JOHN SCHMIDT BRIEFING BOOK
May 1994

JOHN SCHMIDT
BRIEFING BOOK
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Clinton Presidential Records
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BRIEFING PAPER
JOHN SCHMIDT CONFIRMATION HEARING
UNITED STATES TRUSTEE PROGRAM

PERSONNEL/ADMINISTRATIVE ISSUES CONCERNING U.S. TRUSTEE POSITIONS

ISSUE STATEMENT

The United States Trustee Program has two personnel and administrative issues that concern the 21 regional United States Trustee positions.

The foremost issue is that there are continuing leadership vacancies in numerous United States Trustee positions as well as the Executive Director of the Program. When the Administration took office in January 1993, 8 of the 21 United States Trustee positions were vacant, some for quite some time; another 3 positions were also vacant but were occupied by holdover United States Trustees whose terms had expired; the remaining 10 positions were filed with incumbents sitting in unexpired terms.

The second issue concerns the Attorney General's ability to remove incumbent United States Trustees who have time remaining on their five-year terms. When the Program expanded nationwide in 1986, Congress created a five-year term of office for United States Trustees at the same time it gave the Attorney General the authority to remove United States Trustees, with or without cause, e.g., 28 U.S.C. 581. A 1990 amendment to the civil service laws, however, extended certain procedural and appellate protections to employees in the excepted service. On March 30, 1994, the Merit Systems Protection Board (MSPB) issued a decision in an appeal by a former United States Trustee who had been removed from office noting, in dicta, that United States Trustees may be covered by the due process protections specified in 5 U.S.C. 7511, unless the head of the agency certified that the position was exempt due to its confidential, policy-making or policy-advocating nature. Relying on another decision it had rendered in January 1994, the MSPB further opined that any determination by the agency head must have been conveyed to the employee prior to taking office. Since the Attorney General has not made the requisite determination with respect to United States Trustee positions, no notice was given to the incumbents prior to their taking office. The combined effect of the two MSPB decisions poses a significant litigation risk if the Attorney General were to proceed to remove the incumbents and appoint new United States Trustees.

Compounding the sensitivity of the issue is that, prior the MSPB decisions, the Associate Attorney General advised all United States Trustees of the Department's position that they could be removed without cause. The Department's letter, which ended up being published in a national trade journal, has served to galvanize positions on both sides of the issue. Furthermore, candidates have been identified to replace several sitting United States Trustees whose terms have not expired.

STATUS

Insofar as the removal of incumbents is concerned, the Office of the Associate Attorney General, the Civil Division and the Office of Legal Counsel have been exploring the litigation risks of pursuing the Attorney General's right to remove United States Trustees without cause since the recent MSPB decisions. Further meetings during the week of May 20th have led to the preliminary conclusion that the risks of trying to vindicate the Attorney General's authority, and immersing the Department in protracted litigation, seem to outweigh the benefits. It remains to be decided, hopefully by the end of May, whether the Attorney General should or will make a § 7511(b) determination to exempt United States Trustee positions from the due process protections.

With respect to the leadership vacancies, one of these positions was filled in April, 1994, another new United States Trustee will enter on duty by mid-June, and several other appointments are expected to be signed by the Attorney General by the end of June.[1] It is also anticipated that the Executive Director of the Program will be appointed by the end of June.

DEPARTMENT'S POSITION.

The Department wants to fill all available leadership slots by the end of this fiscal year.

JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

The Attorney General's authority to remove United States Trustees has been a point of contention since 1985-86 when Congress took up consideration of a nationwide Program. Some, including Senators DeConcini and Grassley, have opposed what they view as a politicization of the office. More recently, Senators Grassley and Pryor along with three members of Congress filed an amicus curiae brief in the MSPB proceeding involving the United States Trustee which addresses, in part, the non-policy-making duties of their position.

The proposed movement of the regional headquarters from Cedar Rapids is opposed by Senator Grassley as well as Congressman Neal Smith. In addition, Senator Grassley wants the Attorney General

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[1]Some of these decisions have also necessitated consideration of moving the location of United States Trustees' regional headquarters. Notably, moving Region 12 headquarters from Cedar Rapids back to Minneapolis which served as the headquarters site until 1987 and moving Region 3 headquarters from Philadelphia back to Newark where it was cited until 1990.

to reappoint Wesley Huisinga, whose term has expired, as the U.S. Trustee for Region 12 (Iowa, Minnesota, North Dakota, and South Dakota). As part of his efforts, he has contact the Deputy Attorney General, the Assistant Attorney General for Legislative Affairs, and the Acting Director of the Executive Office for U.S. Attorneys.

REFERENCE MATERIALS

Memorandum from John Dwyer and Erik Reid to the Deputy Attorney General regarding Senator Grassley's concerns regarding the U.S. Trustee Program and the reappointment of Wesley Huisinga.

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

May 23, 1994

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH THE ASSOCIATE ATTORNEY GENERAL

FROM: John Dwyer
Assistant Associate Attorney General

Erik Reid
Special Assistant to
the Associate Attorney General

SUBJECT: Senator Grassley and the U.S. Trustee Program

PURPOSE: To provide the Deputy Attorney General with information regarding the appointment and removal of U.S. Trustees, and to provide talking points for a telephone call to Senator Grassley.

TIMETABLE: None.

SYNOPSIS: Last week, Senator Grassley called you and Bill Baity, Acting Director of the Executive Office of U.S. Trustees, to inquire whether "all of the U.S. Trustees were being fired, and if so why." In addition, we understand that Senator Grassley stated that a U.S. Trustee appointed during the Carter Administration was allowed to remain in office during the Reagan Administration. This memorandum addresses issues raised by Senator Grassley's call and makes a recommendation as to the response. It also provides additional background information on the U.S. Trustees program.

DISCUSSION:

Establishment Of The U.S. Trustee Program

The U.S. Trustee Program was established by the Bankruptcy Reform Act of 1978 as a small pilot program in 18 judicial districts. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 expanded the program to a total of 88 judicial districts (all states except Alabama and North Carolina). The 1986 Act organized those 88 districts into 21 regions, each headed by a U.S. Trustee. It also removed the restriction that U.S. Trustees could be removed only for "cause" and reduced the term of U.S. Trustee appointments from 7 years to 5 years. In 1990, Congress passed the Justice Improvements Act which included a provision allowing the judicial districts of Alabama and North Carolina to remain outside the jurisdiction of the U.S. Trustee Program until October 1, 2002.

The U.S. Trustee Program was established by Congress to ensure the efficient administration of the bankruptcy system and to preserve and enhance the integrity of that system. Prior to the national expansion of the program in 1986, the administrative aspects of the bankruptcy system were centralized in the U.S. Court system. The major goal of the legislation was to move those functions from the courts to the executive branch in order to enhance the efficiency of the system and to remove any appearance of conflicts-of-interest. Congress, as well as many practitioners, were particularly concerned by the practice of bankruptcy judges appointing private trustees in individual cases. Accordingly, the responsibilities of the U.S. Trustees include appointing and monitoring private trustees, appointing creditor committees, monitoring case and caseload progress, reviewing professional fee requests, and discovering and acting upon cases of fraud and corruption in the bankruptcy system. The oversight responsibilities of the U.S. Trustees extends to all chapter 7 (liquidation), chapter 11 (reorganization), chapter 12 (family farmers) and chapter 13 (debtor repayment) cases filed nationwide.

Removal Of U.S. Trustees

Section 581(c) of title 28, U.S.C., provides that "each United States Trustee is subject to removal by the Attorney General." As mentioned above, prior to 1986, U.S. Trustees were "subject to removal for cause." This provision was deleted by the 1986 Act. As a result of Congress' action, and in light of the Department's long-standing position that the power to appoint carries with it the coinciding power to remove absent a specific statutory restriction, the Office of Legal Counsel (OLC) opined in December 1993 that U.S. Trustees serve at the pleasure of the Attorney General. A copy of OLC's opinion is attached at TAB A.

During the last five years, the Executive Office for U.S. Trustees (EOUST) sought the removal of four U.S. Trustees. One U.S. Trustee resigned when confronted with the recommendation that he should be removed. Two U.S. Trustees chose to resign when confronted with the removal notice. The fourth U.S. Trustee initiated litigation seeking reinstatement. In each of these personnel actions, all of which were initiated prior to January 20, 1993, the EOUST prepared extensive memoranda outlining the grounds for removal.

As mentioned above, Carol Thompson, one of the U.S. Trustees the Department sought to remove initiated litigation seeking reinstatement. On March 30, 1994, the Merit Systems Protection Board (MSPB) issued its ruling which suggested that U.S. Trustees fall within the general class of "employees" entitled to statutory due process protections provided by the Civil Service Due Process Amendments of 1990. Thompson v. Department of Justice, _ M.S.P.B. _, _, 1994 WL 111646 (March 30, 1994). Although classes of employees may be exempted from those protections if the relevant agency head determines they hold positions of a confidential, policy-determining, policy-making, or policy-advocating character, the MSPB found that the Attorney General had never made the necessary determination. Applying a 1994 decision that such a determination must be "conveyed to [the employee] in such a way as to place her on notice of the determination before she accept[s] the position," Briggs v. National Council on Disability, 60 M.S.P.R. 331, 336 (1994), the MSPB reasoned that Thompson was entitled to statutory due process.[1] This effectively means that U.S. Trustees may not be removed by the Attorney General except for cause.

We asked OLC to review the MSPB decision and recommend a course of action. Although OLC believes the MSPB decision is erroneous, they conclude that "the dismissal of any incumbent U.S. Trustee -- even if accomplished after the Attorney General exempts U.S. Trustees from the statutory due process requirements prescribed by [the Civil Service Due Process Amendments of 1990] -- will give rise to substantial litigation risk." A copy of OLC's May 1994 opinion is attached at TAB B.[2]

Senator Grassley's Concerns

Senator Grassley has asked the Department whether all the U.S. Trustees will be fired, and if so why? Even without the issues raised by the MSPB decision, the answer to Senator Grassley's question is an unequivocal "no". The Department's position on the removal of U.S. Trustees, based on the December 1993 OLC opinion, is set forth in Webb Hubbell's February 22, 1994 memorandum to all U.S. Trustees. It states that,

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[1] If the Attorney General had made such a determination, which is provided for under the Civil Service Due Process Amendments of 1990, she would be able to remove U.S. Trustees appointed after that determination with or without cause.

[2] A decision memorandum concerning U.S. Trustee removal strategy will be provided to you by the end of this week.

"[d]espite the rumors you may have heard, we do not intend to seek the immediate resignations of all U.S. Trustees." The memorandum, which was drafted before the Thompson decision, makes clear that the U.S. Trustees serve at the pleasure of the Attorney General. It goes on to state that the decision on whether current U.S. Trustees should remain in office will be made after consideration of "both the past performance of the sitting U.S. Trustees as well as the quality of available candidates for individual regions." A copy of Webb Hubbell's memorandum is attached at TAB C.

We also understand that Senator Grassley stated that a U.S. Trustee appointed during the Carter Administration was allowed to remain in office during the Reagan Administration. There were two U.S. Trustees appointed during the Carter Administration who remained in office after the expiration of their seven-year terms. We believe that Senator Grassley is referring to Bill Westphal.[3] Under the pilot program, Westphal was appointed as the U.S. Trustee for Minnesota and North Dakota on October 1, 1979.[4] His term expired on September 30, 1986. Despite the expiration of his term, he remained in office until he retired on August 31, 1987. He was able to continue in his position under 28 U.S.C. § 581(b) which provides that "[o]n the expiration of his term, a U.S. Trustee shall continue to perform the duties of his office until his successor is appointed." It is important to note that he was not reappointed when his term expired.

When Westphal retired, Wesley Huisinga was appointed as the Acting U.S. Trustee.[5] On April 24, 1988, he was appointed to a five year term as U.S. Trustee. Huisinga's term expired on April 23, 1993. Like Westphal, he will remain in office until a successor is appointed. He is seeking reappointment to a second term.

We believe that Senator Grassley is really concerned about whether Huisinga will be reappointed. A number of sources indicate that Senator Grassley and Huisinga know each other well. John Logan, the former Director of the EOUST, stated that Huisinga worked for Senator Grassley although this is not listed on his resume. Huisinga's resume does indicate, however, that from 1981 to 1984 he was a precinct committeeman on the Republican Central Committee for Blackhawk County, Iowa. He also worked as a volunteer on various campaigns for Senator Grassley. Huisinga states that he has not engaged in political activity since joining the Department in March 1987.

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[3] The other U.S. Trustee was Hugh Leonard. Under the pilot program, Leonard was the U.S. Trustee for the Districts of Delaware and New Jersey. After the 1986 Act, Pennsylvania was added to his region. He was reappointed in 1987, in part because of the strong support of Congressman Rodino, former Chairman of the House Judiciary Committee.

