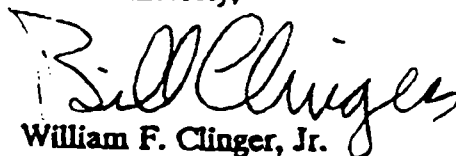
Thank you for your letter of March 9 responding to my request for information regarding the process of interagency consultation under the Freedom of Information Act (FOIA) for records originating in the White House.

The memorandum issued on November 3, 1993, by Associate Attorney General Webster L. Hubbell includes one noticeable amendment to similar instructions issued over the past decade. Namely, the definition of "White House Office" has been expanded to include "task forces and working groups created by the President or an official in the White House Office, and reporting to the President or an official in the White House Office"

This addition to the definition of White House Office broadly expands the scope of documents protected by White House exemptions. For example, would documents prepared by an employee of the Department of Health and Human Services (HHS) at their HHS office be protected simply because that worker temporarily served as a member of the President's Health Care Task Force and was working on a Task Force document? Under this definition, the work of thousands of Federal government employees may be exempted from FOIA disclosure.

I would appreciate your office providing me with further justification regarding the design and impact of this new definition. Your assistance is greatly appreciated.

Sincerely,


 William F. Clinger, Jr.

Ranking Republican
 Committee on Government Operations

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 11 1994

Honorable William F. Clinger, Jr.
Ranking Minority Member
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515-6143

Dear Congressman Clinger:

This responds to your letter of March 15, 1994, in which you seek information regarding the definition of "White House Office" that is contained in the Department's November 3, 1993 memorandum addressing the process of inter-agency consultation under the Freedom of Information Act for White House-originated records. Your letter questions the inclusion of White House task forces and working groups within that definition and also inquires as to the FOIA status of records created for the President's Task Force on National Health Care Reform by federal agency employees.

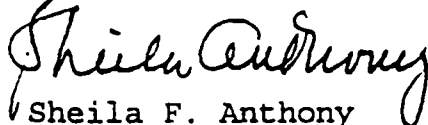
As you know, the Freedom of Information Act applies only to access to agency records and defines the term "agency" only to include the "Executive Office of the President," 5 U.S.C. § 552(f). The term does not include any part of the Executive Office of the President "whose sole function is to advise and assist the President." See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (citing H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)). The United States Court of Appeals for the District of Columbia Circuit has issued a series of decisions addressing the circumstances under which a White House entity is considered an "agency" for purposes of the FOIA. Most recently, and subsequent to any memoranda on this subject drafted by prior administrations, the Court of Appeals decided Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993), in which it was determined that a presidential task force--former President Reagan's Task Force on Regulatory Relief, which was chaired by then-Vice President Bush and was staffed by Office of Management and Budget employees--was not an "agency" under the FOIA. Accordingly, when the White House FOIA consultation memorandum was updated this past year, the definition of "White House Office" was revised to incorporate the principle established in that recent decision.

Consistent with the D.C. Circuit's decision in Meyer v. Bush, records created by or for President Clinton's Health Care Task Force--the sole function of which was to advise the President on a comprehensive proposal on health care reform for

enactment by Congress, see Charter at ¶ III, which is enclosed-- are not the records of an "agency" under the FOIA. Nor does the FOIA apply to records created or received by agency officials or employees who served on the Task Force's interdepartmental working group that gathered information for and provided it to the Task Force. Rather, they are presidential records and are governed by the provisions of the Presidential Records Act. See 44 U.S.C. §§ 2201, 2204-05.

I trust that this information responds to your inquiry. If you have any further questions on this or any other matter, please do not hesitate to contact this office.

Sincerely,



Sheila F. Anthony
Assistant Attorney General

Enclosure

THE PRESIDENT'S TASK FORCE ON NATIONAL HEALTH CARE REFORM

CHARTER

I. Official Designation

This task force shall be designated the "President's Task Force on National Health Care Reform," as set forth in the Statement of the President, dated January 25, 1993. See 29 Weekly Compilation of Presidential Documents 96 (Feb. 1, 1993).

II. Membership

This Task Force is chaired by Hillary Rodham Clinton, the First Lady, who in this capacity is assisting the President in the discharge of his duties and responsibilities. See 3 U.S.C. § 105(e). The other members of the Task Force are Secretary of the Treasury Lloyd Bentsen; Secretary of Defense Les Aspin; Secretary of Commerce Ron Brown; Secretary of Labor Robert Reich; Secretary of Health and Human Services Donna Shalala; Secretary of Veterans Affairs Jesse Brown; Office of Management and Budget Director Leon Panetta; Assistant to the President for Domestic Policy Carol Rasco; Assistant to the President for Economic Policy Robert Rubin; Council of Economic Advisors Chair Laura Tyson; and Senior Advisor to the President for Policy Development Ira Magaziner.

This membership includes those officials who presently have principal responsibility for administering and regulating government-related health care services; for developing domestic and economic policies that affect, and are affected by, public and private health care systems; and for advising the President on health care and economic issues.

III. Objectives and Duties

The Task Force's mission is to gather and analyze information provided by federal, state and local governmental entities and employees, private organizations and individuals on the state of existing health care policies and delivery services; to assess possible alternatives to such policies and services; and to recommend to the President as promptly as possible a proposal for comprehensive health care reform legislation to be enacted by Congress.

The Task Force shall not delegate its responsibilities to subcommittees or subgroups.

IV. Timing and Duration

The creation of the Task Force was announced by the President on January 25, 1993. The Task Force will terminate on May 30, 1993, unless terminated earlier by the President. This charter is subject to renewal.

V. Official Reporting and Agency Support

The Task Force shall report to the President. Support shall be provided to the Task Force by the Executive Office of the President, the Department of Health and Human Services, the Department of Defense, the Department of Veterans Affairs, the Department of Labor, the Department of Commerce, the Department of Justice, the Department of the Treasury, the Office of Management and Budget, the Council of Economic Advisors, and Congress.

Mr. Magaziner, the Senior Advisor to the President for Policy Development, leads an interdepartmental working group that is gathering information for, and will provide information and policy options to, the Task Force. The working group consists of government employees and is consulting with a wide range of citizens in the public and private sectors. The Task Force, in turn, will review information provided by the working group and make recommendations to the President.

VI. Estimated Costs

The estimated cost of the Task Force is expected to be below \$100,000.

VII. Meetings

The Task Force shall conduct meetings as necessary. The Task Force has not yet met.

Filed this 17th day of March 1993.

Office of the Assistant Secretary of Defense
for Command, Control,
Communications and
Intelligence

1225 Jeff-Davis Hwy., Suite 910, Arlington, VA 22202-4301

FAX

Date: May 20, 1994Number of pages including cover sheet: 1

To: Agency Representatives Interested in
Records Management & NARA's proposed
rules for Managing Federal Records on
Electronic Mail Systems

Attn: Dan Metcalf

Phone: _____

Fax phone: 202-514-1009From: **LINDA BAGBY**Phone: 703-604-1562Fax phone: 703 604-1492REMARKS: ☐ Urgent ☒ For your review ☐ Reply ASAP ☐ Please comment**RECORDS MANAGEMENT SYMPOSIUM – Government-wide Meeting**

FTC has graciously made arrangements for DoD to use its Commissioners Conference room to conduct a session on the DOD Records Management Business Process Improvement and review the National Archives and Records Administration's proposed rule for managing Federal records on electronic mail systems.

WHEN: May 26, 1994TIME: 2:00 PMWHERE: Commissioner's Conference Room – Rm 432
Federal Trade Commission
6th & Pennsylvania Avenue
Navy Memorial/National Archives Metro Stop

We encourage agencies to bring a functional, a technical, a records mgr. The various viewpoints provide helpful dialogue. If you need more information, contact Capt Daryll Prescott 703-614-0657 or Ms. Linda Bagby 703-604-1562

Thought you might be interested

Office of the Assistant Secretary of Defense
for Command, Control,
Communications and
Intelligence

1225 Jeff-Davis Hwy., Suite 910, Arlington, VA 22202-4301

FAX

Date: May 20, 1994Number of pages including cover sheet: 1

To: Agency Representatives Interested in
Records Management & NARA's proposed
rules for Managing Federal Records on
Electronic Mail Systems

Attn:

Dan Metcalf

Phone:

Fax phone: 202-514-1009From: **LINDA BAGBY**Phone: 703-604-1562Fax phone: 703 604-1492

REMARKS:

☐ Urgent☒ For your review☐ Reply ASAP☐ Please comment

RECORDS MANAGEMENT SYMPOSIUM – Government-wide Meeting

FTC has graciously made arrangements for DoD to use its Commissioners Conference room to conduct a session on the DOD Records Management Business Process Improvement and review the National Archives and Records Administration's proposed rule for managing Federal records on electronic mail systems.

WHEN:

May 26, 1994

TIME:

2:00 PM

WHERE

Commissioner's Conference Room – Rm 432
Federal Trade Commission
6th & Pennsylvania Avenue
Navy Memorial/National Archives Metro Stop

We encourage agencies to bring a functional, a technical, a records mgr. The various viewpoints provide helpful dialogue. If you need more information, contact Capt Daryll Prescott 703-614-0657 or Ms. Linda Bagby 703-604-1562

I thought you might be interested

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

98

Divider Title: _____

PENDING FOIA CASE: DOW JONES (FOSTER RECORDS)

1. **Statement:** Pending in the Southern District of New York is a Freedom of Information Act lawsuit, Dow Jones & Co. v. United States Dep't of Justice, No. 94 Civ. 0527, in which The Wall Street Journal seeks access to two reports prepared for the Deputy Attorney General in connection with the July 1993 death of Deputy White House Counsel Vincent Foster. The reports were prepared by the United States Park Police, which investigated the death because Mr. Foster's body was discovered at a federal park, and the Federal Bureau of Investigation, which was asked by the Department to investigate the discovery and handling of a torn-up, handwritten note found subsequent to Mr. Foster's death by the White House Counsel's Office in a briefcase used by him.

On August 10, 1993, the Department held a press conference at which the Deputy Attorney General, the Park Police, and the FBI announced the completion of the investigations and discussed their conclusion that Mr. Foster's death was a suicide. The handwritten note, which the Park Police concluded was written by Mr. Foster, was shown to the news media in reassembled photocopy form--but out of respect for the Foster family's privacy, no copies were distributed; a typed transcription of the note was provided. (See attached press conference transcript excerpt.)

After the press conference, these two reports became the subjects of numerous FOIA requests made to both the Department and the Department of the Interior (the Park Police's parent agency). Prior to the filing of the lawsuit those FOIA requests were being handled and coordinated by OIP, as the FOIA staff for the Deputy Attorney General's Office. The reports contain information originating with several Department components and other government entities--which required, under standard FOIA procedures, extensive consultations to determine their disclosability.

Much of this consultation process had been completed, and a proposed partial disclosure determination had been prepared by OIP for review by the Deputy Attorney General's Office, when Robert Fiske was appointed as an Independent Counsel with broad investigatory jurisdiction over the underlying subject matter. Mr. Fiske contacted OIP and requested that the Department not release any part of the two reports until he had had a full opportunity to review them and to determine whether their release would detrimentally affect his investigation. (OIP has been cooperating with, and providing FOIA assistance to, Mr. Fiske.)

The Wall Street Journal filed this lawsuit in late January under its parent corporation's name. The suit is being defended by AUSA Steve Froot, with oversight by the Civil Division here. By letter of February 28 to AUSA Froot, Mr. Fiske advised that the reports' "release at this time would be detrimental to the investigation currently being conducted by my Office. These documents report on a number of events relating to the death of [Mr.] Foster. All of the events covered by the Park Police and FBI reports will be investigated by the Independent Counsel's

Office." Accordingly, the reports were withheld in their entirety pursuant to the FOIA's "ongoing investigation" Exemption 7(A).

Subsequently, on May 11, the Independent Counsel's Office formally advised that FOIA disclosure of a photocopy of the handwritten note "will no longer have the effect of interfering with our ongoing investigation." Accordingly, the Department notified counsel for the Foster family that it would consider any personal privacy objection that the family might wish to present before making a final decision on the note's FOIA disclosure.

2. Status: The Department has moved for summary judgment as to the entirety of the reports (except for the handwritten note), based upon Independent Counsel Fiske's determination that disclosure at this time would impair his investigation and therefore is covered by FOIA Exemption 7(A). Dow Jones has cross-moved, primarily arguing that the Department waived its ability to invoke any FOIA exemption by discussing the reports' subject matter at the press conference. The Department's next brief is due on June 3, with oral argument scheduled for July 15.

As for the handwritten note, the Department is considering the objections of the Foster family to disclosure of it in photocopy form, based upon their privacy concerns about its potential media publication. (See attached letter of May 17.) The Department must decide whether those personal privacy interests outweigh the public interest in complete FOIA disclosure under FOIA Exemption 7(C). (See attached OIP memorandum.)

3. Department Position: Independent Counsel Fiske's Exemption 7(A) judgments in this matter are being accepted and defended by the Department, consistent with his independent status. In accordance with that status, the Attorney General also has issued an order establishing Mr. Fiske as the final administrative appellate authority for any records originated or obtained solely by his Office. (See attached Attorney General Order.)

4. Judiciary Committee Member/Positions: The primary congressional interest in access to these two reports has been expressed by members of the House. Representatives Robert K. Dornan and Dan Burton have made FOIA requests for the reports, each of which has been denied under Exemption 7(A); the former has filed an administrative appeal. Additionally, Representative William F. Clinger, Jr., Ranking Minority Member of the House Government Operations Committee, has sought limited access to the reports directly from Independent Counsel Fiske pursuant to a separate statute (5 U.S.C. § 2954). The only member of the Judiciary Committee known to have expressed particular interest in disclosure of the reports or related records is Senator Hatch, who has been in contact with both OLA and the Criminal Division.

5. Reference Materials: (a) transcript excerpt of August 10, 1993 press conference; (b) Foster family objection letter of May 17, 1994; (c) OIP memorandum of May 24, 1994; (d) Attorney General Order of May 23, 1994.

PRESS CONFERENCE WITH: PHILIP B. HEYMANN, DEPUTY ATTORNEY GENERAL; ROBERT
LANGSTON, CHIEF, US PARK POLICE; ROBERT BRYANT, SPECIAL AGENT IN CHARGE OF
WASHINGTON METROPOLITAN FIELD OFFICE, FBI; SUBJECT: REPORT ON DEATH OF
VINCENT FOSTER, FORMER DEP. ASST. TO THE PRESIDENT, US JUSTICE DEPARTMENT
F-10-01 page# 1 TUESDAY, AUGUST 10, 1993

dest=mwh,doj,fbi,park,crime
data

TRANSCRIPT BY: FEDERAL NEWS SERVICE
620 NATIONAL PRESS BUILDING
WASHINGTON, DC 20045

FEDERAL NEWS SERVICE IS A PRIVATE FIRM AND IS NOT AFFILIATED WITH
THE FEDERAL GOVERNMENT.

COPYRIGHT 1993 BY FEDERAL INFORMATION SYSTEMS CORPORATION,
WASHINGTON, DC 20045, USA. NO PORTION OF THIS TRANSCRIPT MAY BE
COPIED, SOLD, OR RETRANSMITTED WITHOUT THE WRITTEN AUTHORITY OF
FEDERAL INFORMATION SYSTEMS CORPORATION.

TO RECEIVE STATE, WHITE HOUSE, DEFENSE, BACKGROUND AND OTHER
BRIEFINGS AND SPEECHES BY WIRE SOON AFTER THEY END, PLEASE CALL
CORTES RANDELL AT 202-347-1400.

COPYRIGHT IS NOT CLAIMED AS TO ANY PART OF THE ORIGINAL WORK
PREPARED BY A UNITED STATES GOVERNMENT OFFICER OR EMPLOYEE AS A PART
OF THAT PERSON'S OFFICIAL DUTIES.

MR. HEYMANN: Ladies and gentlemen, we are here today to announce
the results of the inquiry into Vince Foster's death. I received an
FBI report this morning, a Park Police report last Friday just got
into my hands on Monday. As you all know, Park Police have been
taking the lead in investigating the cause of death. The FBI has been
assisting in that investigation and separately investigating the
circumstances surrounding the finding of the note.

The chief of the Park Police, Chief Langston, and the special
agent in charge of the Washington field office of the FBI, Mr. Bryant,
are here today. They're here to describe their findings to you and to
answer any questions you have.

I have directed that the full text of the note that was found be
made public now. At the very strong urging of the family of Vince
Foster, we are not making available photocopies of the note itself,
but knowing that some of you may want to see it so that you can
describe what it looks like, Carl Stern will have a copy available and
anyone who wants to see it is welcome to see it. We just don't want
to distribute it.

There are in the note some statements, which to be sure that no
one was left unturned, we have referred to the units which the
attorney general asked some weeks ago to review any questions about
the travel office -- the Office of Professional Responsibility, and

PRESS CONFERENCE WITH: PHILIP B. HEYMANN, DEPUTY ATTORNEY GENERAL; ROBERT LANGSTON, CHIEF, US PARK POLICE; ROBERT BRYANT, SPECIAL AGENT IN CHARGE OF THE WASHINGTON METROPOLITAN FIELD OFFICE, FBI; SUBJECT: REPORT ON DEATH OF VINCENT FOSTER, FORMER DEP. ASST. TO THE PRESIDENT, US JUSTICE DEPARTMENT
F-10-01 page# 2 TUESDAY, AUGUST 10, 1993

the public integrity section. As to these assertions in the note, the Office of Professional Responsibility is looking at the sentence dealing with the FBI as part of its broader inquiry into the FBI contacts with the White House in accordance with the attorney general's letter to Chairman Brooks promising that we would look into the FBI's contacts.

As to the remaining assertions, the Public Integrity Section of the Criminal Division is looking at them as part of its mandate -- also from the attorney general, also in response to Chairman Brooks -- to review all travel office matters. Now, there's one that is not a travel office matter, and as to that one, which I don't even have it in front of me to describe it, involves the ushers. While the inquiry into these assertions is not totally complete, I am told that based on its interviews to date, nothing has led the Public Integrity Section to suspect any criminal conduct that would then have to be investigated.

I will also hand out or make available to you my instructions last week to the Public Integrity Section and to the Office of Professional Responsibility asking them to look into these matters.

The FBI joined the Park Police in the initial stages of the inquiry into Vince Foster's death because of his status as a federal official and assassination statutes. As it became apparent that this was a suicide, the FBI gradually assumed a secondary role to the Park Police. The bureau reentered the inquiry at our request to examine the handling of the note.

And with this, I think I should turn you over to Chief Langston.

Chief?

CHIEF LANGSTON: Good afternoon, ladies and gentlemen. The United States Park Police has completed its inquiry into the death of Vincent Foster and, as you are aware, that occurred on the 20th of July at Fort Marcy National Park. It's a component of the George Washington Memorial Parkway in Fairfax County, Virginia.

MORE

PRESS CONFERENCE WITH: PHILIP B. HEYMANN, DEPUTY ATTORNEY GENERAL; ROBERT LANGSTON, CHIEF, US PARK POLICE; ROBERT BRYANT, SPECIAL AGENT IN CHARGE OF THE WASHINGTON METROPOLITAN FIELD OFFICE, FBI; SUBJECT: REPORT ON DEATH OF VINCENT FOSTER, FORMER DEP. ASST. TO THE PRESIDENT, US JUSTICE DEPARTMENT
F-10-08 page# 3
TUESDAY, AUGUST 10, 1993

MR. STERN: Bill, you came in late. We did distribute a letter from the deputy attorney general that indicates how those matters will be pursued.

(Cross talk.)

Q You didn't distribute it over here.

MR. STERN: Okay.

Q Well, what are these --

MR. STERN: I'll make -- Sarah, will you please?

Q (Inaudible.)

MR. STERN: We'll make sure that he -- I thought it was passed out on your side. If it wasn't, we'll get you copies. Let me just say one last thing. There are some of you who obviously would like to see a photocopy of the original -- of the note in its original form. If you want to come to my office after this session, I'll be happy to show it to you, but we did want to respect the family's wishes. But if you wish to see it in terms of where there are scratch-outs, underlines, scribbles, anything like that, I do have one photocopy. And if you want to come to my office --

Q So we can't get a copy?

MR. STERN: No. But if you'd care to come to office to look at it --

Q Sure.

MR. STERN: I understand your journalistic need to describe the note to your readers or to your viewers.

Q For those of us who don't usually cover Justice, could you tell us where your office is? (Laughter.)

MR. STERN: Just passed the men's room.

(Cross talk.)

MR. STERN: Thank you. Thanks a lot.

Q Wait a minute, sir!

Q From which office are we getting the report?

MR. STERN: The report --

JAMES HAMILTON
ATTORNEY-AT-LAW

SWIDLER
&
BERLIN

CHARTERED

May 17, 1994

DETERMINED TO BE AN
ADMINISTRATIVE MARKING

INITIALS: W DATE: 07/20/2021 DIRECT DIAL 424-7826

~~CONFIDENTIAL~~

BY HAND

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Re: Vince Foster Note

Dear Madam Attorney General:

The attached letter announces the Department's "preliminary determination to release [a photocopy of Vince Foster's note] in response to the pending FOIA requests." Please be aware that the Foster family strongly objects to this action. The family believes that releasing a photocopy would constitute a clearly unwarranted invasion of the family's personal privacy, which should be protected under 5 U.S.C. § § 552(b)(6) and (7)(C). Unless the Department asserts that an exemption applies, release will occur because the Foster family has no right under the statute to seek injunctive relief. Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

Since Vince's death, the conduct of the news media has caused the Foster family grievous harm. Some articles and television reports have passed the bounds of both taste and belief. I have complained to you repeatedly about various articles (examples attached) that appear the result of leaks from federal investigating authorities.

Time and time again, the Foster family has been beleaguered by media requests for comments and interviews. There have been calls in the night, knocks on the door. Other family members have not been spared this unwanted attention.

Throughout it all, the family has retained its dignity. Lisa Foster and her children have refused all interviews, preferring instead to cope with their grief in private and not to feed the frenzy of speculation about Vince's death and anxieties. Mrs. Foster could have appeared on almost any television interview program, but all the many requests have been denied.

Release of a photocopy of the note will set off another round of articles, television reports and speculation. The family would be forced to see this sad document -- in Vince's handwriting and torn into many pieces before being reassembled -- on television and the front pages of numerous newspapers. (Please do not underestimate the effect on the family of seeing on television photographs, leaked from the investigative file, of Vince's hand holding the gun at the death scene.) The note likely would be subject to morbid commentary and sensationalized handwriting analyses. And the media's hounding of the family would increase.

3000 K STREET, N.W. ■ SUITE 300
WASHINGTON, D.C. 20007-5116

(202)424-7500 ■ TELEX 701131 ■ FACSIMILE (202)424-7643

The Honorable Janet Reno
May 17, 1994
Page 2

The anguish the family would suffer is described in the attached personal letter to you from Lisa Foster.

Ms. Reno, we deal here with what essentially is a private writing about a man's personal distress. Vince did not intend the note to be part of the White House files. Rather, it was torn into pieces and discarded in the bottom of an old briefcase he long had owned. It thus is difficult to perceive what public interest requires release of a photocopy, particularly where the text of the note has been released and the press has been allowed to view a photocopy of the reassembled note. If there is such a public interest, it clearly is outweighed by the family's interests in preserving its personal privacy.

This situation bears striking resemblance to the case arising from the disastrous mission of the space shuttle Challenger. NASA had released a transcript of the audio tape of the astronauts' voices in the moments before the disaster, but refused to release the actual tape. The United States District Court for the District of Columbia agreed that the FOIA did not require NASA to release the tape, citing the § 552(b)(6) protection against a "clearly unwarranted invasion of personal privacy." New York Times Co. v. NASA, 782 F. Supp. 628 (D.D.C. 1991).

The court began by setting forth NASA's views of the privacy interests involved:

NASA contends that the privacy interest at issue in this case is one enjoyed by the families of the Challenger astronauts. NASA characterizes the interest here as one that protects against disclosures which would cause the astronauts' survivors to suffer additional anguish.

One need only assume that, given the demonstrated public and press interest in the Challenger accident and its effect on the families of the astronauts, the press will not overlook an opportunity to obtain a recording of the astronauts' last words.... At that point, it is a certainty that inquiries will be made of the families to obtain their reactions to hearing the voices of their loved ones; that there will be a proliferation of print articles presuming to uncover and describe the emotional state of the astronauts during the period captured by the tape; ... It simply is not reasonable to assume that the families would be able to prevent the press inquiries, to stifle the public's curiosity, or even avoid exposure to the news accounts.

The Honorable Janet Reno

May 17, 1994

Page 3

Judge Norma Holloway Johnson agreed that the "privacy interest asserted on behalf of the Challenger families is a valid and substantial one." She observed that, should the tape be disclosed, the Challenger families may be subject to a "panoply of telephone calls from media groups as well as a disruption of their peace of mind every time a portion of the tape is played within their hearing." *Id.* at 632. The Judge found that, because the media already had a transcript of the tape, "public interest in disclosure of the actual tape, with the highly speculative conclusions which might be drawn from it, is very minimal, if it can even be said to exist at all." *Id.* at 633. She concluded that the substantial privacy interests outweighed the public's interest in disclosure because disclosure would not "'significantly contribute' to the public understanding of the Challenger disaster" or the operations of NASA. *Id.* at 633.

Similar factors require non-disclosure of a photocopy of Vince's note. As remarked, releasing a photocopy would provoke additional media efforts to interview the family, large-scale publication and broadcasting of the photocopy, yet more speculation about Vince's death and private anguish, and increased discomfort for the family. And to what legitimate public end? As in the NASA situation, release of a photocopy of this private note "would [not] 'significantly contribute' to the public understanding" of what transpired or the operations of government. In short, the privacy interests of the Foster family clearly outweigh whatever negligible public interest may pertain.

The family very much appreciates your personal attention to this matter. The family also hopes that now is the time to return the original of the note to it, as it has long requested.

Respectfully submitted,



James Hamilton

JH/cmb

Enclosures

cc: The Honorable Jamie S. Gorelick
Daniel J. Metcalfe, Esq.
Elizabeth Pugh, Esq.
Steven I. Froot, Esq. (by telecopy and mail)

(All without Ms. Foster's personal letter to the Attorney General)



U.S. Department of Justice
Office of Information and Privacy

Washington, D.C. 20530

May 24, 1994

TO: William C. Bryson
Acting Associate Attorney General

FROM: ~~WCB~~ Daniel J. Metcalfe
Co-Director
Office of Information and Privacy

SUBJECT: Decision on FOIA Disclosure of Foster Note

As we discussed this morning, the Office of Information and Privacy recommends that the Foster note be withheld under Exemption 7(C) of the FOIA in response to pending FOIA requests and in connection with the pending case of Dow Jones & Co. v. United States Dep't of Justice, No. 94 Civ. 0527 (SS) (S.D.N.Y.). This memorandum will outline in greater detail the legal factors that the Department should consider in deciding whether Exemption 7(C) applies in this case.

A. Legal Standard

Exemption 7(C) of the FOIA is the Act's privacy exemption for information contained in law enforcement files. It applies to "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).¹ This standard is a lesser one than is contained in the FOIA's non-law enforcement privacy exemption, Exemption 6, which is bound by the phrase "would constitute" and which requires a "clearly unwarranted" privacy invasion.