[4] When the 1986 Act was passed, Iowa and South Dakota were added to the region. The regional office was originally located in Minneapolis; it was move to Cedar Rapids when Wesley Huisinga was appointed as the U.S. Trustee.

[5] Huisinga had previously been appointed Assistant U.S. Trustee for Iowa on March 23, 1987.

As we have done elsewhere, we reviewed Huisinga's performance to determine if he should be reappointed. We sent Huisinga a U.S. Trustee questionnaire and contacted individuals familiar with his work. Based on the mixed reviews he received, and in light of his long-standing partisan activities, we concluded that he should not be reappointed. He was not invited to Washington for a formal interview although we have spoken to him on numerous occasions.[6] After reviewing other candidates, we recommended to Webb Hubbell that the FBI should begin a background investigation of Barbara Stewart, our recommended candidate for the position.[7] Our recommendation was approved and the FBI investigation was started on April 20, 1994.

In light of this information, we recommend that you make the following points in response to Senator Grassley's phone calls to the Department:

1. The Department <u>does not</u> intend to seek the immediate resignations of all U.S. Trustees. This policy is set forth in Webb Hubbell's February 22, 1994 memorandum to all U.S. Trustees.

2. Although the program has many strengths, we are concerned that there is much more that can be done to make it a more effective player in the bankruptcy arena.

3. We are therefore actively seeking highly qualified bankruptcy practioners to serve as U.S. Trustees in those regions where there are vacancies. We are especially proud of Arthur Gonzalez, the Attorney General's first U.S. Trustee appointment. Mr. Gonzalez was a career Assistant U.S. Trustee in New York for three years before his appointment.

4. We understand that Senator Grassley is concerned about the status of Wesley Huisinga. Mr. Huisinga has been a dedicated U.S. Trustee during his term. However, his five-year term as U.S. Trustee has now expired. We have considered reappointing Mr. Huisinga, but we have decided to move forward with another individual.

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[6] The Office of Legislative Affairs recommends that we interview Huisinga. We are willing to do that if necessary.

[7] If Barbara Stewart is appointed as the U.S. Trustee, we would also move the regional office back to Minneapolis.

RECOMMENDATION:

We recommend that you contact Senator Grassley and make the points set forth above.

APPROVE __________

DISAPPROVE ________

OTHER ___________

cc: Sheila Anthony
Assistant Attorney General
Office of Legislative Affairs

U. S. Department of Justice

Office of Legal Counsel

Kofisky
Shiffrin
Powell
Johnsen
Yates
Murphy
Ret.

Files

Office of the
Assistant Attorney General

Washington, D.C. 20530

December 16, 1993

MEMORANDUM TO WEBSTER HUBBELL
ASSOCIATE ATTORNEY GENERAL

From: Walter Dellinger
Assistant Attorney General

Re: Standards for Removal of United States Trustees and Assistant U.S. Trustees

You have asked for our assessment of the conditions under which the Attorney General may remove United States Trustees and Assistant United States Trustees from office. According to 28 U.S.C. § 581(c), "[e]ach United States trustee is subject to removal by the Attorney General." Similarly, 28 U.S.C. § 582(b) provides that "[e]ach assistant United States trustee is subject to removal by the Attorney General."[1] Based upon our analysis of these statutes and their legislative history, we conclude that United States Trustees and Assistant U.S. Trustees serve at the pleasure of the Attorney General and may be removed by the Attorney General with or without cause.

I. Congressional Development of the United States Trustee Program

In 1978, after ten years of comprehensive study and investigation, Congress enacted fundamental reforms of the laws governing bankruptcy proceedings. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52-56 (1982) (summarizing several major changes). The innovations in the Bankruptcy Reform Act of 1978 included the creation of ten United States Trustee positions covering 18 pilot districts. See Bankruptcy Reform Act of 1978, § 224(a), 92 Stat. 2662-63; In re Schollett, 980 F.2d 639, 641-42 (10th Cir. 1992) (explaining pilot program). Each United States Trustee was to be appointed by the Attorney General for a seven-year term, "subject to removal for cause by the Attorney General." Bankruptcy Reform Act of 1978, § 224(a), 92 Stat. 2662-63. Congress also authorized the Attorney General to "appoint one or more assistant United States trustees in any district when the public interest so requires"

[1] We note, however, that the "appointment of Assistant U.S. Trustees" has been delegated to the Deputy Attorney General. 28 C.F.R. § 0.15(b)(1)(iii) (1993).

for a term of unspecified duration. Id., 92 Stat. 2663. Although the appointment of Assistant United States Trustees was left to the Attorney General's discretion, Congress directed that any Assistant U.S. Trustee, once appointed, could only be removed "for cause." Id.

United States Trustees and Assistant U.S. Trustees, as originally conceptualized, were "to aid in the administration of bankruptcy cases, a task which the courts had previously performed." In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990); see H.R. REP. NO. 595, 95th Cong., 1st Sess. 4 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5966 (explaining transfer of responsibilities to Trustees). "Congress specified that the U.S. Trustees were to be independent of direct court supervision, as 'executives of the bankruptcy network'; it likened the U.S. Trustee's relation to that of a prosecutor." Revco, 898 F.2d at 500; H.R. REP. NO. 595 at 4, 110, reprinted in 1978 U.S.C.C.A.N. at 5966, 6071-72 (United States Trustees "will act as bankruptcy watchdogs"). Indeed, Congress modeled the United States Trustee program "on the United States attorney system" and "place[d] the United States trustee system in the Department of Justice."[2] H.R. REP. NO. 595 at 100, 111, reprinted in 1978 U.S.C.C.A.N. at 6061, 6072. But Congress chose to provide more employment security to United States Trustees and their assistants than to United States Attorneys and their assistants, granting United States Trustees seven-year terms and empowering the Attorney General to remove Trustees and their assistants only "for cause." Bankruptcy Reform Act of 1978, Pub. L. No. 598, § 224(a), 92 Stat. 2663 (appointment and removal provisions previously codified at 28 U.S.C. §§ 581(b) & (c), 582(b)). The seven-year tenure provision and the heightened standard for dismissal were "designed to make the office of the United States trustee more of a professional and less of a political position." H.R. REP. NO. 595 at 100, reprinted in 1978 U.S.C.C.A.N. at 6061.

Congress overhauled the Bankruptcy Code in 1986 and expanded the United States Trustee system from a temporary pilot program to a permanent, nationwide operation. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111(a) & 307(b), 100 Stat. 3088, 3090-91, 3125 (1986) (creating United States Trustee positions to cover all judicial districts and repealing provision that made Trustee program temporary, rather than permanent). In addition, Congress modified the length and nature of the United States Trustees' tenure, reducing their terms from seven to five years, id., § 111(b)(1), 100 Stat. 3091, and striking the language limiting the Attorney General to dismissal of Trustees only "for cause." Id., § 111(c), 100 Stat. 3091. Congress likewise eliminated the statutory language limiting the Attorney General to dismissal of Assistant U.S. Trustees only "for cause." Id., § 111(d)(2), 100 Stat. 3091. In these respects, Congress diminished the degree of job security afforded to Trustees and Assistant Trustees. Neither of these provisions has since been modified.

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[2] Department of Justice studies and reports concerning the pilot program revealed that a "close working relationship" developed "between U.S. Trustees and law enforcement authorities within the Department in the detection and prosecution of white collar crimes related to bankruptcy, such as embezzlement, fraud, theft, and concealment of assets." H.R. REP. NO. 764, 99th Cong., 2d Sess. 20 (1986), reprinted in 1986 U.S.C.C.A.N. 5227, 5232. Congress viewed this development as desirable, particularly in light of the placement of the United States Trustee program in the Department of Justice. Id. at 20-21, reprinted in 1986 U.S.C.C.A.N. at 5232-34.

II. The Attorney General's Authority to Remove Trustees and Assistant Trustees

Under current law, each United States Trustee is appointed by the Attorney General for a term of five years, 28 U.S.C. § 581(b), but "subject to removal by the Attorney General." Id. § 581(c). The Attorney General may, but need not, appoint Assistant U.S. Trustees, who likewise are "subject to removal by the Attorney General." Id. § 582. This language, when viewed in conjunction with congressional excision of the "for cause" restrictions on discharge, indicates that United States Trustees and their assistants serve at the pleasure of the Attorney General. Cf. Parsons v. United States, 167 U.S. 324, 343 (1897) (repeal of tenure of office statutes "concede[d] to the President the power of removal"). This conclusion is buttressed by the legislative history of the Trustee tenure provisions. The original House bill in the 99th Congress set the terms of United States Trustees at five years and retained the "for cause" requirement for discharge; the House report accompanying the original bill stressed the need to maintain such limitations upon the Attorney General's authority to dismiss United States Trustees and their assistants:

> Removal from Office of U.S. Trustee or Assistant U.S. Trustee. -- H.R. 5316 retains the provisions in effect during the operation of the Pilot Program which permit the Attorney General to remove a U.S. Trustee or Assistant U.S. Trustee only "for cause." If the Attorney General was permitted to remove and replace a U.S. Trustee without regard to cause, it could politicize the Program and thus negate the purpose behind a five-year term of office. U.S. Trustee[s] would potentially be subject to removal whenever a new Administration took office.

H.R. REP. NO. 764, 99th Cong., 2d Sess. 23 (1986), reprinted in 1986 U.S.C.C.A.N. 5227, 5235. The House also characterized its selection of a five-year term for each United States Trustee as a measure designed to "help keep the Program from becoming politicized. If the term of office was four years, a U.S. Trustee's term of office could parallel a president's term in office, creating the appearance of making the U.S. Trustee a political appointment." Id. at 24, reprinted in 1986 U.S.C.C.A.N. at 5236. The Senate, however, responded to the House bill with a comprehensive amendment that included a provision reducing the term of each United States Trustee to four years and rendering Trustees and their assistants "subject to removal by the Attorney General." Thurmond Amendment No. 2772, §§ 204, 205(2), 132 Cong. Rec. 21,987 (August 15, 1986).

Despite concerns in the House about politicization of the United States Trustee program, the bill that emerged from conference and ultimately became law expressly deleted the "for cause" language that had previously cabined the authority of the Attorney General to remove Trustees and their assistants. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111(c) & (d)(2), 100 Stat. 3091 (1986) (providing that Sections 581(c) and 582(b) of title 28, United States Code, are "amended by striking out 'for cause'."). The conference report accompanying the final bill offers no explanation for this development, see H.R. CONF. REP. NO. 958, 99th Cong., 2d Sess. 45-51 (1986), reprinted in 1986 U.S.C.C.A.N. 5246, 5246-52 (joint explanatory statement of the conference committee), although the compromise between the Senate and the House on this point ostensibly involved the adoption of five-year terms for United States Trustees in exchange for the elimination of the "cause" requirement for discharge of Trustees and their assistants.[3]

The decision of Congress to delete the "for cause" language from the statutes governing the tenure of United States Trustees and their assistants gives rise to a strong presumption that such officials serve strictly at the pleasure of the Attorney General. Cf. Parsons, 167 U.S. at 343 (repeal of tenure of office statutes "concede[d] to the President the power of removal"). Separation of powers jurisprudence fortifies this conclusion, particularly in light of the fact that United States Trustees and Assistant U.S. Trustees are federal executive officers under the Attorney General's supervision. See 28 U.S.C. § 586(c); see also Lawline v. American Bar Ass'n, 956 F.2d 1378, 1384 (7th Cir. 1992) ("United States Trustee and the Trustee's assistant . . . are federal executive officers"), cert. denied, 62 U.S.L.W. 3375 (Nov. 29, 1993). The Supreme Court, when faced with an express "good cause" limitation upon discharge of an independent counsel, indicated that separation of powers principles may bar Congress from imposing "a 'good cause'-type restriction on the President's power to remove" certain Executive Branch officials. Morrison v. Olson, 487 U.S. 654, 689-90 (1988). The Morrison decision plainly authorizes Congress to insulate some Executive Branch officials from discharge for less than "good cause," see id. at 691-93, but the separation of powers concerns identified in Morrison militate against finding restrictions on the Executive Branch's power to discharge its officials when Congress explicitly rescinds such limitations. Moreover, in the absence of an express "cause" limitation upon removal, the statutory five-year tenure prescribed for United States Trustees by 28 U.S.C. § 581(b) does not impose any restriction upon the Attorney General's power to remove Trustees. See, e.g., Parsons, 167 U.S. at 342 (construing specified term as limitation on tenure rather than grant of tenure); Chabal v. Reagan, 841 F.2d 1216 (3d Cir. 1988) (same). Because Congress no longer conditions removal of United States Trustees and Assistant United States Trustees upon cause for dismissal, see 28 U.S.C. §§ 581(c), 582(b), the Attorney General possesses unfettered authority to remove all United States Trustees and Assistant United States Trustees from office.[4]

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[3] The debates in the House and Senate following the conference contain only a single, oblique reference to the authority of the Attorney General with regard to United States Trustees: "They have a record of success, but with the added powers and authority contained in this bill, the need will be even greater for the Attorney General to closely monitor the Trustee activities to ensure that abuses of that power do not occur." 132 Cong. Rec. 28,609 (Oct. 3, 1986) (statement of Sen. DeConcini).