Both of these privacy exemptions are applied through the same basic "balancing" process: Any personal privacy interest involved must be balanced against the public interest expected to be served by FOIA disclosure. The Supreme Court has defined

¹ Although the Foster note is inherently the type of personal record that ordinarily would be assessed under FOIA Exemption 6, its connection to the ongoing law enforcement investigation shifts that assessment to Exemption 7. Specifically, the threshold "law enforcement purposes" requirement of Exemption 7 is met in this case by virtue of the note's compilation into federal investigatory files. See, e.g., John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

"public interest" in this context as served by FOIA disclosures that "shed[] light on an agency's performance of its statutory duties." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

B. Privacy Interest

The first step in the balancing process is to determine whether the FOIA disclosure in question implicates a protectible personal privacy interest. In this case, this requires threshold consideration of the "survivor privacy" issue.

Simply put, the Department has followed a longstanding FOIA policy that a person's privacy rights are extinguished at death; as a general rule, information pertaining to deceased persons is disclosed. See FOIA Update, Sept. 1982, at 5. Nevertheless, it is recognized under the FOIA that "survivor privacy" interests can exist, and can be entitled to protection, in exceptionally sensitive situations. A primary example is autopsy reports or other graphic details of death. See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991); Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987).

This protection has been extended to photographs of deceased persons as well, based upon the premise that disclosure would directly harm the privacy interests of surviving family members. See Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); KTVY-TV v. United States, No. 87-1432-T, slip op. at 9 (W.D. Okla. May 4, 1989), aff'd per curiam, 919 F.2d 1465 (10th Cir. 1990). But see also Outlaw v. United States Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure of murder-scene photographs in absence of evidence of known survivor whose interest would be harmed by disclosure).

This protection also has been extended to situations in which the information in question might not be so graphic or sensitive, but its disclosure could reasonably be expected to engender disruption in the lives of surviving family members given the exceptional circumstances involved. The Challenger case, New York Times Co. v. NASA, 782 F. Supp. 628, 632 (D.D.C. 1991), is of course the leading example, but this "consequential harm" rationale has been recognized in connection with radiation-exposure records, see Cowles Publishing Co. v. United States, No. 90-349 (E.D. Wash. Dec. 26, 1990),² and for general medical rec-

² Consistent with this, the Department of Energy and other agencies involved in the ongoing federal efforts to locate and disclose records of government involvement in human radiation

ords pertaining to a highly publicized medical-treatment case, see Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987), as well. Suffice to say that there is ample legal precedent for considering the privacy interests of the surviving family members in this case.

The second step in the balancing process is to assess the nature and magnitude of those privacy interests. In this case, those interests appear to have two distinct aspects. The first is the family's interest in avoiding exposure (especially on the part of the children) to any graphic display of the note itself. In the words of counsel's objection letter: "The family would be forced to see this sad document -- in Vince's handwriting and torn to many pieces before being reassembled -- on television and the front pages of numerous newspapers." Letter of May 17, 1994, at 1. Mrs. Foster's letter to the Attorney General personally speaks to the impact that this exposure would have on her children and it provides specific detail to support the conclusion that such exposure could reasonably be expected to occur, for at least one of her children, in a particularly harmful setting.

This direct "exposure" interest is compelling. It is well supported by the objection letters submitted and by existing case law as well. The New York Times decision, for example, speaks to this aspect of "survivor privacy" in a passage not quoted by counsel for the family:

Exposure to the voice of a beloved family member immediately prior to that family member's death is what would cause the Challenger families pain. What the astronauts said may not implicate privacy interests; . . . But how the astronauts said what they did, the very sound of the astronauts' words, does constitute a privacy interest. This is the "intimate detail" that the Challenger families seek to protect from disclosure.

782 F. Supp. at 631.

To be sure, a survivor's exposure to the sound of a deceased loved one's voice is a stronger case than exposure to the handwriting involved here; also, the proximity of death might not be as strong in this case as in New York Times. But it is significant that other FOIA precedents generally recognize this aspect of privacy invasion as well, including the autopsy report cases. See, e.g., Badhwar v. United States Dep't of the Air Force, 829 F.2d at 186 (disclosure could "shock the sensibilities of surviv-

²(...continued)
experimentation are respecting the privacy interests of next-of-kin survivors in those efforts.

ing kin"). Most significant of these precedents is the recent FOIA decision protecting the Kennedy family from being further "traumatized" by public disclosure of the autopsy x-rays and photographs of President Kennedy. See Katz v. National Archives & Records Admin., No. 92-1024, slip op. at 23 (D.D.C. Mar. 2, 1994) (alternative holding) (motion for reconsideration pending).

The other aspect of the Foster family's privacy interest in this case is in avoiding the "indirect" harm that FOIA disclosure might cause, a harm that is somewhat more general and speculative in nature. It is based on the family's concern that FOIA disclosure ". . . will set off another round of articles, television reports and speculation. . . . And the media's hounding of the family would increase." Letter of May 17, 1994, at 1. This concern is generally supported by the letter from Mrs. Foster to the Attorney General, at least insofar as it addresses the overall impact of any such contact on the family.

This privacy interest is substantial and is supported by FOIA case law as well. The New York Times decision, as noted by the family's counsel, speaks to the significance of both "telephone calls from media groups" and the "disruption of [the] peace of mind" of surviving family members. 782 F. Supp. at 632. Similarly, the Cowles Publishing Co. decision, involving personal information on radiation-exposure victims, afforded privacy protection on the basis that survivors should be insulated from media contacts that "interfere with reasonable expectations of privacy, invite unwarranted intrusions, and interfere with the solitude and seclusion of one's own home." Slip op. at 7.

In sum, the privacy interests implicated here are both substantial and compelling.

C. Public Interest

The next step in the balancing process is to identify and assess the magnitude of any public interest that could be served by disclosure, i.e., the shedding of light on the operations or activities of the government, or the assurance of the public of the integrity of government operations.

In this case, this analysis must proceed from the unusual starting point of the disclosure that already has occurred. Not only has a full transcript of the note been disclosed (comparable to the transcript disclosure of the Challenger audiotape), but the Department has taken the admittedly unorthodox step of permitting any member of the press (and presumably any member of the public, upon request) to view a photocopy of it. Inasmuch as the only further thing being sought under the FOIA is the production of a copy of the note (undoubtedly for publication purposes), the inquiry most logically should focus on any public interest that would be served by that requested FOIA disclosure. In other

words: What is the differential public interest benefit that would be gained through production of the note, as compared to the level of public benefit already gained through existing disclosure? Accord New York Times Co. v. NASA, 782 F. Supp. at 633 (analyzing public interest factor in light of existing transcript disclosure); cf. Katz v. National Archives & Records Admin., slip op. at 20-22 (recognizing differential interests on both sides of the balancing equation).

Assuming that there is no reasonable doubt about the accuracy of the note's transcription (which there certainly should not be, given its inspection availability), only two potential public interests can be discerned in the difference between FOIA disclosure and the disclosure that has already occurred.³ The first is that FOIA disclosure would permit any skeptical member of the public to forward the note for an independent handwriting analysis, thus verifying the accuracy and integrity of the government's conclusion that the note was written freely in Mr. Foster's own hand. This substantial public interest factor is diminished, if not eliminated, by the fact that the Department presumably would allow any expert to analyze a photocopy of the note on the premises. Cf. Katz v. National Archives & Records Admin., slip op. at 20 n.16 (noting that such inspection access to Kennedy autopsy materials has been afforded to several private researchers and medical experts under conditions established by the Kennedy family).

The second public interest factor is a more general one. Given the exceptionally high degree of public interest in the subject matter involved here, as part of the overall aura of Whitewater-investigation matters, one could reasonably conclude that there is some substantial service of the public interest in any FOIA disclosure of a record such as the one in question here. If nothing else, such disclosure would serve a general public interest in assuring the public that nothing related to this subject is being unduly withheld from public disclosure in any way. Providing such a heightened level of public assurance would to at least some extent further the Department's overall policy of openness in government as a means of achieving government accountability. This factor should be accorded substantial weight in the balance.

D. Conclusion

On balance, the privacy interests in this case seem more substantial and weighty than the public interests that would be

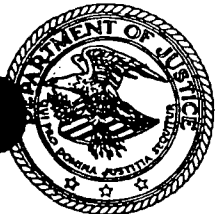
³ In this respect, this is a stronger case than New York Times, where the very nature of the record being withheld (an audiotape) allowed the requesters to point to a possible qualitative difference between it and a mere transcript. See 782 F. Supp. at 633.

served by FOIA disclosure. The privacy harms contemplated here are palpable, compelling ones--all the more so in that they would be experienced by schoolchildren. The Foster family's privacy interests are adequately documented in this exceptional case and are well supported by exceptional FOIA case law. The public interest to be served by FOIA disclosure, given this case's unusual starting point,⁴ is more general and less compelling by comparison.

Based upon this, the Office of Information and Privacy recommends that the note be withheld under FOIA Exemption 7(C) and that this position be defended (with further evidentiary support from the Foster family) in the pending Dow Jones litigation.⁵

⁴ If the Department decides to withhold the note under the FOIA, the plaintiff in the Dow Jones litigation undoubtedly will argue that the limited disclosure already afforded to the public constitutes a "waiver" of any exemption applicability. While there is some force to that argument, and to the idea that agencies ordinarily should not indulge in "degrees of disclosure" under the FOIA, there are strong public policy arguments against finding waiver in any case in which an agency is striving to afford as much access to sensitive records as possible. See, e.g., Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law"); Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977) ("The FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information."). Though the posture already adopted by the Department on the note is unorthodox under the FOIA, and the waiver issue is hardly free from doubt, this complication ought not to alter the balance of interests under Exemption 7(C).

⁵ This conclusion has been discussed with Elizabeth Pugh, Assistant Director of the Civil Division's Federal Programs Branch, who is overseeing the defense of Dow Jones by the U.S. Attorney's Office for the Southern District of New York. She agrees with this conclusion and has advised that the U.S. Attorney's Office (AUSA Steve Froot) is prepared to defend this Exemption 7(C) position if it is adopted by the Department.



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

ORDER NO.

DESIGNATING INDEPENDENT COUNSEL AS FINAL
FREEDOM OF INFORMATION ACT ADMINISTRATIVE APPEAL AUTHORITY

By virtue of the authority vested in the Attorney General by law, including 28 C.F.R. § 16.8(b), I hereby designate the Independent Counsel: In re Madison Guaranty Savings & Loan Association to act as the final administrative appeal authority with respect to all Freedom of Information Act matters upon which his office exercises denial authority.

Date

May 23, 1994

Janet Reno

Attorney General

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

99

Divider Title: _____

REPRESENTATIVE LEACH v. RESOLUTION TRUST CORPORATION

1. ISSUE STATEMENT

On May 11, 1994, Representative James A. Leach, Ranking Minority Member of the House Committee on Banking, Finance and Urban Affairs, filed suit against the Resolution Trust Corporation ("RTC") and the Office of Thrift Supervision ("OTS"), challenging those agencies' failure to honor in full his request for documents pertaining to Madison Guaranty Savings & Loan Association. Leach v. RTC (D.D.C.).

2. BACKGROUND

Rep. Leach had sought such documents from defendants in his official capacity as Ranking Minority Member of the Banking Committee. The agencies declined to treat his request as a formal request of Congress or of the Committee and instead processed it as a Freedom of Information Act ("FOIA") request. In producing documents, the agencies withheld some materials pursuant to the FOIA exemptions. In the present suit, Rep. Leach claims that he is entitled to all documents sought and alleges that the agencies' withholding of some documents violates FOIA, the Administrative Procedure Act, and the Federal Home Loan Bank Act, as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

3. DEPARTMENT POSITION

RTC requested that the Department of Justice represent it. It was decided, however, that in view of the appointment of Special Counsel Robert Fiske to investigate Madison Guaranty, the Department of Justice should not get involved. RTC has therefore retained private counsel. OTS is handling its own defense. [With the approval of the appropriate Justice Department officials and at the request of RTC, the Federal Programs Branch is informally monitoring the progress of the litigation and providing advice on legal issues where appropriate.] Under an expedited briefing schedule approved by the Court, plaintiff filed a motion for summary judgment on May 16, 1994; defendants' responses and cross-motions are due on June 6, 1994.

4. JUDICIARY COMMITTEE MEMBERS' INTERESTS/POSITIONS

N/A

5. REFERENCE MATERIALS

None.

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

100

Divider Title: _____

DEPARTMENT CONTACTS WITH CONGRESS

1. Issue Statement

The issue is the Department's policy and practice regarding communications with Congress, including Members, staff and congressional committees, including contacts initiated by Congress with the Department's offices, boards and divisions. This arises primarily in the context of requests for information about the Department's position on legislation and non-legislative matters.

2. Status

On October 6, 1993, Deputy Attorney General Philip Heymann sent a letter to Senate Judiciary Committee Chairman Biden, which articulated the policy on contacts between Congress and the Department on "pending criminal and civil litigation, investigations, and other case-specific matters... including matters that have not ripened into an investigation or litigation, as well as applications for preclearance under the Voting Rights Act." (Heymann letter)

3. Department Position

The Heymann letter distinguishes congressional contacts on general policy issues, which we encourage, from contacts regarding pending matters "on behalf of or regarding constituents or other identified parties." With regard to the latter, "our goal is to insure that the administration of justice will be free of political considerations and that it is correctly perceived to be totally apolitical." In order to avoid "any possible misimpression" that Members or staff influence our case-specific actions, the letter requests that contacts on pending matters be directed only to the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Legislative Affairs.

Mr. Heymann also asked that, to the extent possible, such an inquiry be set forth in writing and state the extenuating circumstances that appear to warrant the inquiry. The letter also notes our general policy to neither confirm nor deny the existence of a pending investigation, although there have been exceptions, such as antitrust, civil rights and other matters that have been publicly acknowledged. Public record information, such as case status, can be obtained through the Office of Legislative Affairs.

The Attorney General has met with Members regarding matters pending in the Department under section 5 of the Voting Rights Act, in accordance with the policy articulated by the Heymann letter. This policy is consistent with the Department's long-standing practice regarding congressional contacts.

Generally, Department employees refer congressional requests for information on legislation and pending non-legislative matters to the Office of Legislative Affairs (OLA). OLA routinely confers with relevant DOJ offices and divisions about congressional requests for information on pending cases and investigations in an effort to be as responsive as possible while avoiding any misimpression of political influence in the Department's decisions about such matters.¹ The U.S. Attorney's Manual (1988) contains guidance which comports with this goal by routing all congressional inquiries, except for public domain materials, through OLA.

OLA also coordinates with interested DOJ components to develop positions on legislation, which are then cleared with other Executive Branch agencies through the OMB clearance process, based upon OMB Circular A-19. This process facilitates the development of coherent Executive Branch response to legislation, which the Congress can rely upon in the legislative process.

4. Judiciary Committee Member Interests/Positions

Mr. Heymann's letter responded to informal requests for guidance from Committee Members regarding the Department's position on this issue. The Department has provided it to other Members of Congress in response to particular inquiries.

Contact: Susan Liss

3/94

Department Contacts with Congress
Addendum: Judiciary Committee Members' Positions/Interests

Senator Biden supports the development of a formal departmental policy regarding Congressional inquiries. Senators DeConcini and Specter believe that Members of Congress and the President should be permitted to inquire about the stage of a case, without trying to influence an investigation.

Senator Grassley expresses concern about the handling of the Ford case, and wants safeguards against political interference with criminal investigations on the part of the White House or Members of Congress. Senator Brown questions Gerson's actions, and how the situation should have been handled. He is also interested if U.S. Attorney Bryant will finish the case.



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

October 25, 1993

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: Philip B. Heymann
Deputy Attorney General

SUBJECT: Congressional-Departmental Contacts

Attached for distribution to the appropriate members of your component is a copy of a recent letter circulated to all members of Congress, setting forth the Department's policy on contacts between Congress and the Department on pending matters. While we remain hopeful that members of Congress will cooperate with this policy, please direct any Congressional inquiries concerning pending matters that your component may receive to the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Legislative Affairs.

Attachment



Office of the Deputy Attorney General

Washington, D.C. 20530

October 6, 1993

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

One of the fundamental goals of this Administration is to protect the professionalism and integrity of the Department of Justice's attorneys and to avoid even the appearance of their being subjected to political influence as they perform their official duties. Because I know that you share this goal, I wrote to you on May 24, 1993 to inform you of the Department's policy with respect to contacts between the White House and the Department on pending criminal and civil litigation, investigations, and other case-specific matters (collectively, "pending matters"). This letter is to advise you of the parallel Department policy on contacts between the Congress and the Department on such pending matters (including matters that have not ripened into an investigation or litigation, as well as applications for preclearance under the Voting Rights Act).

Initially, of course, there is a clear distinction to be drawn between Congressional-Departmental contacts on case-specific pending matters and general policy issues related to law enforcement and the administration of justice. On policy issues, the Department welcomes and encourages a spirited dialogue with the Legislative Branch, and we value the input of individual Members in shaping such policy. We also recognize that policy issues may occasionally arise in the context of individual matters pending before the Department. We believe that discussion of those issues, without reference to the individual matter at hand, can be both appropriate and beneficial to the policy formulation process. There may also be occasions when Justice Department lawyers will need to be in contact with Senate or House counsel, where, for example, we are defending the constitutionality of legislation or where individual Members may be fact witnesses in investigations or cases.

With respect to Congressional contacts on pending matters on behalf of or regarding constituents or other identified parties, our policy has historically represented different concerns. As with the policy concerning White House contacts on pending matters, our goal is to insure that the administration of justice will be free of political considerations and that it is correctly perceived to be totally apolitical. We want to avoid any possible misimpression that persons with unique access to the

Department, such as Members of the House or Senators, whether acting for themselves or for constituents, receive more favorable treatment or attention than persons without such access. That is an important reason behind our desire to insulate the Department, and particularly its line and supervising attorneys from any situation that could be construed as an effort (however inadvertent or well-intended) to influence our case-specific actions.

To this end, we would request to the extent that Members of Congress or their staff deem it essential to make inquiries concerning pending matters, such inquiries be directed only to the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Legislative Affairs. To the extent possible, we would also request that these inquiries be in writing and that they state the extenuating circumstances that appear to warrant the inquiry.

We will, of course, respond promptly to such inquiry. In the vast majority of cases, such an inquiry would result in the Department simply following its long-standing policy of not discussing the facts of a pending matter or investigation with persons outside the Department, except, of course, with persons representing parties to such a matter or inquiry. Indeed, for the most part we will not be able to confirm or deny that any particular individual or entity is under investigation or what steps we intend to pursue in a pending matter. As you know, the reasons for this policy are to protect the privacy and reputations of presumptively innocent individuals and to promote the efficacy and success of our investigations and litigation.

With respect to investigations, historically the general policy of the Department has been neither to confirm nor deny the existence of a pending investigation. Exceptions have been made in cases in which particular civil rights or anti-trust investigations have been publicly acknowledged. The exceptions were broadened slightly on January 14, 1993 with a revision of a portion of the United States Attorneys' Manual. The general rule remains that Department personnel shall not respond to questions about the existence of an ongoing investigation or comment on its progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document. However, the Manual now provides that "[i]n matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made."

Thus, the policy recognizes the difference between, first, confirming the investigation of a crime or crimes about which there has already been considerable publicity and, second, revealing or confirming that a particular person is the subject of an investigation. To take contrasting examples, it may be appropriate to confirm an investigation into a series of apparently related murders in an area of federal jurisdiction, but it would not be appropriate to confirm the investigation of a public official for malfeasance in office.

In our view, the Department policy is appropriate for a system in which investigations are often exceedingly complex and where even the acknowledgement of an investigation, and particularly the identification of individual targets, can have dramatic adverse consequences for both the targets and third parties. Examples are investigations involving political corruption (where a publicized investigation of a public official may be extremely harmful even if he or she is completely exonerated) and investigations of financial institutions or of publicly owned corporations (where even acknowledging an investigation can have serious economic consequences for investors).

In light of these considerations, we would hope that in most cases Members of Congress would forbear from making case-specific inquiries. While no doubt well-intentioned, such inquiries have the potential for being misconstrued by the press and the public. As you stated at my confirmation hearing, in your 24 years in the Congress you have never had occasion to make such inquiries, and we believe that most of your colleagues have had a similar record. We would hope that other Senators and Members and their staffs would exercise similar forbearance from making inquiries regarding pending investigations or litigation.

Of course, even in the case of pending matters, the Department, through the Office of Legislative Affairs, will assist Members in obtaining access to public record information such as the procedural status of pending litigation.

Once again, we look forward to working with you and the Congress in providing information needed by Members, their constituents, and the legislative process, while faithfully carrying out the Department's responsibility for the evenhanded, impartial administration of justice.

Sincerely,



Philip B. Heymann
Deputy Attorney General

Justice's Proper Interference in Rep. Ford's Trial

Mr. Harold Ford's acquittal Friday on charges of financial corruption further validates my ruling while acting attorney general that the government should not engage in jury shopping. Contrary to some assertions, my decision was made independently. It was informed by a race-neutral policy, consistent with the Justice Department's historical practices.

Federal prosecutors originally sought to try Mr. Ford, who is black, along with 11 white co-defendants, in Knoxville, Tenn., a mostly white city where several alleged collaborators had been convicted. The prosecutors wanted the Ford trial to be held in Knoxville because they worried that the congressman's popularity would make it difficult to obtain a favorable

principle that federal prosecutors should expect just verdicts from citizens of any community. The Framers of the Constitution recognized this principle, writing in the Sixth Amendment that the accused shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed."

The decision to accept the juries that inhabit the cities in which the Justice Department tries its cases is not only consistent with constitutional tradition but also with the department's historic practice. The 1960s civil rights trials of Klan criminals all took place before their townsmen. More recently, the government tried John Gotti before a hometown jury in New York City, where many feared or admired him.

In most cases, it is the government, opposing defendants' motions to change venues or avoid juries, that insists that local passions and prejudices can be overcome in fair courtroom proceedings. The Justice Department took this position with respect to the police officers charged in the Rodney King case in Los Angeles. I strongly felt that the rule in Los Angeles should be the rule in Memphis.

The Ford case is instructive not only of the government's role in seeking a fair trial but also of a fundamentally conservative view of race. The importation of a virtually all-white jury to a mostly black community, whatever rational concerns led to it, sends a powerful racial message: that the black community's citizens are unworthy of trust.

Such a notion should be particularly unacceptable to us conservatives who defended the nomination of Justice Clarence Thomas against liberal criticisms of his

None of this, however, is to say that the Jackson jury did not deal with the case fairly, just as I believed a Memphis jury should have been made to do. We should not stereotype a largely white community either.

My decision was a matter of strong policy preference, but not of legal mandate. The Justice Department was required to conclude that the Tennessee court's decision to go forward with a jury from Jackson was within its discretion. This was a contingency we anticipated from the outset. It represented no change of position for the government to join Mr. Ford's motion to strike the Jackson jury but then not to support his petition to block the trial.

The decisions I made in this case were mine alone and were made without any attempt by purported agents of the White House, including its nominee Webster Hubbell, directly or indirectly to exert influence. I value my independence and that of the Justice Department enough that I would have resigned if I had been pressured, but am compelled to note that there would have been nothing inherently improper about the president himself trying to direct his subordinate's decision.

Nor is there anything improper about an attorney general meeting with public groups or members of Congress—such as I did with the Congressional Black Caucus on the Ford matter—to speak about policy issues raised by a prosecution. The prosecutor should be publicly accessible.

What was unfortunate in this case is that the compressed period from when I first learned of the issue to when I had to make my decision tended to give the appearance of undue political influence. I thus was left with the choice between making what to me was the right decision and enduring criticism and results, including the resignation of a U.S. attorney in Tennessee, or making the wrong decision simply to maintain a false peace. Though these events were troubling, the decision was not. I thought then as I think now: A Memphis jury should have been given the chance to do its civic duty in the Ford case.

Mr. Gerson, appointed to the Justice Department by President Bush, was President Clinton's acting attorney general.

Counterpoint

By Stuart Gerson

verdict from his constituents in mostly black Memphis.

Memphis was nonetheless ruled the proper locale for the trial, which ended with a hung jury split strictly along racial lines. The government wanted a retrial, but evidence of improper pressure on potential jurors by Mr. Ford and his supporters raised the question of whether a trial could be decided on the merits. Forbidden to try the case outside of the Memphis area, the prosecutors convinced the judge then presiding at the retrial that the jury should be selected from Jackson, Tenn., a largely white community near Memphis.

That judge ruled without apparent consideration of such possible alternate measures as sequestration or use of an anonymous Memphis jury. The prosecutors exercised most of their challenges against blacks. As a result, of the 18 regular and alternate members of the Jackson jury, 17 were white.

Because Mr. Ford likely would continue to seek racial sympathy in Memphis, the prosecutors rationalized that by asking for a Jackson jury they were doing no more than ensuring that the government would get a "fair" trial. But the prosecutors are not the government; the people are. And as the people's surrogate, I questioned whether it was fair for the Justice Department to declare an entire community incapable of rendering justice. For many reasons—historical, practical and ethical—I concluded that it was not.

Although issues of race marked the case from its beginning (and although Mr. Ford doubtless sought racial advantage), at my order the Justice Department joined Mr. Ford's petition for a Memphis jury. In doing so, I was supporting the race-neutral

The decisions were mine alone and made without any attempt by purported agents of the White House, including its nominee Webster Hubbell.

nonconformity with perceived black philosophical orthodoxies, or who urge local choice in education, housing and health care, and demand local initiative to create a culture of responsibility in minority communities to counteract crime, drug dependency and illegitimacy. We cannot rationally expect minority communities to accept justice if we have no confidence in them to do justice.

Senator Grassley. Thank you, Mr. Chairman.

Ms. Reno, congratulations and, more importantly, thank you for stopping by our offices to visit with us separately. It was a very nice way of getting acquainted, and we look forward to working with you.

I also have had the good fortune of having some mutual friends in Des Moines who speak highly of your qualifications. Also, I have a friend who used to serve in the Florida Legislature who, even though he is not of your philosophy, still believes that you are very well qualified for the position you are taking. So congratulations.

Now, as I told you in my office, I did want to discuss with you the Congressman Ford instance, and I know that while I was out, Senator Thurmond brought this up, and specifically the department's handling of that. I know you have not been involved in that yet.

Now, I think you indicated that you were satisfied with Stuart Gerson's explanation. I want you to know that I am not satisfied with his explanation and I hope that you would try to help me see the way through here.

Isn't it true that, in this instance, more than two dozen Congressmen visited the White House and the Acting Attorney General, in an effort to influence the department's conduct in this case?

Ms. Reno. Senator, just as you asked me what the department's policy was going to be with respect to qui tam and working with qui tam relators, I think there has got to be access on the part of all Americans, whether they be a United States Senator or Congress person or a member of the public to the Department of Justice.

I used to and in the job I now have, I have been able to be accessible to people. Obviously in a nation this big, that is not possible on a personal basis.

When people come to me to talk about policy, as you and I did, I think we can talk about policy. But forgive the repetition: As I told Senator Thurmond this morning, when somebody comes in and says, "If you don't do this, I'm going to the Miami Herald and I'm going to blow the whistle on you," I write out the number for the Miami Herald and say, "Here, go to the Miami Herald, and when you're through fussing and when you're through editorializing and you want to come back and talk about the evidence and the law, I'll put you with the prosecutor and we'll do it."