[4] This conclusion is not undermined by the Sixth Circuit's statement in Revco that "the U.S. trustee may be removed by the Attorney General if he abuses his office." Revco, 898 F.2d at 501. The Revco court made this observation in dicta suggesting the possible remedies available to a debtor aggrieved by the conduct of a United States Trustee. See id. The observation in no way reflects the Sixth Circuit's studied conclusion about the relationship between the Attorney General and United States Trustees; the statement simply suggests a potential avenue of relief for disgruntled debtors.

U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

May 19, 1994

MEMORANDUM FOR WILLIAM C. BRYSON
ACTING ASSOCIATE ATTORNEY GENERAL

FROM: H. Jefferson Powell
Deputy Assistant Attorney General

SUBJECT: Dismissal of United States Trustees

PURPOSE: To apprise the Acting Associate Attorney General of the risks associated with dismissal of United States Trustees and the methods for reducing these risks.

TIMING: The Federal Programs Branch of the Civil Division must file a brief in Thompson v. Department of Justice, DE-122-92-0182-W-1 (M.S.P.B.), by May 20, 1994, but the Federal Programs Branch is trying to settle the Thompson case. There is no deadline with respect to action involving any other United States Trustee.

SYNOPSIS: Although the appointment statute for all United States Trustees empowers the Attorney General to dismiss Trustees without cause, the 1990 Civil Service Due Process Amendments limit this power to dismiss Trustees absent a determination by the Attorney General that Trustees occupy confidential, policy-determining, policy-making, or policy-advocating positions.

According to 28 U.S.C. § 581(c), "[e]ach United States Trustee is subject to removal by the Attorney General." On December 16, 1993, the Office of Legal Counsel ("OLC") issued an opinion interpreting section 581(c) and concluding that United States Trustees "serve at the pleasure of the Attorney General and may be removed by the Attorney General with or without cause." Memorandum to Webster Hubbell, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, at 1 (Dec. 16, 1993) ("OLC Trustee Opinion"). Two subsequent decisions of the Merit Systems Protection Board ("MSPB") have caused the Executive Office for United States Trustees ("EOUST") to question the conclusion in the OLC Trustee Opinion that United States Trustees may be summarily removed by the Attorney General. See Memorandum to Acting Associate Attorney General William Bryson, from William Baity, Acting Director, Executive Office for United States Trustees (April 29, 1994). Specifically, the EOUST has suggested that the Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2(a), 104 Stat. 461, 461-62 (1990) (codified at 5 U.S.C. § 7511), limit the authority of the Attorney General to dismiss United States Trustees.

The statute that renders United States Trustees "subject to removal by the Attorney General" once limited the Attorney General to dismissal of United States Trustees only "for cause." See Bankruptcy Reform Act of 1978, § 224(a), 92 Stat. 2549, 2662-63 (1978). In 1986, however, Congress deleted this restriction upon the power of the Attorney General to remove Trustees. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 111(c), 100 Stat. 3088, 3091 (1986). Applying Parsons v. United States, 167 U.S. 324 (1897), and reviewing the legislative history of the elimination of the cause requirement for discharge, we concluded that the repeal of the tenure of office "concede[d] to the [Attorney General] the power of removal." OLC Trustee Opinion at 4 (quoting Parsons, 167 U.S. at 343). Although the OLC Trustee Opinion alluded to overarching separation of powers concerns about congressional restrictions placed upon the discharge of Executive branch officers, we did not base our decision upon such a constitutional theory. See OLC Trustee Opinion at 4 (citing Morrison v. Olson, 487 U.S. 654, 689-93 (1988)).

Because our assessment of the Attorney General's authority to remove United States Trustees flowed from federal statutes, rather than constitutional requirements, other federal statutes may furnish job security to United States Trustees. The EOUST suggests that the Civil Service Due Process Amendments -- as interpreted recently by the MSPB -- accomplish this result. The Civil Service Due Process Amendments, enacted in 1990, "extend[ed] to certain employees in the excepted service who are not preference eligibles the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service." H.R. Rep. No. 328, 101st Cong., 1st Sess. 1 (1989), reprinted in 1990 U.S.C.C.A.N. 695, 695. The threshold question is whether United States Trustees fall into the category of non-preference eligible employees in the excepted service to whom the notice and appeal procedures and substantive limitations upon discharge have been extended.[1]

The Civil Service Due Process Amendments include most non-preference eligible excepted service employees in the general definition of "employees" with statutory due process rights,[2] 5 U.S.C. § 7511(a)(1)(C), but expressly exclude certain government employees from the protection of the statutory due process requirements. Id. § 7511(b). For example, an employee "whose appointment is made by and with the advice and consent of the Senate" has

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[1] The protections extended to federal employees by the Civil Service Due Process Amendments include discharge "only for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), "at least 30 days' advance written notice . . . stating the specific reasons for the proposed [adverse employment] action," id. § 7513(b)(1), "a reasonable time, but not less than 7 days, to answer orally and in writing," id. § 7513(b)(2), the right to be "represented by an attorney or other representative," id. § 7513(b)(3), and "a written decision and the specific reasons therefor at the earliest practicable date." Id. § 7513(b)(4).

[2] According to 5 U.S.C. § 7511(a)(1)(C), the term "employee" includes "an individual in the excepted service (other than a preference eligible) -- (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less."

no right to statutory due process prior to dismissal. Id. § 7511(b)(1). In addition, a second group of federal employees, although presumptively entitled to statutory due process, are deprived of this protection if their positions "ha[ve] been determined to be of a confidential, policy-determining, policy-making or policy-advocating character." Id. § 7511(b)(2). We must decide whether United States Trustees fall within this exception to the coverage of the due process statutes.

United States Trustees plainly possess the type of "policy-determining, policy-making or policy-advocating" authority contemplated by 5 U.S.C. § 7511(b)(2), see In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990) (explaining responsibilities of United States Trustees), and therefore could be exempted from statutory due process requirements upon such a determination by the Attorney General. 5 U.S.C. § 7511(b)(2)(C). On March 30, 1994, however, in a case resulting from the 1991 dismissal of Trustee Carol Thompson, the MSPB suggested that Trustees fall within the general class of "employees" entitled to statutory due process because the Attorney General has never made the necessary determination that Trustees hold positions of a confidential, policy-determining, policy-making, or policy-advocating character.[3] Thompson v. Department of Justice, __ M.S.P.R. __, __, 1994 WL 111646 (March 30, 1994) ("[T]he record does not show that the appropriate official or agency made the determination described in 5 U.S.C. § 7511(b)(2)."). Applying a 1994 MSPB decision that a determination under 5 U.S.C. § 7511(b)(2) must be "conveyed to [the employee] in such a way as to place her on notice of the determination before she accept[s] the position," Briggs v. National Council on Disability, 60 M.S.P.R. 331, 336 (1994), the MSPB reasoned that Thompson was entitled to statutory due process unless she was informed of a determination under 5 U.S.C. § 7511(b)(2) before she was appointed to the position of United States Trustee. Thompson, __ M.S.P.R. at __.

The rulings in Briggs and Thompson suggest that no determination made by the Attorney General at this point can deprive incumbent United States Trustees of statutory due process rights. Thus, if the 1994 MSPB decisions in Briggs and Thompson are correct,[4] all Trustees appointed in the future can be exempted from the statutory due process requirements by an appropriate determination under 5 U.S.C. § 7511(b)(2) that is communicated to new appointees,

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[3] The Thompson case is still being litigated by the Federal Programs Branch of the Civil Division as a result of the MSPB decision remanding the case to an Administrative Law Judge. Representatives of OLC and the Federal Programs Branch met with Assistant Associate Attorney General John Dwyer on May 13, 1994, and agreed that the Thompson case should be settled. Simply put, the government finds itself in a virtually indefensible position in Thompson because of the manner in which Carol Thompson was terminated. The record in the Thompson case does not favor the government from a legal or an equitable standpoint. Further litigation of the Thompson case could result in decisions that would foreclose arguments that could otherwise be offered to justify subsequent removal of other United States Trustees.

[4] The Briggs case, like the Thompson case, is still being litigated by the Federal Programs Branch of the Civil Division. The Briggs case was remanded by the MSPB for further development of the record and, ultimately, resolution of the issue whether the former federal employee was exempt from statutory due process requirements. Briggs, 60 M.S.P.R. at 336.

but Briggs and Thompson would foreclose the Attorney General from stripping current United States Trustees of the protections afforded by the statutory due process provisions.

We regard Briggs and Thompson as erroneous insofar as those decisions hold that federal employees cannot be summarily dismissed unless they were informed of their exemption from statutory due process protection before they entered into service. A more logical reading of 5 U.S.C. § 7511(b)(2) indicates that the Attorney General's determination of an exemption must simply antedate the removal of the exempted federal employees.[5] While this interpretation may be entirely consonant with the language of the statute, however, the MSPB has twice ruled that an effective exemption cannot occur once an employee has entered into service. The Federal Circuit could reject this rule developed in Briggs and Thompson, but a jurisdictional barrier may foreclose review of the issue. The statutes defining the jurisdiction of the Federal Circuit preclude an agency from appealing a decision issued by the MSPB unless the Office of Personnel Management ("OPM") intervenes on behalf of the agency. 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(d). Moreover, even if OPM intervenes, the Federal Circuit retains the discretion to refuse to hear the appeal. 5 U.S.C. § 7703(d). Thus, the Federal Circuit cannot be compelled to review the MSPB rule devised in Briggs and Thompson.

* * * *

As a result of the MSPB rulings in Briggs and Thompson, which could be insulated from review in the Federal Circuit by virtue of 5 U.S.C. § 7703(d), the dismissal of any incumbent United States Trustee -- even if accomplished after the Attorney General exempts United States Trustees from the statutory due process requirements prescribed by 5 U.S.C. § 7513 -- will give rise to a substantial litigation risk. If incumbent United States Trustees can avail themselves of the protections prescribed by the statutory due process provisions, the government will be forced to furnish each Trustee with notice of an impending employment action and an opportunity to be heard. 5 U.S.C. § 7513(b). Moreover, the government will have to defend each dismissal as "for such cause as will promote the efficiency of the service." Id. § 7513(a). If the government fails to satisfy either the procedural or substantive requirements, the incumbent Trustee may well be reinstated by the MSPB. The litigation risk can, however, be reduced if the Attorney General immediately issues a formal determination that United States Trustees occupy positions "of a confidential, policy-determining, policy-making or policy-advocating character." See 5 U.S.C. § 7511(b)(2)(C). Once such a formal determination has been issued, the government can present a colorable argument that United States Trustees are exempt from statutory due process protection by the express language of 5 U.S.C. § 7511(b)(2).

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[5] In Thompson, the Administrative Law Judge ruled that an agency head can make an ex post facto determination under 5 U.S.C. § 7511(b)(2) that a position is of a confidential, policy-determining, policy-making or policy advocating character, and thereby justify the summary dismissal of a federal employee who has already been fired. Although the MSPB flatly rejected this position, the MSPB has never addressed the intermediate position that an employee can be exempted from statutory due process requirements after entering into service but before being removed.

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Divider Title: **103**

THE FEDERAL PRISON SYSTEM

1. ISSUE STATEMENT

The following statement provides a brief summary of the Bureau of Prisons' (BOP) population, estimated growth, and major challenges.

2. STATUS

To address the challenges facing BOP, the 1995 President's budget requests a total of $2.6 billion for BOP's operating and construction budgets, a net increase of $378 million over 1994. Within this total, over $100 million is requested to activate nine new facilities in 1995, and approximately $83 million is requested to construct or plan for three new prisons and to provide the annual lease payment for one facility.

Subsequent to submission of the budget, the Administration submitted amendments to Congress that reduced the level of resources requested in the President's 1995 budget by identifying savings in the areas of procurement and GSA rent. BOP's portion of the savings and its corresponding reduction was nearly $9.5 million.

3. DEPARTMENT POSITION

The foremost concern for the Federal Prison System is managing growth in the prison population. As of May 12, 1994, the Bureau of Prisons' (BOP) operated 75 institutions with a rated capacity of 61,853, and an inmate population of 84,700--or **37% over capacity.** In addition to this population, BOP is also responsible for 8,327 offenders housed in contract facilities such as Community Corrections Centers and State and local jails, as well as others who are placed on home confinement. Thus, BOP is currently responsible for a total population of 93,027.