I have had other groups say, "We're going to vote against you," and I say, "I didn't get into this business for votes. My old law firm said they'd take me back any time the voters didn't want me."

I got into this to do justice, based on the evidence and the law and that's what I want to try to do."

I have met Mr. Gerson. I was impressed with him. I was very impressed with the statement and the fact that he was as high-level appointment of the prior administration. As a matter of fact, as we talked, he was telling me he had been in communication with President Bush, who, I understand, had just bought a car and was driving back and forth to work again.

He obviously reflects the views of the prior administration, but he emphasized to me and was emphatic that he had done what he thought was right, that there was not political influence, and I am satisfied with his explanation. If it were somebody from the current administration--but this I think was an independent person.

Now, somebody said he wants a job in the Department of Justice. he was telling me how he was looking forward to private practice.

Senator Grassley. I think that what you said about the difference between policy and a specific case, none of us are going to disagree with that. But it seems to me that if more than two dozen Congressmen visited you about a case, that what you are basically telling me in that particular instance is you go tell them to mind their own business, is that right?

Ms. Reno. If two dozen Congressmen came to me and said, "Ms. Reno, I'm concerned about the Department of Justice's handling of qui tam cases, I don't think you cooperate with the relators, I just think you butt-head it, and I want you to do something about it and I want you to look at it carefully," I would say, "Certainly, Senator, we will always review what we do. If you have a specific concern, please present it to the lawyer."

Again, I think, as the Nation's lawyer, you have got to be accessible to people. If they try to politically influence you, corruptly influence you, I think you have to--I don't know how you gracefully throw a Senator out the door, but you--

The Chairman. I imagine you will find a way.
Laughter.

Senator Grassley. I will make sure I just visit with you on policy and not on a specific case.
Laughter.

Ms. Reno. Well, Senator, you have already been very helpful to me on the qui tam issue, because, quite frankly, when I first came to Washington, I was really beginning to grapple with the issue.

Senator Grassley. Let me ask you this in regard to this same

case: Have you had a chance to discuss with anybody about the role of Webster Hubbell and what he played in this course of events on the Ford case?

Ms. Reno. I made a point of talking to Mr. Gerson about it, who spoke very highly of Mr. Hubbell and was emphatic that Mr. Hubbell had not tried to influence anybody to do anything politically inappropriate.

Senator Grassley. I hope that is the case, of course. I think what it looks to people on the outside and being suspicious of politics generally is that it suggests inappropriateness of White House influence and the appearance of impropriety, and I think you are indicating to us is that you are going to do what you can even to protect against the appearance of impropriety.

As a follow-up of this, then, and what you told me that you would do when you were in my office, that you would look into the Ford matter and report back to me and other people that are interested in it about the circumstances of the case, specifically, I think it is important that you tell us what meetings took place between any White House officials and Acting Attorney General Gerson, as well as meetings between other outside parties, including members of Congress, with White House officials or even Department of Justice officials.

Ms. Reno. Senator, what I understand is that the Congress persons met with Mr. Gerson and that he satisfied himself. I don't know of anything further to do on the matter. I mean this is an--

Senator Grassley. You are satisfied, then, that you know-- unlike when you were in my office and you said you would be very glad to look into this in detail and you didn't want to comment on it until you have, you are satisfied now that you know enough about it, is that right?

Ms. Reno. If this was the Clinton administration, that would-- you have a high-level appointee from the prior administration who I think has made one of the most eloquent statements that I have seen in a long time. I think it speaks for itself, and I don't see any further action to be taken on it.

Senator Grassley. You ought to know that my reputation on this committee, I don't care whether it is Republican or Democrat, if I am not satisfied with one person's explanation, I think I would be satisfied with your explanation, if you can answer the questions that I just gave you, and I hope you will. Will you do

that?

Ms. Reno. Well, I will refer you to Mr. Gerson's statement, and if you will let me know any further concerns you have after carefully reviewing his statement, I would be happy to try to follow up on it.

Senator Grassley. Then as a matter of further concern about another case, and this would be quoting from the New York Times, there are some people at the White House who are concerned about what they call the Rostenkowski factor and what will happen if the grand jury looking into his case might result in some sort of charge that would cause him to lose his chairmanship. And the last paragraph of this article says: "Officials said that it would be improper for Mr. Clinton or others in his administration to put pressure on Mr. Stevens, who happens to be the attorney, the U.S. Attorney and a Republican U.S. Attorney, a holdover, or even to learn the facts of the case, but that no one in the administration would do so. But they said that, as a practical matter, an Attorney General might be able to get a general idea of the likelihood of an indictment. We need to know whether we have to have a plan B in regard to getting the President's tax bills through the House Ways and Means Committee."

Now, in regard to this, if you are that Attorney General that they are talking about there, to what extent would you be involved in the White House concerns about this interest?

Ms. Reno. I don't understand your question, Senator.

Senator Grassley. Well, my question is simply this, and thank you for telling me you didn't understand it: This White House official unnamed here says that, as a practical matter, an Attorney General might be able to get a general idea of the likelihood of an indictment. Would you answer for the White House the chances of an indictment of Representative Rostenkowski?

Ms. Reno. To you now?

Senator Grassley. What?

Ms. Reno. To you now?

Senator Grassley. I'm sorry?

Ms. Reno. Would I answer to you now?

Senator Grassley. Would you provide that information to the White House?

Ms. Reno. The chance of an indictment, no.

Senator Grassley. Okay. Well--

Ms. Reno. I keep politics out of what I do, Senator. As I told you, I try to do it based on the evidence and the law.

HAROLD FORD

Senator Brown. Thank you, Mr. Chairman.

Ms. Reno, you had the pleasure of going through this for quite a while and have stood up admirably. I just had a couple questions to finish off the line of inquiry that we had chatted about briefly back in February and then covered yesterday.

My focus of attention related to ex parte communications when someone contacts you or the Justice Department with regard to an ongoing case, ongoing criminal case. I had two questions in that area. I think we had sent written copies of them to you last evening that you may have seen this morning.

The first one dealt with trying to identify the policy that I think you discussed yesterday; that is, being happy to meet with people when it is possible to discuss policy, but not feeling it is appropriate to deal with certain matters in ex parte communications.

The one point that I still had a question about was whether or not you would consider it appropriate to meet with an ex parte contact when the subject of the discussion was to be a particular and a specific motion in the case itself.

Ms. Reno. If it related just to the motion and to no policy, what I would suggest to that person who wanted to meet with me is that any contact be made through the litigant's attorney and give them the information concerning the motion that didn't relate to policy.

Senator Brown: Well, I appreciate that. That is a very forthright answer, and I think very helpful in looking at the process.

I had also inquired about the kind of decision you would have made had you been our Attorney General at the point the request had come in to move the--well, to dismiss the empaneled jury, the very difficult matter that Mr. Gerson had been in a position where he had to decide at the time. You I think had rightly suggested you wanted an opportunity to review the facts before you would indicate or felt comfortable in indicating how you would have acted under those circumstances.

Have you had a chance to look at that and form an opinion as to how you would have acted in response to that request?

Ms. Reno. If the Black Caucus came to me and said, "Look, we don't want to talk about the specific facts of the case, the specific evidence of the case, but we are concerned that the United States

Government does not think that a person can be tried in a major city of this country," then I would talk to them.

Senator Brown. Well, I was thinking more in terms of the specific decision that Mr. Gerson made; that is, to reverse the position of the Justice Department, or at least their representative that was handling the case, and join the defense in the motion to dismiss the empaneled jury.

Ms. Reno. If you are asking--because I understood the question related to the meeting and the discussion of the meeting. But if you are asking me to comment on specific action that the United States Government has taken in a case pending trial, I don't think it is appropriate for me to comment on that. I mean, that goes back to the other issue.

As Mr. Gerson has said, from his statement, because this issue has arisen in a case pending trial and because we insist that trial be a fair one, this will be the only statement that we make about this action. And this is a pending case, and that is getting deep into the issues, the very specific issues that don't go to policy about the pending case.

Senator Brown. Fair enough. We are batting 50 percent. I had been left yesterday, I think, thinking that you would take a look at this and tell us how you would have ruled if the decision had been yours. And I think--

Ms. Reno. Understand, Senator, what I said yesterday--and I don't know how possible it is with the demand, but I think every lawyer for their client should be ultimately accountable to their client. In my instance, as I have indicated to you, my philosophy of this position is that I represent the American people. So it is an extraordinary balance. But using the experience that I have had in Dade County, what I say again and again to people is: I cannot comment on this pending case. I am not going to be influenced by you politically. But at the conclusion of this case, at the conclusion of this investigation if we do not file charges, I will tell you why I did it and my reasons.

And in many instances--and I don't want to set a precedent for all United States attorneys because I don't know about their workload--what we try to do, for example, in our more sensitive cases is do close-out memoranda explaining our actions. So I am not suggesting to you that I am stonewalling you for all time, but I don't think I should comment on pending cases and the specifics. And I think you should, when this litigation is all over and I am still the Attorney General, if I am, or whatever the case, when it has reached a conclusion and it is not pending, I

think the buck stops with me as to how it got handled, or at least
for the time I was on watch.

Senator Brown. I think you have observed the admiration was a mutual one as we went through the process.

I do have, as I indicated in our discussions when you visited the office, some follow-up questions in several areas, and I don't know how much time we will have to get to them, but I thought I would proceed with it.

You have already, frankly, addressed some of the problems surrounding Mr. Gerson's activities prior to your coming. Mr. Gerson, of course, the Acting Attorney General prior to your assuming that role, had directed the prosecutor in the Ford trial to reverse the prosecutorial position and agreed to the defense motion to dismiss that jury, and, moreover, assent in the position of taking a jury from Memphis, rather than Jackson.

My question is: Would you have taken the same action? Do you agree with Mr. Gerson's directive, or do you disagree with him?

Ms. Reno. Senator, I couldn't answer that question, because I would have to research the law and look at the legal issues involved. But one thing I am very clear on, having talked to Mr. Gerson and having read his statement, is that he did it because he believed he was right.

Senator Brown. I wasn't asking about his belief, but this was something that I think I had mentioned when we chatted, and I do think it is a relevant question to know what your feelings are with regard to it.

Ms. Reno. Each case, you have to look at carefully and on the law, and I would have to look at it. For me to comment on something as complex as that jury selection issue in that case would really-- I would have to research everything and understand it clearly.

Senator Brown. My hope is that you would be willing to look at that and give us your feelings on it.

I guess a follow-up question, really, is: Do you think racial quotas ought to be used in jury selection?

Ms. Reno. Quotas shouldn't be used anywhere, sir.

Senator Brown. What about the advisability of selecting a venue to try a case based on the racial makeup of the jury that might result on those different venues?

Ms. Reno. Again, what you do in a case like that is just look at that case, look at the whole situation with respect to that case, and make a judgment based on the evidence and the law.

Senator Brown. Again, if you would today, if you have a chance, I would appreciate knowing what conclusions you come to with regard, specifically, to the Ford case, if you have a chance to look at it.

It has been a long-time practice--at least that is my understanding--in the Justice Department to not discuss ongoing criminal cases with non-litigants; that is, people who are not parties to the case. Clearly, counsel for the various parties will chat. That is a normal part of the negotiations. But, as I understand, it has been the practice of the Justice Department to not discuss those criminal litigation matters with non-litigants, with people who are not parties to the case.

Do you favor that policy, or may I take it from what you have said that you think it is proper to discuss with non-litigants the criminal litigation?

Ms. Reno. I don't think it is proper to discuss with anybody who doesn't have firsthand knowledge of the evidence, the evidence in a pending case. If somebody wants to give me law, I say give it to the prosecutor handling it and give it to me. We will be happy to review it.

But, for somebody to come in and say, "This man is innocent because," and they don't have any firsthand knowledge, that is just plain wrong.

Senator Brown. So, I take it, your position is that you would talk with people who are not parties to the case, but you would not talk to them if they did not have firsthand knowledge?

Ms. Reno. What you have to do, I think, is distinguish between policy and policy-related issues that go beyond that case, where I think the lawyer for the United States has to be accessible. But, where you get into the evidence and the law and the particular case and you try to in any way politically influence somebody, I think that is just plain wrong.

Senator Brown. I take it, in this case, that you would be advocating a change in policy to the point that you would be

willing to talk with non-litigants about criminal cases when it reflects on the overall policy matters. Is that a fair summary?

Ms. Reno. Well, what Mr. Gerson said here is that they expressed no opinion about the case against Mr. Ford, and that is what he indicated to me.

Senator Brown. I am not trying to play games with this. I am trying to get an idea if you think it is appropriate to talk with non-litigants in the case about a case in the event they talk about policy, not the details for a particular case.

Ms. Reno. I think that, in terms of policy that is not related to the evidence and the law of the case and they relate to other cases and other issues, it is important that people be able to discuss that. To say that I cannot discuss general policy that affects so many different issues because it may relate to that case, I think interferes with my serving as a lawyer for the people, my providing the best advice that I possibly can, and my working with you in terms of developing--

Senator Brown. I appreciate that. I guess my question then is: Is it appropriate or would you as Attorney General meet with congressmen that come to talk about which venue is appropriate for the selection of a jury in a particular case? At least that is my understanding of what occurred here. They came and talked about the appropriateness of a venue and whether or not you should dismiss the jury.

Ms. Reno. You would have to talk with Mr. Gerson about what specifically they said.

Senator Brown. I guess I am asking you. If someone came to you and said, "Look, there is an existing criminal case that is being tried by the Justice Department. We want to talk to you about what is an appropriate venue for the jury selection in that case," what would your position be on that discussion?

Ms. Reno. It would depend on who called me and what they said, Senator.

Senator Brown. Well, I thought you had just said you would not

talk with them about criminal litigation with non-litigants unless they were talking about general policy. Have I misunderstood?

Ms. Reno. Senator, when they call me and ask to come to meet with me, I am going to ask them what they want to meet with me about, and if they say, "We want to meet with you about what appears to be a Justice Department policy, that a city in America just automatically cannot give a person or the Government a fair trial," we want to understand that. I would meet with them.

If they said, "We want to influence you, and we are going to cut your appropriation, and we are going to give you fits because you prosecuted this person," I would say, "I am not going to meet with you." And if they got in the back door without my knowing about it and started to tell me, I would try to figure out how to gracefully throw out 30 congressmen.

Senator Brown. The circumstances here that they talked about, as least as I understand it, relate--they talked about the appropriate venue and a motion in the case not related to general policy, but a specific motion in the case to dismiss the jury. Is that policy? Is a motion to dismiss the jury in a particular case policy, or is that something that you think is appropriate? Is it appropriate to talk about the dismissal of a specific motion to dismiss a jury in a specific case?

Ms. Reno. Here is what Mr. Gerson advised me. He said that--

Senator Brown. I am not talking about Mr. Gerson. I am talking about you, what your policy is.

Ms. Reno. My policy is going to be when they call me, I am going to judge it on a case-by-case basis, and if it relates to policy, I am going to try to address that issue. And if relates to the evidence and the law, I am going to tell them it is better to deal through the litigants.

Senator Brown. Would a motion to dismiss a jury in a specific case, in a specific motion, fall into the policy category you have outlined?

Ms. Reno. It could. And I don't mean to be evasive, but the one thing I have learned as a prosecutor is never deal in what if's. Because if you deal in what if, and you answer it one way, there

will be sure to be some new fact added to it by the curious circumstances that develop in human existence, so that your judgment on the what if didn't apply to the what if plus one.

Senator Brown. Will you offer a job to Mr. Gerson in the Justice Department?

Ms. Reno. No. Mr. Gerson--I haven't offered him a job, and he said he was looking forward to private practice and couldn't wait until--he hoped I got confirmed.

Senator Brown. Do you plan to retain Mr. Hubbell, who, as I understand it, was the one who arranged this meeting with the Acting Attorney General?

Ms. Reno. I haven't made any judgments. As I said, Senator, one of the things that I have tried to make a promise to myself, as people call me and Senators called me and other people called me and told me about the number of fine applicants, is don't think about it until after confirmation.

Senator Brown. They advise me that the U.S. Attorney, Edward Bryant, has overseen the Ford case for over two years. As you know, he resigned when he was ordered to seek a new jury by the Acting Attorney General.

Will you be asking him to finish the case if you are confirmed?

Ms. Reno. I don't know, sir. I don't know all the details of the current posture of the litigation and who is handling it, and I would make a judgment if you confirm me.

The Chairman. Thank you.

Ms. Reno, before we go to our colleague from Illinois, let me just mention three things. I hope you will not close your ears-- and I realize it is a difficult and legitimate series of questions you had regarding the situation involving Congressman Ford. But I would point out to you that in the L.A. trial, in the Los Angeles trial of the police officers, a number of Senators and Congressmen petitioned our last Attorney General to bring a Federal cause of action for violation of the civil rights of the individual, and in the process petitioned him to deal with venue, and to be sure that we didn't repeat what happened before, which was an all-white jury. And we saw the impact of what happened. That related to process, not whether he was innocent or guilty, but indicated that it should be pursued.

And he responded, and President Bush responded, and they did move federally against the police officers, with much more pressure put on them, that I am aware of, from speaking to Mr. Gerson, than was done with regard to the Black Caucus.

So I hope you don't close your mind to hearing requests from members of both parties relative to the procedural way in which cases are handled, and I would offer that as the most significant glaring and wide-known example of the Members of Congress in both parties, in both Houses, dealing with that issue.

Ms. Reno. I wouldn't close my mind to it, but I wouldn't do it based on Congressmen or Senators petitioning me when they may not know the facts or the details or the law. I would make the judgment based on the evidence and the law. If people came to me and tried to politically influence me into doing something that I didn't think was right, I would resist it in every way I possibly could.

The Chairman. Well, you are living up to your reputation of being tough and stiff-necked on matters like this. That is not what I am saying. All I am saying is--

Laughter.

That is not what I am saying. What I am saying is what we did, a number of people, is petition the Attorney General to determine whether or not a civil rights cause of action should be brought in Federal court against the police officers in question; and, secondly, if he concluded to do that, to look at the venue issue, in which case he did both things.

As I understand it, the Black Caucus didn't even go that far, according to Mr. Gerson, with whom I have spoken personally at the VFW dinner that was held in Washington where we had a chance

to have a 10-minute conversation, and from what you say. And I don't want to argue with you about it because I don't want to be kicked out of your office before you get in it.

Senator Hatch. Could I just mention one thing? I also chatted with Mr. Gerson, and my recollection of my conversation is very similar to yours, that he took responsibility. He said that Mr. Hubbell has been a very fine person to work with, that he has supported him every step of the way. And so I think that just kind of sets the record straight, and I have a great deal of confidence in Stuart Gerson. He is a very fine human being who has taken over as Acting Attorney General at a time that is very difficult for him. But he has enjoyed it. He has enjoyed working with Mr. Hubbell, and he said he has acted in the highest sense of the law and ethics.

Knowing Mr. Gerson as I do, I have great confidence in that. So he basically said exactly what you have said here today to me.

The Chairman. I might add that I thought that it has been kind of interesting. We Democrats have been beating Mr. Gerson up and about the head for things he has done or not done as Acting Attorney General, and some of my Republican colleagues are doing the same from the other perspective. And anyone who says they enjoy that deserves to be in private practice with a big law firm, with the requirement of having to bill 2,200 hours a year.

But, at any rate, let me yield now to my friend from Illinois.

Senator Moseley-Braun. Thank you very much, Senator Biden, and to Ms. Reno and members of the committee. I have asked for recognition, so as to make a point of personal privilege as a member of the Congressional Black Caucus, given the line of questioning that has been directed to you and the implications that have been made in this hearing suggesting impropriety in the conduct of the caucus on that day.

This was a publicly acknowledge meeting concerning the issue of simple evenhanded justice. But sometimes in the Alice in Wonderland language of this town, some have attempted to transform that meeting into the improper exercise of political influence in pursuit of some hidden agenda.

The meeting was hardly an example of improper political influence. Rather, it was about the improper political influences the United States Attorney in Memphis has injected into the trial of Congressman Harold Ford. The Congressional Black Caucus acted appropriately in bringing a potential miscarriage of justice to the attention of the chief law enforcement officer of our country.

These are the facts, Mr. Chairman: After a racially mixed Memphis jury refused to convict Congressman Ford on bank fraud charges in 1990, a mistrial was declared. The United States Attorney then advanced the unique theory that the government was entitled to a change of venue, because Harold Ford's popularity as a Congressman made it impossible to find 12 residents of Memphis willing to convict him.

For the second trial, the U.S. Attorney had jury selection moved outside of the city, used 9 of his 10 peremptory challenges to strike African-Americans from the pool, and succeeded in obtaining a jury of 11 whites and 1 black to sit in judgment of Harold Ford. That jury is now being bused from Jackson to Memphis to hear the second trial.

It was this cynical manipulation of the judicial system, this assertion that African-American elected officials who effectively represent their constituents lose the basic American right to a trial by a jury of their peers that the Congressional Black Caucus protested.

Presented with these facts, the Acting Attorney General's decision to support the unseating of this gerrymandered jury was simply a proper exercise of his supervisory responsibilities.

Mr. Chairman, Congressman Ford has served the people of Tennessee for almost 20 years. He is surely capable of defending himself in any fair trial, and this question does not go, frankly, to the guilt or innocence, the right or wrongness of his actions with regard to the charges that he is answering to.

Stuart Gerson is a Bush administration holdover whose tenure as Acting Attorney General will expire as soon as the Senate confirms this administration's nominee. Surely, he would have no political agenda in calling for a change based on the

petitioning of the Congressional Black Caucus.

Mr. Chairman, justice is only served if the American people have confidence in the integrity of the jury system. Mr. Gerson acted to protect the public's faith in that system. My colleagues from the other side of the aisle should be supporting him, instead of attempting to drag him and the Congressional Black Caucus down into the quicksand of accusations and innuendo.

What this mud-slinging and finger-pointing is really about, Mr. Chairman, is the disappointment that at this time in our history there are people in elective office willing to stand up and say that equal justice under the law applies to everybody in this country, and that we can go to the Justice Department for justice, even when the subject is a member of the United States Congress.

I just want to make that point for the record, Mr. Chairman. It is an important point. I frankly regret that this nominee has had to go through being asked questions and given insinuations and responding to insinuations all afternoon, because that has been the case, and I have done my level best to hold my peace. Thank you for the time to make this point of privilege. I have attempted to keep it short.

Thank you very much, Mr. Chairman.

1 happens, Senator. As you can imagine, the problem with--the
2 only problem I could imagine with what seems to me a perfectly
3 morally correct position that you are stating is in some
4 trial context--but even if there is a trial context, I will
5 try very hard to see that we do that.

6 Senator DeConcini. Thank you. Now, also Senator
7 Grassley asked questions about intervention of the White
8 House, or if not intervention, at least questions of a case
9 or, you know, what is going on, a review or a summary or
10 bring us up to date. What do you think the policy should be
11 in relating to Members of Congress? Let me give you just a
12 hypothetical, and this is truly hypothetical.

13 If a Member of Congress calls, or his chief of staff or
14 whoever, and asks about a pending case and they don't ask,
15 "We want to know what you are going to do with it," whether
16 or not you are going to proceed with nine counts or two
17 counts, or whether or not you are going to go for the
18 mandatory sentences under Section 409, or whatever it is--I
19 can't remember--but just said, "Can you give me a summary of
20 where you are on the particular case? And by the way, this
21 is a constituent of mine" or "I have an interest in this
22 person. I just want to know what are you doing with it."

23 What is the feeling from your perspective, Mr. Heymann,
24 as to those type of inquiries?

Mr. Heymann. Senator, frankly I should say to you that

PH

1 I think that those are not wise and perhaps--they are not
2 improper, but I think we should discourage them in every way
3 we can. If it is a question of why has the case gone on so
4 long or could you please, Mr. Heymann, try and see to it that
5 this doesn't go on forever and there is a resolution one way
6 or another, that may be different. But I don't think we
7 should tell either the White House or Members of Congress or
8 Members of the Senate about ongoing investigations, and I
9 don't think we should receive advice about ongoing
10 investigations or cases.

11 Senator DeConcini. Well, do you think it is proper to
12 ask the question of, "Can you tell us, is it true that the
13 Justice Department has had this case for six months and won't
14 resolve it one way or the other?" I get complaints from
15 constituents. I have some right now regarding cases on the
16 border, and they are not drugs cases. They are other cases.
17 They can't get an answer from the Justice Department. I have
18 not made inquiries, but I am interested in knowing just
19 exactly what you think is a--and can there be a proper way to
20 just find out why the case is not moving forward? And maybe
21 there is a good reason, and maybe you don't even have to tell
22 the reason, but you can say, "Yes, we looked at it, and we
23 can't move it forward because we are having a witness problem
24 or "We are working on the case" or "There is an active
25 investigation," or, "By God, Senator, you know, this case

PH

1 should be moved up on the docket here and given the priority,
2 because it has been going on for a year-and-a-half."

3 Mr. Heymann. Senator, my answer would be that if it is
4 a question of delay, if it is a question of time, if it is a
5 question of why is this person subjected to such a long
6 delay, I don't think there is anything seriously--I don't
7 think there is any serious problem if you were to call me or
8 Judge Hubbell, if we are confirmed, or Janet Reno. And we
9 could very--and we could decide for ourselves whether it is
10 appropriate to ask, and we would be happy to.

11 If it is a question of the merits of the case, the
12 evidence, either urging or simply finding out about it,
13 unless it is a broad policy issue separated in the discussion
14 from the actual case, I don't think even we should be asked
15 about it.

16 Senator DeConcini. Thank you, Mr. Heymann.

17 Thank you, Mr. Chairman.

18 The Chairman. On that point, if I may, one of the
19 things that we have found on this committee, as in other
20 committees, is that all large Government agencies on occasion
21 find that taxpayers are, to use the vernacular, "hung out to
22 dry" and don't get decisions, whether it is the IRS, whether
23 it is the Immigration and Naturalization, whether it is the
24 Justice Department. And as I understand your answer, it
25 would not be inappropriate for this committee, for example, in

PH

1 its oversight responsibilities, to ask the Justice Department
2 -not ask, demand of the Justice Department an explanation as
3 to why something that ordinarily would take months or a year
4 is taking years or multiple years to resolve. Not asking why
5 you haven't resolved it, what the flash points are, but just
6 to be assured that it doesn't get lost in the crack.
7 Because, as you know from your experience, in U.S. Attorney's
8 Offices, in Justice Departments, in all States and federally,
9 things do get lost. They do drop through the cracks. And
10 while they are dropping through the cracks, people are left
11 out there hanging. Because once someone is indicted, until
12 the matter is resolved--or once it is known they are under
13 investigation, until the matter is resolved, they might as
14 well be convicted in terms of how it affects their ability to
15 conduct their lives.

16 Mr. Heymann. I think it would be entirely appropriate,
17 Senator, for you to call me up or Judge Hubbell and--

18 The Chairman. I have never done that. I have no
19 intention of doing it. But I want to make sure we understand
20 what we are talking about.