It is estimated that the Federal prison population will grow from the current level of 84,700 to 113,149 by 1998, and 122,092 by the year 2000. These estimates do not factor in any pending legislation, such as the crime bill, which might drive these figures even higher. To alleviate overcrowding, Congress has appropriated in excess of $3 billion for BOP's Buildings and Facilities account (prison construction fund) since 1989. During that time, several new facilities have been activated, and BOP currently has over 30 prison facilities in the design or construction process. Planned facilities will increase capacity from 61,853 today, to 102,759 by the end of 1998. (See attached chart for overcrowding projections).

However, given the current budget climate, it is apparent that we must look beyond construction to address prison overcrowding. The recently released DOJ study on mandatory minimum sentences indicates that the number of low-risk inmates are contributing significantly to the growth in the Federal prison population. Solutions are required that reduce incarceration rates and stabilize the inmate population, while still ensuring that violent offenders, drug traffickers and serious white collar criminals, who have had a deliberate, harmful effect on the country, go to prison.

The rise in the inmate population, both over the past decade and as projected through the turn of the century, is primarily attributable to four factors: (1) criminal justice initiatives; (2) the effects of changes in sentencing guidelines, particularly for drug-related offenses (3) an increased BOP role in housing pre-trial detainees; and (4) an ever greater number of non-citizen inmates.

Time served in prison has increased significantly due to both legislative and policy initiatives, especially for drug, violent, and weapons offenses. For example, time served for federal drug offenses increased by a factor of 3 (from about 23 months on average in 1985 to more than 71 months in 1991). Currently, 61 percent of BOP's inmates are incarcerated for drug-related offenses. BOP projects that over 70 percent of its population will consist of drug offenders by fiscal year 1997.

In addition to drug offenders, the number of criminal aliens in BOP facilities, continues to increase at a faster rate than that for non-aliens. Criminal aliens represent 25 percent of BOP's inmate population, and they are an important factor in its rapid growth. Over 75% are confined for drug law violations, and serve an average of 7.5 years.

BOP has been cooperating with the Executive Office for Immigration Review (EOIR) and the Immigration and Naturalization Service (INS) to establish Institution Hearing Programs at BOP facilities. These programs facilitate the completion of deportation proceedings prior to an inmate's release date, allowing for expeditious deportation at the end of his or her sentence. The Department would support legislation that would allow criminal aliens to serve their sentences in their home countries, via an expansion of the current prisoner treaty transfer system, as long as offenders are appropriately incarcerated once returned to their native countries.

Due to the continual loss of federal detention bedspace in State and local facilities as their inmate populations also continue to grow, the average daily detention population in BOP institutions has increased from 1,200 in 1981 to almost

7,000 (including INS detainees) in October of 1993. USMS's future detention requirements (above those that can be served in State, local, and private facilities) have been incorporated into BOP's population projections.

Possible solutions to the overall population growth include increased use of alternative sanctions when warranted. The Department supports more boot camps, increased sentencing flexibility, greater use of halfway houses, home confinement and other alternatives when consistent with public safety.

Certain provisions in the pending crime legislation have the potential to significantly increase the Federal prison population above current estimates. These include "three-strikes you're out", regional prisons, and expanded Federal jurisdictions. The Administration supports a modified version of "three-strikes you're out". However, we oppose the concept of regional prisons as outlined in pending legislation. Instead, we support direct financial assistance to States (proposed in the House version of pending crime legislation) that would offer greater flexibility to enable them to meet their distinct needs.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS**

Most Judiciary Committee members support increased prison construction.

5. **REFERENCE MATERIALS**

CONTACT: Mike Roper

The Federal Prison System
Addendum: Judiciary Committee Members' Positions/Interests

Republican senators have said: "the Clinton Administration will build less prisons than the Bush Administration would have built." Senator Grassley is concerned that the budget does not allow enough money for prison construction. All Judiciary Committee members support building more prisons. (Senators Simon and Metzenbaum don't really support prison construction, but they won't come out against it.)

Bureau of Prisons
Overcrowding: BOP Request through 1995 President's Budget

	1993	1994	1995	1996	1997	1998	1999	2000
Year-end Population Projection	79,799	88,645	96,690	103,192	108,780	113,149	118,366	122,092
Rated Capacity	57,610	66,867	75,304	88,971	97,346	102,759	102,759	102,759
Overcrowding %	39%	33%	28%	16%	12%	10%	15%	19%

Note: Due to the average time required for prison construction, projects in the 1995 budget increase capacity in the year 1998.

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HEYMANN CONFIRM. HEARING

Heymann

Senator Grassley. I know that you weren't in place when the Department adopted their proposed budget. In fact, maybe very few of President Clinton's people were. But it provides significantly less money for prisons and prison construction in the coming year. You have noted the importance already of incarceration in fighting white-collar crime.

First, if prosecution and jail is a deterrent to white-collar crime, then doesn't it provide similar deterrence to violent crime?

Mr. Heymann. Absolutely.

Senator Grassley. Then how do you reconcile the smaller budget for prisons with the need to prosecute and jail criminals?

Mr. Heymann. Senator, I think this administration will insist on enough prison cells for every violent and dangerous person that we can convict and for drug kingpins and for more, too. It is absolutely essential. It is fair, it is retribution, and it necessary as a prevention in the form of deterrence.

There is a growth program under way in the Federal prisons. The number of prisoners is, as you know, increasing very rapidly, and we will provide capacity for increased numbers of prisoners. How the exact figure of 20 percent less than President Bush had suggested is arrived at, I don't have any idea.

it. And I would encourage you to do everything you can to make sure that women and minorities are hired throughout the FBI. It makes good law enforcement sense, as we have discussed before.

Judge Freeh. It certainly does and I am fully committed to that.

Senator Leahy. Thank you.

Judge, we have probably the Congress sharing the frustration of most Americans in the amount of crime. You always want to do something, and, well, we just pass a law to increase the penalties or whatever. You and I both know from a background in law enforcement that simply increasing the penalty is not enough, people have to think they are going to get caught. But do you have any feelings about the increasing tendency to add Federal penalties on basically run-of-the-mill drug crimes or holdups or things of that nature?

Judge Freeh. I do. I think it is a concern and a belief which has probably matured over several years, both as a prosecutor and most recently as a judge. There are obviously two aspects to it. One is the resource aspect. We do not have enough prisons to house and properly try to work with those that could be worked with in terms of rehabilitation the vast numbers of defendants who are coming into the system and facing, as you point out, increasingly severe and mandatory penalties.

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The other aspect of it, quite frankly, which I found most recently as a judge, is that pure penalties in many cases and with many defendants simply is irrelevant. I had a young man who pled guilty before me earlier this week for a series of homicides and drug-related crimes, and did so in a monotone and in an emotionless state, which had an absolutely frightening impact on me, as I was listening to him. This is a public matter, so I am not commenting on anything that is not public.

In looking at his background, which is also public, it is somebody who grew up without a home, without any love, without any direction, starting from the age of about 3. Those are problems which increased penalties do not begin to address or appreciate. I think there is a distinct class of defendants who reach a certain point in their life where nothing can be done except to incarcerate them for the rest of their lives. They are beyond hope. And whether we like that belief or not, it is a reality.

However, there is another class of defendants who, at either an earlier stage than we have yet attempted or have been successful at or at a later stage, can be worked with, can be helped, can be saved, so to speak, and I think the system has to have some flexibility with respect to that. And I think some of the developments by the circuit courts and district courts with respect to the sentencing guidelines jt

Freeh

appreciate that. But I don't think enhanced and increasing mandatory penalties per se is the answer to anything.

Senator Leahy. I am pleased to hear you say that. Chief Justice Rehnquist recently said the political combination of creating a Federal offense and attaching a mandatory minimum became a veritable siren song for Congress. I am not asking for your views necessarily on that, but in many ways I wish we would work harder at giving you the resources you need, than simply saying we are going to be hairy-chested about the mandatory minimums. Those resources are not, as you suggested in your answer, just resources just of law enforcement; everything from drug education on through.

In the last Congress, the Senate passed a proposal that would have made almost all routine homicides committed with a firearm a Federal capital offense. They would do that, whether the State had a death penalty or not. We do not have a death penalty in Vermont. We do in Texas. But it would be the same in both States. Is that really the best use of the FBI or DEA or the Justice Department, to be suddenly brought in automatically in Federal offenses like a homicide like that, just because it involved a firearm?

Judge Freeh. Speaking and answering as a judge, and not as a prospective nominee, I think that particular conception of Federal jurisdiction is not one inappropriate use of

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Divider Title: **104**

ABORTION CLINIC VIOLENCE

1. ISSUE STATEMENT

The Criminal Division, U.S. Attorneys, FBI, and ATF are working together to utilize federal jurisdiction, where available, to respond to acts of violence against abortion service providers.

Federal law provides a basis for responding to certain types of threatening or violent acts against abortion service providers. For example, federal arson and explosives statutes have been applied successfully to arsons of women's clinics, and there are a number of other statutes which, depending on the facts of the specific threatening or violent act, have potential application. Examples include the following: RICO, the Hobbs Act, mailing a threatening communication, interstate communication of a threat by telephone (if the threat is to bomb the facility, the call need not be interstate), and interstate travel in aid of racketeering. In addition, the Freedom of Access to Clinic Entrance Act of 1994 was placed on President Clinton's desk on May 17, 1994.

2. STATUS

In late October 1993, the FBI instructed all its field offices to contact local police authorities to evaluate the potential for federal investigations relating to abortion clinic violence. Similarly, the field offices were to contact ATF field offices concerning their efforts relating to arsons of abortion clinic facilities. Finally, 32 Bureau field offices were provided specific leads from the Bureau's debriefing of persons brought together by the Feminist Majority Foundation. Those efforts have led to the initiation of several investigations.

Additionally, Criminal Division attorneys, together with Assistant U.S. Attorneys, FBI agents, and ATF agents, are pursuing an investigation aimed at determining whether or not there is a small group of anti-abortionists who are conspiring to commit violent acts, such as arsons and butyric acid attacks, against abortion clinic facilities.

3. DEPARTMENT POSITION

Abortion clinic violence is a high Department priority.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITION

The FACE bill did not come out of the Judiciary Committee, but instead it went through the Labor and Human Resources Committee, chaired by Senator Kennedy, one of the bill's sponsors and a strong advocate of the legislation. Senator Hatch had problems with the measure.

Contact: Dana Biehl

ABORTION CLINIC LEGISLATION

1. ISSUE STATEMENT

The Congress passed legislation protecting access to abortion clinics and their reproductive health services. The bill would authorize criminal penalties and civil remedies against individuals who use force, threats of force, physical obstruction, or destruction of property to deny women access to reproductive health services or interfere with those who provide such services.

2. STATUS

The Freedom of Access to Clinic Entrance Act of 1994 (FACE), was placed on President Clinton's desk for his signature on May 17, 1994.

3. DEPARTMENT POSITION

The Attorney General endorsed this legislation and took a personal role in developing and supporting it.

It has not yet been determined how the new legislation will be enforced. As the Civil Rights Division was deeply involved in preparation of the legislation and in assisting congressional consideration, that Division will likely have some responsibility for its enforcement efforts.

In Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993), to allow clinic owners and doctors to seek injunctive relief, the Supreme Court refused pursuant to a civil rights statute, 42 U.S.C. section 1985(3), against protestors who threaten patients and physically block access to women's health clinics. The impact of this decision however, is negated by the passage of FACE. In addition to the criminal penalties mandated against those who block women's freedom of access to medical clinics, FACE further permits those providing or seeking such medical services to obtain civil injunctive relief and compensatory damages.

Although the Department supported this legislation, we have also attempted to use existing federal law, to the extent possible, to protect women seeking abortions. While the Supreme Court severely restricted the scope of 42 U.S.C. 1985(3) in Bray, in Women's Health Care Services v. Operation Rescue -- National, No. 91-3250, the Department argued in the Tenth Circuit that there are circumstances in which 42 U.S.C. 1985(3) may be applied. In addition, the Supreme Court held in National Organization For Women v. Scheidler, No. 92-780, that RICO, 18 U.S.C. 1962(c) and (d), can apply to the activities of anti-abortion groups that engage in racketeering activity.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

The legislation did not go through this Committee. Senator Kennedy was the principal sponsor of the legislation, and all of the Democratic Senators voted for the legislation. Senator Hatch was a leader of the opposition.

Contact: Dana Biehl

JUSTICE DEPARTMENT BRIEFING WITH ATTORNEY GENERAL JANET RENO THE JUSTICE DEPARTMENT THURSDAY, OCTOBER 28, 1993
J-28-07-E page# 1

dest=djd,sjd,crime,drug,fbi,doj,hlthcr,teleph,cabletv
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ATTY GEN. RENO: I wouldn't comment on our discussions.

Q Even to say whether you've given him the warning, for lack of a better word, that you've given other prosecutors in the past that they should investigate without fear (of ?) favor, without any political considerations?