21 Mr. Heymann. Simply to say " has come to my attention
22 that there is a case that has been--an investigation that is
23 public, it has been going on for some time. Sometimes our
24 investigations aren't public. Now, that creates a serious
25 problem. If there is a secret investigation, oftentimes

VH
1 people want to know about it. And if asked why is it going
2 on so long, the answer might be, "Mr. Chairman, I can't tell
3 you anything about that subject at all."

4 The Chairman. Right. The real dilemma is secret
5 investigations that the press writes about.

6 Mr. Heymann. Are no longer secret.

7 Senator DeConcini. Mr. Chairman?

8 The Chairman. But they are technically secret--if I can
9 just finish this point. They are technically secret, and
10 what happens is, if John Doe or Mary Smith is named by the
11 press in the secret investigation, and it drags on, it
12 creates dilemmas for John Doe and Mary Smith. But, at any
13 rate.

14 Senator DeConcini. Mr. Chairman, I just want to thank
15 you for going even a little further than I did, and I
16 apologize for infringing on the Senator from Pennsylvania.
17 But to me this is a very important point, because that is
18 what happens to real people out there. They will have an IRS
19 audit turned over to the Justice Department, leaving the
20 impression when it is turned over that there is going to be a
21 criminal prosecution. And then they don't hear from somebody
22 for 6 months. They go to the U.S. attorney in the district,
23 and they say, yes, we are looking at it. You know, somebody
24 has to intervene for them and say if you are going to do
25 something, do it. But decide it.

1 The RTC was the worst example that I ever saw of people
2 being told by the RTC that they are turning it over to the
3 Justice Department to look at it, and then not hearing from
4 the Justice Department, in one case a year. And the person
5 is hung out there trying to get a lawyer to tell them. And I
6 don't know what else to do when people come to me and want to
7 say, you know, "What is going on, can you help me?" It seems
8 like somebody has got to be able to focus on that at the
9 Justice Department, at least to say, "Yes, we found the case,
10 and, by God, it is a very complicated case, and it is going
11 to take a year to make a decision." At least they know.

12 I am sorry, Mr. Chairman.

13 Mr. Heymann. If I may, I just want to be very careful I
14 am not making too much policy while sitting here. I don't
15 have any problem with the expression of concern: "My
16 constituent calls me and says this has been a year and he
17 hasn't heard anything."

18 There may be a problem that I have to think about and
19 consult about with regard to a response. In other words,
20 within the Department there is no problem whatsoever with
21 your saying to me, "This has been going on forever. Will you
22 please, Phil, try and see what you can do about just getting
23 an action one way or the other? Indict him or don't indict
24 him, but do something."

Senator DeConcini. Exactly.

PH

1 The Chairman. Right.

2 Mr. Heymann. I don't have any problem with that.

3 The Chairman. The only point I wish to make is that
4 there is a distinction, it seems to me, between a United
5 States Senator or someone from the White House calling up and
6 saying, "Please don't indict John Doe," or calling up and
7 saying, "Please, when you indict John Doe, indict him on only
8 two counts instead of 20 counts," or "Please tell me where
9 you are precisely in the investigation. Who have you spoken
10 to?" All those things, in my view, are totally--and that is
11 a judgment for you all to make--totally out of bounds.

12 Mr. Heymann. I agree.

13 The Chairman. I have never in 21 years ever contacted
14 the Justice Department on anything that I am aware of
15 relating to anybody under investigation. But, theoretically,
16 I just want to make the distinction here between the role of
17 the Congress and this committee as an oversight in terms of
18 whether or not power is being abused. Power is abused on
19 occasion when individuals are ignored. That is an abuse of
20 power. It is an abuse of power when someone is fingered,
21 everyone knows there is an investigation, and then because it
22 is not convenient or because it is forgotten or because it
23 just doesn't get up on the agenda, that person's life is left
24 out there to atrophy.

25 That is an abuse of power, in my view, as well as going

1 after someone who is unjustifiably targeted. So that is the
2 point. And I know of no example. I am not raising this--but
3 this is always raised, and I wanted to make sure--in the
4 context of what I think the separation of powers requirements
5 are under our system, it is not inappropriate for this
6 committee or an individual Senator to insist that something
7 be moved on and/or an explanation given. Not the outcome,
8 how to move, what precisely you are going to do or not do.

9 At any rate, I yield to the Senator from Pennsylvania.

10 Senator Specter. Thank you, Mr. Chairman.

11 Before the Senator from Arizona leaves, I would like to
12 pick up on the question which he has asked and which the
13 chairman has elaborated upon to express my concern about
14 having Senators call up the Department of Justice and the
15 issue of your making policy in this confirmation hearing. I
16 have the utmost confidence in the chairman of this committee,
17 and if someone had asked me if he called up the Justice
18 Department in 21 years, I would have ventured a speculation
19 that he hadn't, just as he has confirmed it. But what I
20 would like to see done is to have a Department policy in
21 writing on this subject

22 Mr. Heymann. I think you are absolutely right, Senator
23 Specter, and I will move on that right away.

24 Senator Specter. This is the kind of colloquy which can
25 lead to a great many requests coming in to Chairman Biden or

PH

1 Senator DeConcini or any of the rest of us, and you start to
2 get to some tough lines to draw when you pick up the telephone
3 and make a call to the Justice Department. And I think that
4 is something where we ought to have the rules well established
5 and in writing as to what ought to be done.

6 The Chairman. I think that is a good suggestion by the
7 Senator from Pennsylvania.

8 Mr. Heymann. And I appreciate your suggestion, Senator
9 Specter, because I think I was responding too quickly on the
10 questions of delay. I think we have to look.

11 Senator Specter. Because it may be that the chairman
12 would be an inappropriate funnel to have the matters go
13 through to make an inquiry as to delay in consultation with
14 the ranking member, but I would not like to see members of
15 this committee or Senators generally picking up the phone and
16 bringing up cases.

17 Some of us may know something about a specific case, but
18 that is not in our oversight capacity. That is something
19 that ought to be very, very carefully handled.

20 Let me pursue, as I had intended to before Senator
21 DeConcini's inquiry, the responses you gave to Senator
22 Grassley, because I am similarly concerned about the White
23 House, even if it is limited to the counsel, calling up the
24 Justice Department, even if it is limited to the Attorney
25 General, the Deputy, and the Associate Attorney General. And

1 I am concerned about your statement that people don't make
2 rules for the President and the Vice President, because I
3 think we have to make rules for everybody.

4 My own sense is--and, again, I would like to see
5 something in writing on Department policy--that any contacts
6 other than the President with the Attorney General would
7 raise a question in my mind. There are a lot of counsels to
8 the President, and there are a lot of inputs to counsels to
9 the President from the White House. And I wouldn't feel
10 comfortable in having the counsel to the President call up
11 the Deputy Attorney General, your position if confirmed, and
12 to raise some sort of a question.

13 I think the President does have standing. He appoints
14 the Attorney General, and he can fire the Attorney General.
15 But I think even if it is the President, the contacts ought
16 to be preferably non-existent, or if in existence, ought to
17 be in a very, very tightly circumscribed manner.

18 I was a district attorney, and I wouldn't take calls
19 from anybody about a pending case. I wasn't appointed, so it
20 was a little different.

21 Mr. Heymann. Senator Specter, I agree so fully with what
22 you are saying, and I appreciate so much your pulling me
23 back, even on the questions of delay. I am very worried--
24 nobody worries more about White House contacts and congress-
25 sional contacts. Senator Hatch knows what difficulties I

1 created for this committee even on closed cases, and those
2 are much less serious than open cases.

3 If I may, the only time--I am really discussing two
4 things. I am discussing a procedure to make sure that people
5 don't get casual, and that procedure involves the White House
6 counsel and a handful of people. When you get to substance,
7 I don't think that there ought to be--I think that the
8 occasions on which there ought to be contact on an active
9 case between the White House and the Department of Justice
10 are extremely rare. But if I may, let me just tell you there
11 are some examples. I gave one, which was the present
12 investigation in Kuwait, carried out by FBI people. It is
13 not a case. This will generally be investigations. It won't
14 be cases.

15 The FBI people have been in Kuwait trying to find out
16 whether Iraqi agents were trying to kill former President
17 Bush--

18 Senator Specter. Mr. Heymann, that is more than an
19 investigation. It is a case. It is a potential case.

20 Mr. Heymann. If you like--

21 Senator Specter. It is a potential case against a named
22 individual.

23 Mr. Heymann. I have no objection. If we should call it
24 a case, let's call it a case. But the information they get
25 is obviously of great importance to the foreign policy

1 community of the United States Government, too. And so we
2 have to be able to make that available to the National
3 Security Council, which is in the White House.

4 Similarly, if I may take another example, Senator
5 Grassley said really I think you ought to be bringing more
6 cases with regard to a particular type of agricultural
7 shipment to Eastern Europe. I think that the White House
8 could be--that is the type of policy issue that the White
9 House can properly raise. It is a policy matter. And it
10 remains a policy matter even if there is a case of no
11 particular interest to them that may be pending. Oftentimes
12 there will be a pending case.

13 Just as it was appropriate for Senator Grassley to make
14 the suggestion and for us to turn it down if we disagree, the
15 White House can make policy suggestions about litigation
16 strategy, not in an individual case, but across a range of
17 cases, a matter of policy, and we can turn it down if we
18 disagree.

19 Senator Specter. Well, Mr. Heymann, I don't agree with
20 that. I do not agree that the White House can make policy
21 recommendations. That is too broad. I think you have to
22 specify who it is at the White House who has the standing to
23 raise the issue on what kind of a matter and with whom.

24 When you talk about national security matters which
25 impact on an investigation into a possible assassination of

PH

1 President Bush, the Attorney General sits on the National
2 Security Council. If somebody has something to say to the
3 Attorney General, there is a mechanism in place for that to
4 be done.

5 But when you talk about policy of the Justice Department
6 on investigations and the White House having standing, I
7 would want to know precisely who can raise that question.
8 And I would not want to see it broadly diffused.

9 Mr. Heymann. I don't want to see it broadly diffused
10 either, Senator. I doubt if your adavance about keeping
11 politics away from cases and investigations is very different
12 from mine. I have a record in that regard, and I am adamant
13 about it. Whether it is the Congress or it is the President,
14 I want no politics with regard to cases and investigations.

15 Senator Specter. Mr. Heymann, there are occasions when
16 some of us in our individual capacities may know something
17 about a case. It may be perfectly within our rights in
18 calling up someone in the Justice Department or in a capacity
19 looking at legal issues to make a call and to make an inquiry
20 without any suggestion that our status as a Member of the
21 Senate has any special overtone.

22 We are individuals and we do have standing without any
23 suggestion of political impropriety, but I would like to see
24 you give us something in writing on the subject that we have
discussed as raised by Senator DeConcini, the chairman,

PH

1 enough issue to get into and maybe look at.

2 Mr. Heymann. I think it is very much an important
3 enough issue to look at. It may be something that is best
4 handled by going to the Russians and saying, Look, if we are
5 giving you grain, you have to make sure that your ports are
6 fairly open to everybody.

7 Senator Grassley. Yes. Okay. On the question of
8 something you wrote in the Politics of Public Management, I
9 quote, "No one in the White House or the Congress should have
10 any direct contact with those in charge of an ongoing
11 criminal investigation."

12 What safeguards would you institute as the day-to-day
13 manager of the Justice Department to make sure that political
14 figures do not have direct contact with people running a
15 criminal investigation? And maybe before you answer that, a
16 couple things that are closely related that you might answer
17 in your answer. Under what circumstances would it be
18 appropriate for Members of Congress to voice their concerns
19 to you about how particular prosecutions or investigations
20 might be proceeding, and also what about contact with White
21 House officials concerning a particular prosecution or
22 proceeding?

23 Mr. Heymann. Senator Grassley, I too link the White
24 House question and the congressional question. In both
25 areas, I think the general rule which I hold very strongly is

PH

1 that in dealing with the specific investigation or a specific
2 case, there should be as little, if any, influence from the
3 White House and also from Congress as we can set up.

4 You asked how would we do it. I think the best way to
5 do it would be for the White House--and I am only going to
6 refer to the White House--to establish a system that only the
7 President's counsel, other than the President and the Vice
8 President, who I don't think we should be making rules for in
9 any way, only the President's counsel should communicate with
10 the Justice Department on an individual case or investigation
11 and that if the President's counsel communicates, it ought to
12 be only with the Attorney General, the Deputy Attorney
13 General, or the Associate Attorney General, so that we don't
14 have a lot of people making comments that a lot of line
15 attorneys may not understand.

16 Now, when should even this take place--by the way, there
17 may be a situation like the investigation of the Kuwait
18 matter, the effort perhaps to attack former President Bush.
19 In that situation, the Attorney General or me or the Associate
20 Attorney General ought to be able to say, yes, about this
21 matter, the National Security Council can be in contact with
22 the Terrorism Section of the Criminal Division. But always
23 these two filters, the President's counsel and the three of
24 us in the White House.

25 When should it ever happen? Because I can't say never.

1 It is almost never. There has to be permissible contact
2 through us, not otherwise, when there is a major national
3 security issue involved. The Kuwait case is a very good one.
4 This is an investigation on our part as to whether Iraqi
5 agents were trying to assassinate President Bush. It is also
6 a major foreign policy issue, so the National Security
7 Council has to be involved. So there has to be an exception
8 running through us for national security cases, and finally,
9 although I think we should try to avoid it as much as
10 possible, there are broad policy issues that sometimes arise
11 in litigation, sometimes arise as part of litigation. If
12 possible, we should try not to discuss them in the context of
13 an individual case.

14 Senator Grassley. Does your term litigation mean
15 criminal and civil? Because I was asking more about the
16 criminal aspect.

17 Mr. Heymann. Even in criminal cases, sometimes a broad
18 policy issue will arise that it would be legitimate to discuss
19 as a policy issue by Senators or Congressmen or White House
20 people.

21 The one you brought up, Senator Grassley, seems to be
22 entirely--seems to me an example, a very good example. What
23 are we doing? What are we doing about cases where the
24 Russian--I didn't know about this before you said it--make it
25 difficult for our ships to come in without paying bribes?

1 evidence that you are very proud of.

2 I think this is an issue that has to be looked at very
3 hard.

4 Senator DeConcini. The Noriega case is not now pending,
5 is it?

6 Mr. Heymann. I don't think so. An appeal may be
7 pending.

8 Senator DeConcini. An appeal may be pending, yes. Very
9 good. Also, you were involved, were you not, when the
10 ABSCAM--maybe you had some questions on that already--on the
11 ABSCAM investigation?

12 Mr. Heymann. Yes, I was, Senator.

13 Senator DeConcini. One thing that bothered me about it--
14 --and I know some of the background regarding your inves-
15 tigation. And one of the things that bothered me about it is
16 that some Members of Congress--as a matter of fact, I
17 believe, if I am not mistaken, one member that now sits on
18 this committee who was found not to be involved although he
19 went to a place where there was an ABSCAM plant or whatever
20 you call them. And yet, unless I am incorrect, it was
21 impossible under the Carter administration to get a letter
22 exonerating that Senator after there was no indictment, no
23 presentation, no investigation opened up.

24 Are you familiar with that type of operation that the
Justice Department refuses to clear a public official or

1 anybody else who may have been taken in on the net and then
2 found to be totally innocent and having turned down taking
3 any action?

4 Mr. Heymann. Senator, I don't remember why there was a
5 failure to write such a letter. I remember there being
6 issues about writing such letters. I think it is very
7 important that a letter be written. And, indeed, I have
8 seen, in preparing for these hearings, other occasions in
9 which letters were written with regard to Members of the
10 Congress.

11 Senator DeConcini. I think in this case, thanks to the
12 junior Senator from Arkansas getting on the floor of the
13 Senate, I believe--my recollection is that he finally
14 embarrassed the administration and the Department of Justice
15 to write a letter for this fellow Senator. It is not my
16 purpose to focus on this particular case, but it is my
17 purpose to have a commitment from you, hopefully, that the
18 Justice Department is not going to do that kind of thing. If
19 somebody is not under serious investigation or a target or
20 under any investigation, the fact that they happen to appear
21 some place or somebody made some allegation that turned out
22 to be groundless, the Justice Department is not reluctant,
23 including the FBI or DEA or anybody else, not reluctant to so
24 state.

Mr. Heymann. I will try very hard to make sure that

1 not sufficient--for you to refuse a request and, in effect,
2 be unwilling to expose such improper inquiries made to you.

3 Part of the ability of the FBI to function is dependent
4 upon the faith the people have in its independence, and I
5 think it is a useful and, I would argue, necessary adjunct to
6 your refusal to cooperate and/or to respond to any request
7 you believe to be improper or in any way would interfere with
8 or in any way impinge upon your independence. -

9 I have asked previous nominees of the FBI if they would
10 keep a log of all contacts between the Director's office and
11 the White House, and the Director's office and the Congress.
12 Would you be willing to keep such a log?

13 Judge Freeh. I would be willing, assuming operationally
14 it could be done. I think it could be.

15 The Chairman. Judge, what do you believe to be--and I
16 often have asked this question, because I have been here a
17 long time of previous Directors, and many times they have
18 been unable to answer because they have been able to properly
19 suggest that they are not familiar with the day-to-day
20 workings of the FBI because they were not a part of the FBI.
21 But you have, we know, those of us who deal with the oversight
22 functions and responsibilities of the FBI and have for years,
23 and the White House has trumpeted, with good reason, your
24 knowledge of the practical requirements of an FBI agent, and
25 your recitation of your involvement. So I am going to ask

CONTACTS WITH THE WHITE HOUSE

1. ISSUE STATEMENT

Members of Congress have from time to time asked for clarification of the Justice Department's policy on communications between members of the White House staff and DOJ lawyers. Questions on the subject arose at the confirmation hearings of both Phil Heymann and Webb Hubbell. In interviews following his resignation, Heymann raised a related issue, questioning publicly whether it was sound to channel what he claimed was an inordinate amount of the Department's business with the White House through Webb Hubbell.

2. STATUS

Current Department policy on contacts with the White House on any pending DOJ investigation or criminal or civil case is embodied in a May 24, 1993 letter from Heymann to Chairman Biden in response to questions raised at the confirmation hearings.

3. DEPARTMENT POSITION

The letter states that such contacts should take place only between the White House Counsel's Office and the three most senior officials of the Department. The White House Counsel's office may deal directly with the Office of Legal Counsel on matters in which it is seeking the legal opinion of the Department. If continuing contact is required on particular matters, it will be left to the White House Counsel's Office and the senior DOJ official with whom it is dealing to design and monitor that continuing contact.

The Attorney General has made it clear that it is her view that contacts between DOJ and the White House on any pending matter should be limited. The Heymann letter states that it is her goal "to insulate the line attorneys and division chiefs from any effort, however well intended, by persons outside the Department of Justice to influence their actions."

4. JUDICIARY COMMITTEE MEMBERS INTERESTS/POSITIONS

Senator Specter asked Heymann to provide the Committee with a written statement of its policy.

In light of the current controversy over contacts by other agencies with the White House Counsel's office, this issue is likely to generate questions from one or more of the other Republican members of the Committee.

Contacts with the White House
Addendum: Judiciary Committee Members' Positions/Interests

All Committee members urge ethical conduct with respect to Department contacts with the White House, or visa-versa. Expect Republican senators to bring up, by analogy, recent RTC/White House briefings. Senators Hatch and Simpson are the most aggressive on the RTC issue. Senators Grassley, Biden and DeConcini talked a lot about the issue of DOJ contacts with the White House at former Deputy Attorney General Heymann's confirmation hearings.

Senator Thurmond wants the Attorney General to have more freedom to fill top positions within the Department. Senator Specter believes there should be a very narrow limit as to who can speak for the President and believes authority should be delegated to the White House counsel.



Washington, D.C. 20530

May 24, 1993

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Chairman Biden:

The subject of communication between the Department of Justice and the White House arose at both my and Webster Hubbell's confirmation hearings. Senator Specter requested that we provide the Committee the Department's policy in writing.

It is the view of the Attorney General that in the matter of any pending Department of Justice investigation or criminal or civil case only the White House Counsel's Office (with the exception of the President and Vice President) should initiate contact with the Department of Justice. Any other White House staff person wishing to evidence an interest or seek information as to such matters should do so only through the White House Counsel.

These initial contacts should be only with the Attorney General or the Deputy Attorney General or the Associate Attorney General.

The White House Counsel's Office may deal directly with the Office of Legal Counsel on matters in which it is seeking the opinion of the Department.

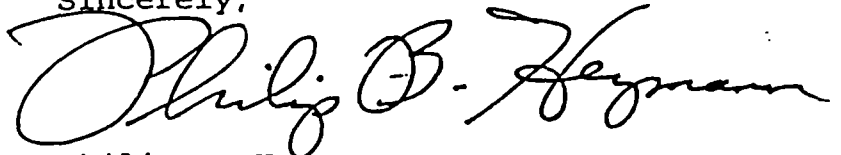
Conversely, if persons in the Department of Justice have a need to contact persons on the White House staff in the matter of any pending Department of Justice investigation or criminal or civil case, the initial contact shall be directed through the Attorney General, the Deputy Attorney General or the Associate Attorney General.

If continuing contact is required on particular matters it will be left to the White House Counsel's Office and the senior Justice Department official with whom it is dealing to design and monitor that continuing contact.

The Attorney General's goal is to insulate the line attorneys and division chiefs from any effort, however well intended, by persons outside the Department of Justice to influence their actions.

On matters of policy, appointments, legislation, budgeting and public relations, members of the White House staff may deal with the appropriate persons in the Department of Justice just as with other departments.

Sincerely,

A handwritten signature in cursive script, reading "Philip B. Heymann". The signature is fluid and elegant, with a large initial "P" and a long, sweeping underline.

Philip B. Heymann
Deputy Attorney General-Designate

PRESS CONFERENCE WITH ATTORNEY GENERAL JANET RENO, THE DEPARTMENT OF JUSTICE, WASHINGTON, DC / WEDNESDAY, JANUARY 12, 1994
JR-12-03 page# 1

dest=notvpcl,sjd,doj,ethics,crime,reales,svngins
data

They always do it in the name of the president. Haven't you had enough yet of having your department run from over there?

ATTY GEN. RENO: I haven't gotten any directions from the White House.

Q General, if you heard it, what was your reaction to the statement made by Senator Dole -- (inaudible due to background noise) -- is the White House in control of the attorney general's office?

ATTY GEN. RENO: I hope that everybody will understand that one day they say that I'm too independent, the next day they say the White House controls me and that people will understand that I do what's best based on the circumstances, and that I try to make the best call I can based on the evidence, the law, and what's right.

Q Attorney General, would you favor the release of all the documents involved in this to the public once the counsel finishes its work?

ATTY GEN. RENO: That would be up to the counsel. I certainly wouldn't comment on it as -- so as to indicate any preference. I think that this is one of the steps that we should take to ensure independence.

Q Is there one compelling factor that -- (inaudible due to background noise) -- to go forward with this?

ATTY GEN. RENO: There's not one compelling factor. Obviously there are so many interests involved -- one, in any investigation, you want to resolve it promptly, and that has been of concern to me, and the fact that I knew it would take some time for the enactment of an independent counsel statute, and I -- but I, at the same time, did not know what it would say.

You want it done as thoroughly as possible, as promptly as possible, and that is certainly a consideration. The president's concerns are obviously important because he does face so many responsibilities as president of the United States and he must be able to focus on them.

So all of these matters, taken into consideration, including the fact that the public has got to be assured, not just in substance but in form, that the matter is being handled in as impartial and objective way as possible -- taking all these things into consideration I made the decision.

PRESS CONFERENCE WITH ATTORNEY GENERAL JANET RENO, THE DEPARTMENT OF JUSTICE, WASHINGTON, DC / WEDNESDAY, JANUARY 12, 1994
JR-12-03 page# 2

Q Can you tell us under which authority, under which regulation you are going to be appointing a special counsel?

ATTY GEN. RENO: I don't know the number of the regulation, but we'll get it for you afterwards.

Q I'd appreciate it.

Q Can you tell us any more about the possible scope of this investigation?

ATTY GEN. RENO: I would not want to discuss the scope because I think that that goes again to the question of the independence.

Q Will it be --

(Cross talk.)

Q (Inaudible) -- eventually what the scope is once the counsel is named?

ATTY GEN. RENO: Again, what I'd like to do is make sure that as we proceed to the selection of a special counsel -- or an independent counsel, as much as I can possibly make it -- that those statements be controlled by them.

Q Ms. Reno, at your last press -- weekly press conference, you indicated that the appointment of a special counsel by you might even be counterproductive to this investigation because there's the possibility that person could not carry on after the Congress passes the independent counsel statute, assuming it does. Is that no longer a concern?

ATTY GEN. RENO: No, I expressed that concern, because one of the things that we want to do is to make sure that the transition is as smooth as possible, and we will explore with the independent counsel any provision that might -- should be included in the independent counsel statute as well.

MORE

WEEKLY PRESS BRIEFING WITH ATTORNEY GENERAL JANET RENO DEPT OF JUSTICE
J-24-03, page# 2 THURSDAY, FEBRUARY 24, 1994

and other matters. We have -- I have regular meetings with the Domestic Policy Council. I am talk -- either talk to the White House or am at the White House probably once a day. Mr. Heymann would have to characterize what his relationship was with the White House. We work with various parts of the White House -- the office -- OMB, the White House counsel's office -- and I feel very comfortable that it is a process that allows a full exchange of information with respect to policy issues and makes sure that, on pending matters where the White House should not be involved, that there is an appropriate isolation of the Justice Department.

Q How closely, if at all, are you working right now with the White House? And what is the relationship as you craft, as you structure out recommendations?

ATTY GEN. RENO: We work with the White House daily on the whole issue of the crime bill.

Q But specifically, how closely are you working on that component of it?

ATTY GEN. RENO: We're working closely with them on every component of it.

Q I'm not sure I fully understood your answer to the Rostenkowski question, and perhaps you can just clarify.

MORE

-

WEEKLY PRESS BRIEFING WITH ATTORNEY GENERAL JANET RENO DEPT OF JUSTICE
J-24-04 page# 1 THURSDAY, FEBRUARY 24, 1994

dest=doj,sjd,ethics,crime
data

Have you had recent discussions with the White House about the appropriateness of the president campaigning — (off mike) ?

ATTY GEN. RENO: I don't recall any recent discussions about it.

Q Ms. Reno, is it appropriate for the associate to handle criminal matters in discussions with the White House?

ATTY GEN. RENO: matter gets up to the — when a criminal matter gets to the point that it has to be discussed with the White House, then it's referred to Mr. Hubbell.

ATTY GEN. RENO: Again, I -- I don't know what specifically -- as I indicated earlier, we're all rather puzzled as to what he was talking about. And I don't know of any inappropriate contact by the White House or vice versa with respect to a pending criminal matter.

Q Just to make sure we understand, you have -- you have an opinion on the president's campaign for Rostenkowski. Have you volunteered that opinion to the White House?

ATTY GEN. RENO: I don't think I should discuss what I talked about with the White House.

Q You just said that you don't recall any recent discussions about this with the White House.

ATTY GEN. RENO: I don't recall specifically discussing with the White House recently whether the president should campaign for a particular person or not.

(Cross talk.)

Q (Inaudible due to cross talk) -- you're not answering here, the question was whether you had volunteered your opinion to the White House. It -- if what you just said is correct, then therefore you haven't volunteered your opinion. Is that correct?

MORE