ATTY GEN. RENO: What I have discussed with every U.S. attorney as I have interviewed them prior to making a recommendation to the president that they be nominated is that I want a department run free of political interference. I want decisions made based on what's right based on the evidence and the law. And that applies to any case pending or that will be developed.

Q Ms. Reno, assuming -- and I do assume that something like the president's health care plan (to include ?) federal law phasing in in 1998 is going to present the Justice Department with a massive fraud problem. Is the Justice Department gearing up for whatever comes down the pipe as a result of the health care plan?

ATTY GEN. RENO: I think you're a little behind times. There has been a massive health care fraud problem in the United States, as far as I can determine. I've heard estimates as much as $80 billion worth of fraud. And one of the first things that I did when taking office was to start seeing what the department was doing now and to try to develop now and for the future an effective effort working with states, working with states' attorneys general and their Medicaid units to have early detection of any fraud and prompt, vigorous investigation and prosecution of any fraud. In instances where the evidence is not sufficient for a criminal prosecution, we want to make sure that procedures are available for civil action.

But health care reform can frankly only help, I think, address the issue of health care fraud. I think, as I have talked to health care task forces and U.S. attorneys offices around the country, they're almost looking forward to health care reform because it's going to simplify the procedures and make detection of fraud much, much easier.

Q Ms. Reno, there was a group of abortion doctors here, doctors who perform abortions, recently to say that they have to wear bullet-proof vests and some of them have armed guards. And they say they've asked the Justice Department to declare the interference at abortion clinics domestic terrorism and have the FBI investigate. Can I ask a sort of two-part question? One, how does that sort of thing work? How do you go about declaring something domestic terrorism? And specifically, in the case of abortion protestors, is there such a declaration?

ATTY GEN. RENO: What we have done is working with ATF and the FBI, we're trying to review all the information that is available, take effective action now through prosecution in terms of arson or firebombing cases that arise, and develop sufficient information to make a judgment on whether there is any pattern that should be explored.

Q That investigation then is going on in a specific case of abortion protestors now, whether there is a pattern.

ATTY GEN. RENO: That's correct.

Q Assuming you get the verdict that the government gets in NOW v. (Schindler ?) next month -- the argument is next month, I believe -- will there be an increased use of the RICO statutes in prosecuting abortion violence?

ATTY GEN. RENO: I always wait to see what happens.

Q Ms. Reno, on gays in the military, why did the Justice Department wait more than two weeks before filing the papers with the Supreme Court? Was there disagreement within the administration? And, second, by waiting, doesn't that undercut the argument that it's an emergency matter?

ATTY GEN. RENO: I think in any instance we want to make sure that our decision is an informed one and a thoughtful one. This involved a number of issues, and we wanted to make sure it was carefully considered.

Q Ms. Reno, if this TCI/Bell Atlantic merger is allowed to go through, the resulting company will have access to half the nation's cable customers. I know you don't like to talk about specific cases and I know you don't like to talk about antitrust, but does monopoly power bother you, oligopolies, monopoly power? Do you have any feelings at all about that?

ATTY GEN. RENO: I would not comment on my policies or philosophy about oligarchies in the context of your direct question about that specific merger. And as I have told you in the past, there will be a very thorough antitrust review of that matter pending the finalization of any judgment.

Q Well, could we put aside TCI and --

ATTY GEN. RENO: No, because you're asking in that context.

Q Could I ask another question then?

///

5/12/93 RENO TESTIMONY 5/12/93

Mr. Chairman and members of the Committee, it is a distinct privilege to appear before you regarding the very important matter of ensuring that women have an unobstructed opportunity to choose whether or not to have an abortion. When I appeared before the Senate Judiciary Committee as the President's nominee for the office of Attorney General, this subject was very much on my mind because of the tragic killing of Dr. David Gunn outside of a clinic in Pensacola in my home state. I promised the members of the Judiciary Committee that, if I were confirmed as Attorney General, I would undertake a review of existing federal law to determine what could be done in this area.

Immediately upon assuming office, I directed attorneys in the Civil Rights Division and the Criminal Division of the Department of Justice to examine existing law and report back to me. They did so and their unanimous judgment was that existing federal laws, while perhaps applicable in some instances, were inadequate. I, thereupon, instructed them to cooperate closely with members of Congress to assist in crafting the best possible legislation to remedy this deficiency. I emphasized that the legislation must secure the rights of women seeking reproductive health services and the individuals who provide those services, while respecting the First Amendment rights of those who oppose abortion to express that opposition in meaningful ways. I also stated that passage of this legislation would be one of the Department's top priorities. I remain firm in that commitment.

Shortly after our staffs met for the first time, Chairman Kennedy introduced S. 636. I am very pleased to report my strong

5/12/93

endorsement of this legislation. Our staffs have met subsequently to discuss fine-tuning of the bill and I am told that the spirit of those meetings has been extremely cooperative and productive. The Department is convinced that S. 636 is constitutional and, with minor changes, will effectively ensure women access to abortion without suppressing the legitimate activities of those who oppose abortion.

S. 636 is modeled closely on 18 U.S.C. 245, which prohibits the use of force or threat of force to interfere with an individual's exercise of certain federally protected rights because of the victim's race, color, religion, or national origin. The comparable core of Section 3 of S. 636 would prohibit the use of force or threat of force to interfere intentionally with a person because she was "obtaining abortion services" or "lawfully aiding another person to obtain abortion services." It would also prohibit an individual from intentionally damaging or destroying the property of a medical facility because the facility provides abortion services. In our view, with one minor change, this section very effectively addresses the problem that brings us here today. Although we gather that the phrase "lawfully aiding another person to obtain abortion services" is intended to protect abortion providers, as well as others, we think that purpose would be accomplished more directly by simply adding the phrase "or providing" after "obtaining". The section would then prohibit interference with someone who was "obtaining or providing abortion services." The remainder of the section should be preserved

5/12/93

application and the assistance "is necessary to provide an adequate response to a law enforcement emergency." The assistance that can be provided is limited to "funds, equipment, training, intelligence information, and personnel." Because a state must initiate this process and because the conditions for granting assistance are stringent, this statute does not provide a significant response.

We, therefore, have concluded that existing federal law is inadequate to address this problem. Although some statutes may provide limited relief in specific circumstances, new federal authority is needed to address all of the parameters of the problem. S. 636 would do that by creating a comprehensive response that would create civil and criminal penalties for interference with access to abortion services, regardless whether that interference occurred at the site of a clinic as part of a large-scale action, or involved sabotage in the middle of the night, or involved an attack on an abortion provider in her home or car.

In sum, federal legislation is necessary. The problem is national in scope, local law enforcement has been unable to deal effectively with it, and existing federal law is inadequate to provide a complete response.

<u>Congressional Authority to Enact S. 636</u>

A. <u>The Commerce Clause</u>

Congress has authority to enact S. 636 pursuant to Article I, section 8, clause 3 of the Constitution, which gives it authority to regulate interstate commerce. That authority is broad and an exercise of it will be sustained if Congress has a rational basis

Reno
Confirmation Hearing

ABORTION CLINIC ACCESS

Senator Leahy. You give an answer that, frankly, is music to my ears. Before my time ends--incidentally, seeing Senator Cohen here, I want to add something I mentioned when he was out of the room. Again, when I spoke of federalizing crimes, I made it very clear I was speaking of the fact that we are the ones who write the federalizing of crimes, and my own concern on that.

I know you discussed possible legislation to address the Bray decision when you talked with Senator Kennedy. Justice Kennedy pointed out in his concurrence in Bray that the Attorney General has the authority to place Federal resources at the disposal of State authorities to enforce the laws. Up in my own State three years ago we had 95 abortion protesters, almost all of whom were from out of State, try to literally shut down the Vermont judicial system. Ninety-five people suddenly going into court is an awful lot of people in a State like mine.

Until we have criminal legislation, are there circumstances where you would consider employing Federal resources, including Federal marshals, to protect access to clinics?

Ms. Reno. When I started considering the whole issue of Bray, this is one of the issues that came to mind, and I would like to explore that.

Senator Leahy. To the extent you feel you can, can you keep this committee apprised of what you are going to do on that? Because we are faced with the question we can pass specific legislation. I don't think there is a person up here that doesn't feel that it would be a lot better to leave the discretion within the executive branch if the executive branch is going to be using that discretion.

Ms. Reno. Again, to the extent that it is appropriate so that it is not commenting on a pending investigation or a prosecution or an initiative that is about to be undertaken, I would like to keep you as informed as is consistent with what is the right thing to do.

Senator Leahy. Thank you.

CHOICE

Senator Kennedy. Thank you very much.

Ms. Reno, yesterday we talked about a rather basic and fundamental right in our society, and that is to the extent that we can be free from violence in our communities, free from violence in our home. I thought you spoke very eloquently and knowledgeably about the domestic violence situation, freedom from violence in our streets. And we talked a bit about the gun control issues and what might be done. We want to have freedom from violence in our schools, in our businesses, and to the extent that we can, I think do whatever must be done in enforcement of laws, other steps that can be taken to at least assure that rather basic and fundamental issue.

Today I would like to talk in just a number of areas quickly, and I will follow up with other kinds of written questions. We have talked about these matters previously, and I have a pretty fair idea of where you are, a good idea of where you are. But it is basically on the issues of achieving equal justice under law, and I am talking now really about discrimination and what needs to be done both on enforcement and what might have to be done in terms of support for statutes to achieve the remedies and the outcomes which have been guaranteed by the Supreme Court. I think initially now about Roe v. Wade and the freedom of choice legislation to try and guarantee that particular right. And I understand that you are in support of that legislation as the President is as well.

Ms. Reno. That is correct, Senator.

Senator Kennedy. And I think of also the Bray decision which prohibited women from actually exercising that particular right. At the present time, there are different legislative proposals to try and address that issue in an appropriate way. It is not quite as easy as initially sort of thought, but as I understand, you will work closely with us in the House and the Senate to try and remedy that decision by the Supreme Court so that accessibility will be available to people to give them assurance of that right.

Ms. Reno. That is correct, Senator.

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Divider Title: ______________________________

HEALTH CARE FRAUD

I. ISSUE STATEMENT

A. SUMMARY. The Attorney General announced that health care fraud (HCF), estimated to be $80-100 billion, is DOJ's number two initiative, behind violent crime. HCF enforcement suffers from a lack of resources and fragmentation due to the many health care systems and program-specific law enforcement. Gerald M. Stern, Special Counsel, Financial Institution Fraud, also serves as Special Assistant for HCF, coordinating health care policy issues with the FBI, Department of Health and Human Services Inspector General (HHS IG), other federal agencies (e.g., Defense Criminal Investigative Service (DCIS), Department of Labor Inspector General), and the state Medicaid Fraud Control Units; and regulatory reform with HCFA. HCF enforcement is part of many health reform and crime bills.

B. BACKGROUND. Established last year, the Executive Level Health Care Fraud Policy Group meets monthly to identify emerging fraud, develop national priorities, and share investigative techniques. Members include AAGs for Criminal and Civil Divisions, HHS IG, senior FBI officials, and AGAC HCF Subcommittee representative. A National Health Care Fraud Working Group and 33 local groups include federal prosecutors and investigators as well as Medicaid Fraud Control Units. FBI's HCF case load increased three-fold since 1991.

C. AREAS OF CONTROVERSY AND SENSITIVITY.

1. Competing Investigatory Agencies. As HCF gets more attention, conflicts emerge: HHS IG seeks full law enforcement authority. The DOJ, HHS OIG and HCFA recently entered into an agreement which provides for DOJ access to Medicare contractor records.

2. Administrative Remedies. While HHS IG, not DOJ, decides whether to exclude a provider from Medicare/Medicaid, DOJ often is criticized for HHS' failure to act. For example, National Health Laboratories ("NHL") pleaded guilty to felonies, paid $1.5 million fines and agreed to pay $100 million to settle claims involving billing Medicare and CHAMPUS (DOD health care for dependents) for unnecessary laboratory tests. NHL's president pleaded guilty and served three months. NHL was not excluded from Medicare or CHAMPUS.

D. LEGISLATION. Many crime and health reform bills contain HCF provisions. (See attached memo). The Administration's Health Security Act:

1. Authorizes DOJ & HHS to coordinate HCF control & sharing of data & resources among federal, state & local law enforcement & regulatory agencies.

2. Establishes a control account to fund audits & inspections of health care programs and HCF investigations & prosecutions; funded by criminal fines, civil penalties, damages, and assets forfeited in health care cases (restitution will go to victims and not the account).

3. Creates a general health care fraud crime plus crimes of defrauding new health alliances or plans;

4. Gives civil attorneys access to grand jury material; authorized injunctive relief in HCF cases.

5. Expands HHS IG's authority to exclude providers who commit health care fraud from any health care plan.

6. Authorizes forfeiture in health care fraud cases.

Controversies. 1) The Act does not address the other IGs (e.g., Labor; Defense) and the state-based Medicaid Fraud Control Units and their access to the Control Account; as DOJ endorses their continued activities and access to the Account, we are working on a compromise. 2) The Control Account is called a bounty system where recoveries could skew investigative and prosecutorial decisions. The Act permits funding of salaries of investigators; DOJ is opposed to this use; HHS IG is not.

II. STATUS: Upcoming Events, Actions, and Decisions.

A. Legislation: upcoming hearings.

B. Reallocation of FIF Resources To HCF. DAG Heymann authorized Stern to reallocate up to 25 percent of DOJ financial institution fraud resources to HCF enforcement upon a request from the FBI or the relevant DOJ component -- U.S. Attorney's Office, Criminal, Civil and Tax Divisions -- accompanied by documentation setting forth a justification. DOJ has notified Congress and OMB of the proposed reallocation. Congressional committees have concurred in a reallocation of up to ten percent of FIF resources to HCF enforcement.

III. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITION

Biden: Indicated will drop HCF provisions from Senate crime bill so that they may be part of health care reform.

Metzenbaum: Interested in insurance reform.

Specter: Senior member of Appropriations Subcommittee addressing HHS IG. Criticized NHL Pres.'s 3 month sentence as too short.

Leahy: Privacy interest reflected in concern with law enforcement's access to patient records.

Contact: Debra Cohn

dest=djd,sjd,crime,drug,fbi,doj,hlthcr,teleph,cabletv
data

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Divider Title: ______________________________

FINANCIAL INSTITUTION FRAUD

1. ISSUE STATEMENT

Financial institution fraud (FIF) remains a major challenge for Federal law enforcement and a continuing priority enforcement area. Health care fraud is also a priority, and investigative and prosecutive resources are needed in order adequately to address it. As a means of strengthening health care fraud enforcement, without substantially weakening FIF enforcement, the Department decided to seek the concurrence of the Office of Management and Budget (OMB) and the relevant committees of Congress with the reassignment of up to 25 percent of the FBI agents and Federal prosecutors assigned to FIF to health care fraud this fiscal year.

2. STATUS

Gerald M. Stern, the Special Counsel for Financial Institution Fraud, is coordinating this action personally. Recently, the relevant committees provided their concurrence with reassignment of up to 10 percent of FIF resources to health care fraud enforcement.

3. DEPARTMENT POSITION

Although the reassignment of resources from FIF to health care fraud will result in some decrease in the level of FIF enforcement, a strong enforcement effort, concentrating on major financial institution fraud, will be maintained. (We define "major" to mean (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved multiple borrowers in the same institution, or (d) the case involved other major factors.)

The proposal to reassign up to 25 percent of the FIF resources to health care fraud this fiscal year was based on a number of factors, including: the top priority status of health care fraud; advice from the FBI that although the FBI's inventory of major FIF cases is large, it has recently declined slightly and appears to have leveled off ("major" in this context means estimated losses of $100,000 or more or investigations of failed financial institutions); the FBI's advice that its inventory of failure cases, which require greater expenditures of resources than other FIF cases, has been declining; the FBI's advice that its agents generally can investigate more major cases per agent (other than failure cases) than failure cases; and reports from a number of United States Attorneys that they have effective FIF enforcement in their districts and would like to have the freedom to apply some, or all, of their FIF resources to health care fraud or other priority areas.

The 10 percent reassignment level that recently received the concurrence of the relevant committees of Congress is a maximum overall; some United States Attorneys' Offices may not reassign any of their FIF attorneys, while others may reassign all of them. Additionally, the FBI's Criminal Investigative Division recently determined that it will be able to reassign only 40 to 60 agents from FIF to other white collar crime matters by the end of this fiscal year, a number well within 10 percent of the agents with FIF assignments. The FBI, however, expects to reassign a number of agents from other program areas to health care fraud.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

The Members' comments to the Special Counsel have indicated concern that the FIF program not be weakened, especially at a time when the Whitewater investigation is ongoing. Members are also interested in the Government's recovering financial institution losses resulting from criminal fraud or negligent acts of financial institution insiders or professionals such as attorneys and accountants and are aware that recoveries relative to losses are low. Any one of them might ask what impact the proposed reassignment of Department FIF resources to health care fraud may have on the Government's recovery efforts and question reassigning the resources.

The reassignment of certain resources from financial institution fraud to health care fraud should have no noticeable effect on the recovery of criminal debts such as restitution and fines in financial institution fraud cases for a variety of reasons. First, the personnel who work to collect the restitution and fines ordered in financial institution fraud cases will not be reassigned. Each United States Attorney's office has personnel committed to criminal debt recovery as a regular segment of the staff. These personnel work to recover debt in all criminal cases regardless of the crime which is associated with the loss. This core of personnel will remain committed to enforce the criminal debt recoveries in the financial institution fraud crimes.

Second, the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) employ personnel who work to recover debt on the civil judgments which those agencies have obtained in financial institution fraud cases. Those recoveries are used to offset the restitution ordered where the loss reflected in the restitution order and the loss represented in the civil judgment constitute the same loss. These personnel will not be affected by the proposed shift in resources.

Third, where the defendants who committed financial institution fraud remain incarcerated, are on supervised release from a penal institution or are on probation supervision, the Bureau of Prisons' personnel and probation officers have the responsibility to enforce the criminal debt orders, to set payment schedules, or to utilize the Inmate Financial

Responsibility Program of the Bureau of Prisons to see that payments are made on the criminal debt. None of these personnel is affected by the reprogramming of financial institution fraud resources.

Fourth, the United States Marshals Service has personnel who have been assigned to help the United States Attorneys in eleven districts to find criminal debtors and their assets in cases which include financial institution fraud cases. Although the Marshals Service has not been funded to keep these personnel working on such cases, some are still utilized to search for assets and continue to assist the United States Attorneys in recovering the financial institution fraud criminal debt. The responsibilities of these personnel will not be changed by the reprogramming.

Finally, the Department of Justice is receiving some financial resources as a result of acquiring a certain percentage (3 percent) of the civil collection recoveries to be used to pay for services to locate debtors and their assets in civil debt cases and to offset criminal restitution debts when there are parallel civil judgment orders representing the same debts. This effort will not be affected by the reprogramming.

The Special Counsel will ensure that any reassignments made do not harm the recovery effort.

Contact: Jim Reynolds

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Divider Title: **107**

Whitewater Independent Counsel Appointment

1. Issue Statement

A regulatory independent counsel, Robert Fiske, has been named by the Attorney General to investigate and prosecute matters connected to the failure of the Madison Savings & Loan in Arkansas, and the S&L's relationship with a real estate investment known as Whitewater Realty. The President and Mrs. Clinton were investors in Whitewater, and it has been suggested that they may have received some financial advantage from questionable loans made to the venture by Madison, which was run by friends and co-investors of the Clintons. As of the time of the appointment of the independent counsel, there was no evidence of the Clintons' involvement in any criminal wrongdoing, although there are criminal bank fraud cases arising out of the Madison failure, which had been under investigation by the Fraud Section of the Criminal Division.

Fiske was appointed after media attention and congressional demands for appointment of an "independent counsel," in spite of the fact that the statute authorizing such appointments by a special court division had lapsed. The Attorney General used her authority to make appointments to name Fiske, utilizing a regulatory scheme set out in 28 CFR part 600, granting Fiske authority very similar to that given former statutory independent counsels.

Fiske is actively investigating the Whitewater matter and related matters, including the apparent suicide of former White House official Vince Foster, who had apparently dealt with some Whitewater-related matters on behalf of the Clintons. The Department of Justice has no ongoing role in connection with the matter. A remaining issue is what will happen with respect to Fiske's investigation should the Independent Counsel Act be reauthorized. The Independent Counsel Reauthorization Act, as recently reported out of conference committee, contains a provision which would permit the Special Division of the Court responsible for appointing Independent Counsel to name Fiske, should the Attorney General conclude that a statutory independent counsel is warranted.

2. Status

The Department has no operational role for the time being with respect to the Whitewater matter; it is in the hands of Independent Counsel Fiske.

3. Department Position

Independent Counsel Fiske has been charged with fully and fairly investigating Whitewater, and the Department has full confidence that he will do so. It will cooperate with Mr. Fiske's investigation in every way. Should the Independent

Counsel Act be reauthorized, which appears likely, and should it be concluded that appointment of a statutory independent counsel is warranted, the view of the Department is that Mr. Fiske would be an appropriate individual to handle this matter to completion, and that no new independent counsel should be appointed.

Contact: Jo Ann Farrington

1/13/94

STATEMENT OF THE ATTORNEY GENERAL

I have received a letter from the President's Counsel asking me to appoint a person independent of the government to pursue all matters concerning the Madison bank investigation in Arkansas.

As you know, from the beginning, I stated my preference to have an independent counsel -- where appropriate -- chosen by judges under the independent counsel law to ensure that the person appointed is truly independent. I have also expressed my confidence in the ability of the Justice Department's career prosecutors to conduct a fair, thorough and impartial investigation.

However, it is equally clear that we must do everything we can to ensure public confidence in the investigation, and to separate fact from speculation as rapidly as possible.

The President has so many responsibilities. He must be able to focus on the problems that face America. It is important that public confidence be preserved and that the public knows we are doing everything we can. Thus, I do not think we can wait until the independent counsel statute is reenacted.

Sometimes we have to beyond what is generally appropriate simply to assure people that we have gone the extra mile.

That is why I will begin today considering who to appoint as an independent counsel under Justice Department regulations. I hope to do so as soon as possible.

Thank you.

94-011

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JANUARY 20, 1994

AG
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ATTORNEY GENERAL JANET RENO NAMES ROBERT FISKE AS INDEPENDENT COUNSEL IN MADISON BANK PROBE

WASHINGTON D.C. -- Attorney General Janet Reno today named Robert B. Fiske, Jr., age 63, a former U.S. Attorney and Past President of the American College of Trial Lawyers, to serve as Independent Counsel in the Madison Bank investigation.

Noting that she had promised to appoint someone who was "ruggedly independent," the Attorney General pointed out that Fiske, a Republican, was named U.S. Attorney in New York in 1976 by President Gerald Ford but was retained until the end of his term in 1980 by President Jimmy Carter, a Democrat, because of the universally high regard for Fiske's skill and integrity.

Fiske, a Litigation Partner in the New York City firm of Davis Polk & Wardwell, also served as Chairman of the Attorney General's Advisory Committee of U.S. Attorneys from April 1978 to April 1979, Chairman of the American Bar Association Standing Committee on the Federal Judiciary, 1984-87, and President of the Federal Bar Council, 1982-84.

Fiske graduated from Yale University, B.A. 1952, and the University of Michigan, J.D. 1955, where he was a member of the

Order of the Coif and an Associate Editor of the Michigan Law Review.

After law school, Mr. Fiske went to work for Davis Polk Wardwell Sunderland & Kiendl in Manhattan. Two years at the firm were followed by four years at the United States Attorney's Office for the Southern District of New York where Fiske served as Assistant Chief of the Criminal Division and head of the Special Prosecutions Unit on Organized Crime.

Fiske returned to Davis Polk & Wardwell in 1961 where he became a litigation partner in 1964, specializing in securities and antitrust cases.

After he became U.S. Attorney in 1976, Fiske handled a number of important cases personally, including the conviction of narcotics kingpin Leroy "Nicky" Barnes and the labor racketeering conviction of Anthony Scotto and Anthony Anastasio.

Returning to Davis Polk & Wardwell in 1980, Fiske's active practice included the defense of Babcock & Wilcox, the manufacturer of the nuclear reactor at Three Mile Island in a $4 billion damage suit brought by General Public Utilities and the defense, as co-counsel, of the National Football League in an antitrust suit brought by the United States Football League.

Fiske is a former Chairman of the Judicial Conference of the Second Circuit Planning and Program Committee, a Trustee of the Vermont Law School and a member of the Board of Visitors of Michigan and Fordham Law Schools. He is chairman of the Police Commission in his home town of Darien, Connecticut.

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94-26

The Washington Times

DATE: 3/8/94
PAGE: A13

Fiske says hearings would harm probe

By Jerry Seper
THE WASHINGTON TIMES

Special counsel Robert B. Fiske Jr. urged congressional leaders yesterday to refrain from hearings on the Whitewater-Madison affair, but political pressure was building on Capitol Hill for Democrats to accede to Republican calls for the public airings.

Mr. Fiske, named by Attorney General Janet Reno to look into Whitewater-Madison, said congressional hearings would "pose a severe risk to the integrity of our investigation."

He told Senate and House leaders that hearings would overlap with an ongoing federal grand jury investigation into accusations of financial irregularities by Madison Guaranty Savings and Loan Association and its ties to President and Mrs. Clinton through Whitewater Development Corp.

Mr. Fiske said the possibility that congressional witnesses would be granted immunity from prosecution in exchange for their testimony could make premature public disclosures of "matters at the core of the criminal investigation."

Mr. Fiske expressed his "strong concern" about hearings in a letter to Senate Banking Committee Chairman Donald W. Riegle, Michigan Democrat, and Sen. Alfonse M. D'Amato, New York Republican and ranking GOP member of the panel.

"For these reasons, we request that your committee not conduct any hearings in the areas covered by the grand jury's investigation, both in order to avoid compromising that investigation and in order to further the public interest in preserving the fairness, thoroughness and confidentiality of the grand jury process," he said.

"The concerns you outline in your letter — that a parallel congressional investigation would interfere with your inquiry — are compelling and accurate," Mr. Riegle said in a return letter. "It is my view that the Banking Committee should defer to your investigation."

Rep. Henry B. Gonzalez, chairman of the House Banking Committee, who received a similar letter from Mr. Fiske, responded that he had "no intention of taking any action that might interfere with, compromise or otherwise hinder" the Fiske inquiry. But the Texas Democrat added that oversight hearings on the Thrift Depositor Protection Board are scheduled for March 24, and "I cannot prevent members from propounding questions" about the Whitewater-Madison affair.

Mr. Fiske also said he had "similar concerns" about congressional efforts to conduct ethics inquiries into revelations that secret Treasury Department briefings were held with White House officials regarding an inquiry by the Resolution Trust Corp. into the Clintons' ties to Madison.

Congressional Republicans, led by Senate Minority Leader Bob Dole of Kansas and Rep. Jim Leach of Iowa, ranking GOP member of the House Banking Committee, have demanded hearings in both the Whitewater-Madison affair and the RTC briefings. They rejected the Democrats' balking yesterday.

"The Democrat-controlled Congress has never been shy about exercising its oversight responsibilities ... and there's no reason to make an exception for Whitewater," Mr. Dole said.

Mr. Leach agreed, adding, "It looks like the grass is now afire and it may be approaching the forest" unless something is done in Congress to at least attempt to dig into the matter.

House Speaker Thomas S. Foley and other House Democratic leaders tentatively have agreed to hold a special meeting this week, possibly on Thursday, to discuss the Whitewater-Madison issue.

"It has not been formalized as of yet," said an aide to Mr. Foley last night. "But they're working on it."

"Events are unfolding at a pace which makes it all the more imperative that the Congress carry out its congressional oversight function," House Minority Whip Newt Gingrich, Georgia Republican, said in letters to the Democratic leaders requesting the meeting.

House Democratic chairmen also are considering a separate meeting on Thursday to discuss the Whitewater-Madison tempest brewing in an election year.

"They are getting concerned that the [Democratic] leaders aren't doing anything to stop this thing before it gets worse," one senior Democratic aide said last night.

"Better to go on the offensive than sit around looking like we're helping to hide something for those bunch of clowns" at the White House, said one Democratic committee chairman.

"I don't give a damn about the Republicans," said a second Democratic chairman. But "it stinks what we're not doing."

Meanwhile, Attorney General Janet Reno rejected a Republican request to suspend Associate Attorney General Webster L. Hubbell, a longtime Clinton confidant, until questions are resolved about his involvement in Whitewater-Madison.

Mr. Hubbell, a former law partner of Hillary Rodham Clinton's, represented the RTC in a lawsuit directed against Madison after Mrs. Clinton had defended Madison before state regulators during Mr. Clinton's tenure as Arkansas governor. The Arkansas thrift was seized by federal regulators at a cost to taxpayers of $50 million. 4

• *Paul M. Rodriguez contributed to this report.*

4

ATTY GEN. RENO: No.

Q Is there any chance the associate attorney general would hold a press conference and talk to the press himself about this matter, or --

ATTY GEN. RENO: You'd have to ask him.

Q General, I noticed you've given us these rules about contacts between prosecutors and defendants. Do you have any views about contacts between investigating agencies and people who are being investigated, such as the contacts that have apparently taken place between the **Treasury Department** and the RTC and the White House?

ATTY GEN. RENO: I don't know the details of that contact, so I don't know it -- I'm puzzled that you've put it in two different contexts. If you could ask me a specific question, maybe I can address it.

Q Do you have a view about whether such contacts are proper?

ATTY GEN. RENO: Which contacts? The contacts you're referring to in --

Q The contacts between RTC and the White House, between the Treasury officials and the White House.

MORE

dest=doj,sjd,ethics,fbi,rtc,dtr,wh,immig,illaln,intel,esp,cia
data

ATTY GEN. RENO: I don't know the circumstances of the contacts between the **White House and RTC,** so I can't determine whether they're proper or not.

Q Have you asked anybody to look into it? There is -- there was a Justice Department investigation going on at the time. Might it be inappropriate?

ATTY GEN. RENO: Again, I don't know anything about the nature of the contacts, and whatever the **Justice Department** investigation is doing, I'd like it to proceed without any political considerations whatsoever.

Q So, in that case, it would be -- what you're saying is it'd be inappropriate for you to suggest that they -- that Justice look at this?

ATTY GEN. RENO: I don't know what contacts were had between the White House and RTC, and so, again, I can't comment on what's proper or not.

Q Well, you know that certainly Mr. Altman did confirm that he had a meeting with Ickes and Maggie Williams and Bernie Nussbaum to inform them of possibilities stemming from this investigation. Do you think that contact which has been confirmed by all of the parties was proper?

ATTY GEN. RENO: I don't, again, know the specific nature. All I know is what I've read in the paper, and I'm not going to comment about what I read in the paper.

Q Do you think this is a matter that would fall to Mr. Fiske?

ATTY GEN. RENO: I don't know.

Q Speaking of Mr. Fiske, and I know this is a very painful topic, and I know you've spoken unequivocally about this before, but Mr. Fiske is reportedly retaining forensic experts to again look into the death of Vince Foster. Do you know anything that would remotely suggest that Vince Foster's death last July was anything but a suicide?

ATTY GEN. RENO: No.

Thank you.

Q Could we have a couple more? (Laughter.)

BILLING CODE 4410-01

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 603

[A.G. Order No. 1844-94]

Independent Counsel: In re Madison Guaranty Savings & Loan Association

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This rule sets forth the jurisdiction of the Independent Counsel: In re Madison Guaranty Savings & Loan Association, appointed by the Attorney General pursuant to her statutory authority under 28 U.S.C. 509, 510, and 543, and 5 U.S.C. 301. The Attorney General has appointed this Independent Counsel to investigate whether any individuals or entities have committed a violation of any federal criminal or civil law relating to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with the Madison Guaranty Savings & Loan Association, the Whitewater Development Corporation, or Capital Management Services, Inc.

This rule also amends the regulations on the salary of an Independent Counsel and the provisions for appointing, fixing the compensation of, and assigning duties to such employees as the Independent Counsel deems necessary. These changes reflect the elimination of the "GS-18" rate under the General Schedule, 5

U.S.C. 5332(a), more closely align the regulation with the laws governing the civil service, and provide more flexibility in setting the salary of the Independent Counsel, subject to a specified maximum level.

EFFECTIVE DATE: January 31, 1994.

FOR FURTHER INFORMATION CONTACT: Carl Stern, Director, Office of Public Affairs, U.S. Department of Justice, Washington, D.C. 20530, (202) 616-2777.

SUPPLEMENTARY INFORMATION: This order pertains to a matter of internal Department management. It does not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). It is not subject to Executive Order No. 12866.

List of Subjects in 28 CFR Parts 600 and 603

Authority delegations (Government agencies), Crime, Conflict of interests, Government employees.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, and 543, chapter VI of title 28 of the Code of Federal Regulations is amended as follows:

PART 600 - GENERAL POWERS OF INDEPENDENT COUNSEL

1. The authority citation for Part 600 is revised to read as follows:

Authority: 28 U.S.C. 509, 510, 515, 543; 5 U.S.C. 301; Article II of the U.S. Constitution.

2. Section 600.1 is amended by revising paragraphs (b) and (c) to read as follows:

§ 600.1 Authorities and Duties of an Independent Counsel.

* * * * *

(b) An Independent Counsel appointed under this chapter shall receive compensation at a rate not to exceed the annual or per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5 of the U.S. Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (b) of section 594 of title 28 of the U.S. Code.

(c) For the purposes of carrying out the duties of the Office of Independent Counsel, an Independent Counsel shall have the full power of the Attorney General to appoint (other than in the Senior Executive Service), fix the compensation and assign the duties of such employees as the Independent Counsel deems necessary. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (c) of section 595 of title 28 of the U.S. Code.

* * * * *

3. A new part 603 consisting of § 603.1 is added to read as follows:

PART 603 - JURISDICTION OF THE INDEPENDENT COUNSEL: IN RE MADISON GUARANTY SAVINGS & LOAN ASSOCIATION

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 543.

§ 603.1 Jurisdiction of the Independent Counsel

(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services.

(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in part (a) or (b) of this section.

(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or to bring civil actions against, any persons or entities involved in any of the matters referred to in part (a), (b), or (c) who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

Date 1/31/94

Janet Reno
Attorney General

Clinton Presidential Records
Digital Records Marker

Divider Title: **108**

52A

STATEMENT OF WEBSTER HUBBELL

An article published today in the Washington Post speculated that my former partners were "investigating", since the summer of 1992, whether I had overbilled clients. I am not aware of any "investigation", and I have never overbilled a client.

The facts are that my former law firm had some questions about billings on cases I worked on which they put to me last week. One of these cases involved the RTC. I responded promptly. I did not overbill the RTC or any other clients.

It was perfectly reasonable for the firm to direct its questions about these cases to me, since I was the billing partner. Issues frequently arise when a partner leaves a law firm which require his participation and assistance. This is in no way out of the ordinary.

The firm had asked me earlier for backup documentation on certain expenses paid for by the firm. I am in the process of helping the firm locate such documentation.

The improprieties suggested in the Washington Post article simply did not occur.

3/2/94

Contact: Jo Ann Farrington

DATE: 3/4/9.
PAGE: A15

The Washington Post

Reno Supports Hubbell, Says No Inquiry Planned

RTC Begins Its Own Probe Into Billing By Arkansas Law Firm on S&L Matters

By Michael Isikoff
and Susan Schmidt
Washington Post Staff Writers

Attorney General Janet Reno said yesterday she has full confidence in Associate Attorney General Webster L. Hubbell and plans no internal department inquiry into questions about his past client billings and expenses at the Rose law firm in Little Rock, Ark.

Referring to a Washington Post story that first disclosed an internal law firm inquiry into Hubbell's activities, Reno said at her weekly news conference that she "knew nothing" about the matter until this week and was satisfied once Hubbell explained it to her.

"My father taught me especially never to believe everything that you read in the newspaper that makes allegations without at least one identified source," said Reno. "I have worked with Webb Hubbell for a year now. I have been extraordinarily impressed with his honesty, his candor, his professionalism, and the sacrifices he's making to serve the American people."

Reno later compared the matter to a newspaper reporter being questioned about his expense account. Her comments echoed those made by the White House on Wednesday and underscored the degree to which the Clinton administration is standing behind Hubbell, a pivotal figure at Justice and a regular golfing buddy of President Clinton.

But the Resolution Trust Corp. inspector general's office said yesterday it is beginning its own probe into the matter. RTC Inspector General John Adair said his office has been asked by the agency's deputy chief executive officer, Jack Ryan, to audit Rose firm bills submitted to the agency on savings and loan cases. Adair said his office will also audit Rose bills submitted to the Federal Deposit Insurance Corp.

The RTC and FDIC routinely hire outside law firms to sue officers, directors, accountants and borrowers of failed savings and loans. The Rose firm received 22 government contracts in savings and loan cases since 1989 that so far have enabled the firm to bill $1.27 million in fees, according to an Associated Press compilation.

The billing records show that Rose lawyers charged the government between $75 an hour for junior associates' work to $140 an hour for senior partners. Hubbell was one of a handful of senior Rose lawyers, including late deputy White House counsel Vincent Foster and Hillary Rodham Clinton, who performed such work.

Sources close to the Rose firm have said that Hubbell's RTC billings are among those being reviewed. Hubbell has acknowledged being questioned last week by his law partners about his fees in one RTC case, but said in a Wednesday statement: "I did not overbill the RTC or any other clients."

sufficient and through their courage are showing people what can be done in this area.

The ADA opens up all facets of American lives to persons with disabilities, and so what better place than an American symbol like the Empire State Building to show what we can achieve in this area.

Q Ms. Reno, when did you first learn that the Rose Law Firm was looking -- questioning Webb Hubbell about his billing (for ?) expenses? And are you taking any steps to ascertain -- (inaudible)?

ATTY GEN. RENO: Yesterday. One of the -- as I told you last week --you asked me a question about something that I was -- action that I was supposed to have taken. It was published in a newspaper. I knew nothing about the action nor about the matter, and I told you then that my father had explained as a reporter that you should never believe everything that you read in the newspaper. Now allegations are being made about -- implying that Webster Hubbell has done something wrong, and the newspaper has not named or identified any particular person as the source. My father taught me especially never to believe everything that you read in the newspaper that makes allegations without at least one identified source.

I have worked with Webb Hubbell for a year now. I have been extraordinarily impressed with his honesty, his candor, his professionalism and the sacrifices he's making to serve the American people. He came to me after the story was published.

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dest=doj,sjd,ethics,fbi,rtc,dtr
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He discussed the article, and he explained and told me that he and his former law partners were reviewing partnership matters. He told me that the firm had some questions which often arise when a partner leaves a law firm and that he was working with the firm to answer these questions. He advised me that he had not overbilled or done anything wrong. At this point I have no substantiated information that Mr. Hubbell is doing -- has done anything wrong.

Q (There's been ?) an internal investigation within the **Justice Department**. (Off mike.)

ATTY GEN. RENO: All I have at this point is that a law firm is reviewing its partnership billings. And at this point that's all I know.

Q Have you asked anyone in Justice to contact the law firm and to find out more about what they're looking at?

ATTY GEN. RENO: At this point all I know is that some unnamed source says that the law firm is looking at allegations of wrongdoing. At this -- all I know from substantiated sources of any kind is that the law firm is reviewing the matter, they've asked Webb questions, he's answering the questions, and they're resolving partnership issues.

Q What about the issue of the **FBI** not having this in its report, which is suggested in today's story?

ATTY GEN. RENO: The only thing I know about -- again, I don't follow up on suggestions in today's story. I got a letter from Senator Thurmond and Senator Grassley asking for a copy of the FBI report, and I asked that it be sent to them.

Q Have you yourself had a chance to look at it?

ATTY GEN. RENO: No, I haven't. I asked that it be sent to them since they wanted it immediately.

Q Did you ask the question whether the FBI report had included any mention of this matter?

ATTY GEN. RENO: I have not had a chance to review the FBI report because I asked that it be sent directly to Senator Thurmond and to the Senate Judiciary Committee.

Q Just so (it's clear ?), you have not asked anybody in the department to look into the matter.

The Washington Post
DATE: 5-3-94
PAGE: A1

Hubbell Confirms Questioning

By Michael Isikoff
and Ruth Marcus
Washington Post Staff Writers

Associate Attorney General Webster L. Hubbell acknowledged yesterday that his former partners at the Rose Law Firm in Little Rock, Ark., recently questioned him about billings to clients and expenses charged to the firm, but denied he had done anything improper.

"I am not aware of any 'investigation' [by the Rose firm], and I have never overbilled a client," said Hubbell, a former partner in the firm that also included Hillary Rodham Clinton and former deputy White House counsel Vincent Foster Jr. When questioned last week by the firm about his billing practices, "I responded promptly," he said.

Hubbell also acknowledged he had earlier been asked for "backup documentation" on expenses charged to the firm and that he was "in the process of helping the firm locate such documentation." His statement did not say when he began preparing the documents.

The terse, five-paragraph statement was released by the Justice Department late yesterday in response to a Washington Post story that reported the Rose firm has been conducting an internal investigation into Hubbell's billing practices. The firm also was considering reporting the matter to the Arkansas Bar and the Resolution Trust Corp., one of Hubbell's former clients that may have

WEBSTER L. HUBBELL
. . . "This is in no way out of the ordinary"

been improperly billed, The Post reported.

The disclosure of a Rose firm inquiry into Hubbell set off high-level anxiety among Clinton administration officials and prompted two Republicans on the Senate Judiciary Committee to ask to reinspect the FBI's investigative file on Hubbell.

In a letter to Attorney General Janet Reno, Sens. Charles E. Grassley (R-Iowa) and Strom Thurmond (R-S.C.) noted the inquiry was reported to have begun in the summer of 1992, raising the question of "whether information of this nature was included in the file" prepared for Hubbell's confirmation hearings before the panel last year.

Committee sources said yesterday the panel was presented with an FBI "summary" of the bureau's findings on Hubbell, the standard practice when it is examining whether to confirm a prospective nominee. That summary contained no information about any questionable billings by Hubbell, but Grassley and Thurmond want to see the entire file to determine if the bureau ever uncovered such information or if members of the Rose firm may have misled agents during the Hubbell background check.

Controversy over Hubbell's practices, especially if they involved ethical questions, would be particularly serious for the administration because of his unique relationship with the First Family and his critical role at a Justice Department that has been buffeted by repeated controversies.

A long-time golfing buddy of President Clinton, Hubbell has been the third-ranking official at Justice and the department's chief point of contact with the White House. He also was one of a four

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senior Rose Law Firm partners, including Hillary Clinton and Foster, who came to Washington to serve in the new Democratic administration.

Administration officials sought to minimize any political fallout by depicting the matter as an internal dispute arising out of personal rivalries within the Rose firm.

The White House yesterday rushed to Hubbell's defense, saying he had assured Chief of Staff Thomas F. "Mack" McLarty—a long-time friend—that he had done nothing wrong. Hubbell's assertion of innocence satisfied McLarty and the president, and no further investigation was necessary, the White House said.

Clinton "stands by Webb, he believes him, he believes his denial," press secretary Dee Dee Myers said.

"For us to involve ourselves at this point any more deeply would not be normal or proper action. It could even be misinterpreted," McLarty said. Myers said no one at the White House—including the First Lady and Associate Counsel William Kennedy, Rose's former managing partner—were aware of the investigation until Tuesday, when The Post contacted the White House.

In his statement, Hubbell said it was "perfectly reasonable" for the law firm to direct its questions about his billing practices to him. "Issues frequently arise when a partner leaves a law firm which requires his participation and assistance," he said. "This is in no way out of the ordinary."

The Rose firm had no comment yesterday on the Hubbell investigation. RTC officials said they have not been contacted by the firm about possible irregular billings.

But knowledgable sources provided some new details about the inquiry. One source close to the firm said yesterday that tensions began to mount between Hubbell and Rose partners when Hubbell left for Washington and arranged to cash out his share of the firm, worth between $100,000 and $200,000.

The partners belatedly became aware that he had taken a complex antitrust and patent infringement case on behalf of P.O.M. Inc., a parking meter manufacturer owned by his in-laws, on a contingency fee basis, and had run up several hundred thousand dollars in travel and other expenses. Hubbell assured the firm, in writing, that his in-laws would take care of the expenses, but they did not, the source said.

In addition, the Rose firm began receiving unpaid bills from patent lawyers and expert witnesses Hubbell had hired to assist in the case. The Rose firm was obligated to pay those bills as well, according to sources and court documents.

At that point, during the first half of 1993, the firm began looking into other Hubbell billing arrangements, said the source. Another source close to the firm said that review was begun by the firm's accounting department and chief financial officer in the summer of 1992.

In mid-1993, several top partners confronted Hubbell with what they suspected were instances of overbillings to clients and use of firm funds for personal items such as trips and credit card payments, according to sources. The firm compared various documents, including records of billable hours and checks written on an account set up to advance lawyers payment of client expenses, sources said.

The firm has been seeking Hubbell's credit card receipts since mid-1993, said a source close to the inquiry.

At that point, the existence of the investigation became widely known among the firm's 28 partners. Several meetings followed in Little Rock and Washington, sources said.

The Washington Post DATE: 3-2-94
PAGE: A-1

Law Firm Probing Hubbell

Billing Irregularities Alleged; Clinton Aide Denies Wrongdoing

By Susan Schmidt
Washington Post Staff Writer

The Rose Law Firm in Little Rock, Ark., has been investigating the billing practices of Associate Attorney General Webster L. Hubbell during the time he was a partner in the Rose firm. The investigation, which is being conducted by senior partners of the firm, focuses on whether Hubbell overbilled clients and used law firm money to pay for personal expenses, according to sources close to the firm.

The internal investigation began in the summer of 1992, and the firm is considering notifying the Resolution Trust Corp. and several other major clients of billing irregularities, according to a source familiar with the matter. The firm also has been weighing whether to inform the state bar association.

The RTC, the federal agency overseeing the savings and loan industry, was among the major clients Hubbell handled for Rose, one of Arkansas' oldest and most prestigious law firms. In addition to Hubbell, its former partners include First Lady Hillary Rodham Clinton and the late Vincent Foster, who served as deputy White House counsel before his suicide last July.

The pace of the Rose firm's inquiry has sped up in recent weeks as the law firm was subpoenaed in a criminal investigation by special counsel Robert B. Fiske Jr., who is investigating President Clinton's Whitewater land venture and the failed Madison Guaranty Savings & Loan, a former Rose firm client.

Asked whether Hubbell had overbilled clients or used the firm's money to pay for personal expenses, Hubbell's attorney, John Nields, said, "No, that did not happen." He said he had no knowledge that Rose lawyers are considering reporting Hubbell's activities to the Arkansas Bar Association. "I certainly doubt it, but only the firm can answer that question," Nields said.

Numerous senior lawyers at the firm contacted in recent days about the Hubbell investigation said they could not comment on it and referred all questions to managing partner Ronald M. Clark.

Clark declined repeated requests for interviews this week. When first asked about the investigation in an interview about three weeks ago, he said he would have no comment on any internal inquiry of Hubbell, but said "anything and everything" related to the special counsel's investigation is being examined internally.

Walter B. Stuart, who is acting as a spokesman for the Rose firm, said Monday that "I'm certainly not confirming or denying anything." He said the firm would not respond to inquiries concerning clients or internal matters. Stuart, a lawyer with the Houston firm of Vinson & Elkins, is representing the Rose firm in connection with the special counsel's ongoing investigation.

One source familiar with the inquiry said that Rose lawyers are investigating whether Hubbell wrote checks on an account used for client expenses to pay for his personal trips, credit card bills and other items. The firm has examined records going back to 1988, according to the source.

In some instances, Rose lawyers also are investigating whether Hubbell credited to himself hours of legal work performed by salaried associates, according to sources.

In one case involving a company owned by Hubbell's in-laws, Rose lawyers believe the firm lost about $500,000 because of a billing arrangement Hubbell made with his relatives. In that instance, Hubbell took on a contingency basis a complex patent infringement case on behalf of his in-laws. Rose lost the case, and belatedly discovered that Hubbell had agreed that the law firm would pay for expert witnesses on his in-law's behalf.

A lawsuit filed against the Rose firm in federal court in Washington in May 1993 shows that a consultant had a written agreement with Hubbell providing that the Rose firm would pay his fees, amounting to $156,000. The Rose firm balked but was legally obligated to pay the bill, court records show.

Hubbell, a close friend and frequent golfing companion of the president, has taken control of a wide array of issues at Justice, including civil rights and other noncriminal matters. Some department officials have described him as the department's chief operating officer.

Hubbell generally is regarded as the department's chief point of contact with the White House, and was effectively *running* Justice as White House "liaison" in the months before Janet Reno's confirmation as attorney general last spring. He was confirmed to the No. 3 job there in May.

The Rose firm has been racked with turmoil in recent months, with many of the 60 attorneys there upset at being dragged into special counsel Fiske's investigation of Madison and Whitewater.

The subpoena recently served on the Rose firm in relation to Fiske's investigation sought materials on a wide array of individuals and entities, including Hubbell's father-in-law, Seth Ward, a former Madison employee and borrower. The subpoena also sought materials on P.O.M. Inc., a parking meter firm owned by the Ward family and represented by Hubbell. P.O.M. was the firm involved in the patent infringement case handled by Rose.

Hillary Clinton represented Madison before state regulators in the mid-1980s, a matter that figures into the special counsel's investigation. She and President Clinton were joint owners of Whitewater with Madison owner James B. McDougal and his former wife Susan.

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... came to Washington with Clinton's election and because prominent figures in the administration. In addition to Hillary Clinton, Hubbell and Foster, former Rose managing partner William Kennedy is in the White House counsel's office.

Fiske's wide-ranging probe also is examining Foster's suicide. On the morning of his death, U.S. Park Police records show that Foster received a phone message from C. Brantley Buck, the Rose firm's chief financial officer. Foster tried to return the call later that morning but did not get through. It is not known what Buck was calling about. Buck declined to be interviewed this week.

With the departure of four of its most senior partners, a new generation of lawyers has taken control of the Rose firm, most of them in their thirties and early forties. Sources close to the firm say many of them are furious that their livelihoods and their firm's once-sterling reputation are being damaged by actions of the firm's old guard.

Any grievances made to the bar association remain confidential unless it decides to take disciplinary action against a lawyer.

Rose partners have been advised by the state's leading expert in professional ethics, University of Arkansas Prof. Harold Brill, that they have a duty to report any findings about Hubbell to the state bar association, according to a source close to the firm. Brill declined to comment yesterday.

A source close to the firm ~~said~~ senior lawyers there have been agonizing over how to resolve the Hubbell investigation. But they have tried to find ways to handle the probe that cause the least amount of embarrassment to the Clinton administration and to Hubbell.